PREPARED STATEMENT
OF THE FEDERAL TRADE COMMISSION
ON LIVING TRUST SCAMS

Before the

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE
Washington, D.C.

July 11, 2000

I. Introduction

Mr. Chairman, I am Elaine Kolish, Associate Director of the Bureau of Consumer Protection's Division of Enforcement at the Federal Trade Commission.[(1)] I am pleased to be here today to testify about scams involving living trusts. It is important to note at the outset that living trusts can be legitimate and valuable estate planning tools. However, scams involving living trusts raise serious and growing concerns. These scams often prey on older Americans' concerns that their estates will be subject to long and costly probate, and involve misrepresentations about the costs and benefits of trusts versus wills and that local attorneys will create the trust documents.

I want to thank the Committee for holding this hearing and drawing public attention to this issue. To help alert older Americans and others about these scams, we are today issuing a new Consumer Alert. We hope that with the Committee's assistance and that of our many partners such as AARP, state Attorneys General, and the Council of Better Business Bureaus, we can together raise consumer awareness about living trust scams.

II. Background

The FTC is the federal government's primary consumer protection agency. Congress has directed the FTC, under the FTC Act,[(2)] to take action against "unfair or deceptive acts or practices" in almost all sectors of the economy and to promote vigorous competition in the marketplace. The FTC Act authorizes the Commission to halt unfair or deceptive conduct through administrative proceedings, and to bring civil actions in federal district court for injunctive relief to halt the targeted illegal activity and for redress for victims.[(3)] Where redress is impracticable, the Commission obtains disgorgement to the U.S. Treasury of defendants' ill-gotten gains or, in certain situations, uses the money to conduct educational campaigns to prevent further fraud.

Many Commission initiatives and law enforcement actions target scams that prey on older Americans. The Commission brings a wide range of law enforcement actions against fraudulent marketing practices conducted through various media. For example, FTC and Canadian officials recently sued a Canadian telemarketing company engaged in an illegal lottery scheme that targeted elderly U.S. citizens.[(4)] The Commission also pursues aggressively false and unsubstantiated cure or treatment claims for cancer and other diseases, and other health claims with obvious appeal for elderly consumers.[(5)] The Commission is also vigilant in pursuing predatory lending practices that often target older and low income citizens, to protect them from losing what is typically their most valuable asset - their homes.[(6)]

III. Living Trust Scams

A. Living Trusts

As you know, a living trust is a legal arrangement where a person, called the "grantor," places his assets into a trust during his lifetime. The trust is administered by a "trustee" for the benefit of the trust's beneficiaries. The grantor may be a trustee and a beneficiary of the trust. Living trusts are a widely recognized and legitimate estate planning device. Because assets transferred to the trust are no longer owned by the grantor, at the grantor's death, the assets are not part of the grantor's estate and do not have to be probated. Accordingly, a living trust can avoid what could be a costly, lengthy process. Whether or not this is a major advantage varies by the size of the estate and by state and locality; for small estates, many states have an informal probate process that minimizes cost and delay. Whether a living trust is an appropriate estate planning tool depends upon an individual's circumstances and goals, and state laws.

B. Scams Involving Living Trusts

Misinformation and misunderstanding about probate and estate taxes provide a ripe environment for scam artists to prey on older consumers' fears that their estates will be eaten up by costs, and that distribution of their assets to loved ones will be long delayed. Some unscrupulous businesses advertise seminars on living trusts or send postcards inviting consumers to call for in-home appointments, ostensibly to learn whether a living trust is right for them. A common practice is to greatly exaggerate the benefits of living trusts and falsely claim that locally-licensed attorneys will prepare the documents.[(7)] In some instances, consumers send money for living trust kits but receive nothing. In others, the offer of estate planning services is merely a ruse to gain access to consumers' financial information and to sell them other financial products, such as insurance annuities.[(8)] These practices may violate federal securities laws, as well as other laws.

Many state Attorneys General and other authorities, such as disciplinary or grievance committees of state or city bar associations, have taken enforcement actions against living trust scam artists. Some cases have been brought under state Unfair and Deceptive Acts and Practices laws. Others have been prosecuted as the unauthorized practice of law because the salespeople were not lawyers.[(9)] Even in instances where there may be some attorney review, it may be insufficient to render the activity legal.[(10)] The U.S. Securities and Exchange Commission also has prosecuted companies purporting to offer estate planning services, such as living trusts, for violating the securities laws through fraudulent investment schemes targeting senior citizens.[(11)]

IV. The Commission's Experience with Living Trusts

Unlike state authorities, the Commission has had limited experience with prosecuting living trust scams. Historically, the Commission has received few consumer complaints about living trusts. Nonetheless, the Commission sued two companies selling living trusts after AARP brought their practices to our attention.

A. Cases

In 1997, the Commission charged that The Administrative Company (TAC), and its president, Michael McIntyre, and Pre-Paid Legal Services, Inc. (Pre-Paid) together violated the FTC Act by engaging in deceptive practices in selling living trusts. The Commission's staff worked with a 21-state coalition in developing the cases.

The Commission's complaint alleged that TAC, McIntyre and Pre-Paid misrepresented that a living trust avoids all probate and administrative costs; the use of a living trust allows assets to be distributed immediately or almost immediately; a living trust cannot be challenged; living trusts are prepared by local attorneys; a living trust protects against catastrophic medical costs; a living trust is the appropriate estate planning device for every consumer; and there are no disadvantages to a living trust. The administrative consent orders obtained by the Commission require the respondents to stop making these misrepresentations and to disclose clearly and conspicuously that living trusts may be challenged on similar grounds as wills; living trusts may not be appropriate in all instances; and all estate planning options should be examined before determining which estate plan best suits a particular individual's needs and wishes.

Given differences in state laws, the orders also require the respondents to disclose, where true, that: (1) the availability of informal probate under a state's law allows minimal or no contact with the courts and reduces the time required to probate a will; and (2) creditors have a longer period of time to file a claim against a living trust than against a probated estate. The order against Pre-Paid also required redress to consumers who had not previously received refunds or did not reside in states in which Pre-Paid already had settled with state authorities. Under the FTC order, 480 consumers received a total of more than $78,000.

B. The Commission's Consumer Sentinel Complaint Database

The Commission's Consumer Sentinel database does not identify living trusts as one of the most frequently complained about consumer protection problems.[(12)] Consumer Sentinel is an online complaint database and investigatory tool available to more than 240 law enforcement agencies in the U.S. and Canada. Initially focusing on telemarketing fraud when it was first created in the late 1990s, it has expanded to include complaints about all types of consumer fraud. The Consumer Sentinel database contains more than 250,000 consumer fraud complaints that have been filed directly with the FTC through a toll-free telephone number (1-877-FTC-HELP), an online complaint form, or the mail, or added by Sentinel partners. These include other federal, state and local law enforcement agencies, such as the U.S. Postal Inspection Service, Canada's Project Phone Busters and private organizations, such as more than 100 BBBs, and the National Consumer League's National Fraud Information Center and Internet Fraud Watch projects.

Consumer Sentinel can be accessed by law enforcers in the U.S. and Canada through an encrypted Web site to identify particular targets for law enforcement, to determine whether a particular fraudulent scheme is local, national or cross-border in nature, to help spot larger trends for law enforcement action, and to monitor rapidly emerging frauds, such as telephone cramming and sophisticated hi-tech fraud, including Internet pagejacking. It features an "Alert" function that informs users whether a company, address, phone number or email that they came across during a search is of interest to another member, and an "Auto Query" function that notifies users when new data relating to one of their investigations is entered into the complaint database.[(13)]

Consumer Sentinel shows few complaints about living trusts in both absolute numbers and in relative ranking to complaints on other topics. Thus far this year Consumer Sentinel has recorded 14 complaints on living trusts, ranking it the 144th category out of 200 that are recorded; in 1999, there were 17 living trust complaints, with a ranking of 163. By way of contrast, there are more than 1000 complaints for each of the top 30 complaint topics, involving many credit topics (e.g., credit bureaus, debt collection, credit cards, credit information providers, mortgage lenders, credit repair, advance fee loans), travel scams, Internet auctions, telephone pay-per-call services, autos, computers, Internet access providers, mail order sales, and business opportunities, subjects that are frequent targets of FTC actions.

Although Consumer Sentinel is a powerful tool for finding new or emerging frauds, the Commission also looks to other sources of information that may suggest budding problems. On the topic of living trust scams, for example, AARP and Michigan Attorney General Jennifer Granholm recently reported new data showing a 125% increase over the last decade in the number of people aged 50 and older, with incomes of $25,000 or less, who own living trusts, a growth that far outpaces the living trust ownership growth rate of seniors with moderate and higher incomes.[(14)] This is a cause for concern because generally consumers of modest means are the least likely to benefit from sophisticated estate planning services. At a press conference, General Granholm also warned that older people living in Michigan were being targeted by unscrupulous sellers of costly, "cookie-cutter" trusts.

V. New Consumer Alert

The FTC shares AARP and General Granholm's concern that the increase in living trust ownership among lower-income consumers may indicate a corresponding increase in living trust scams. We hope that this hearing and increased education about the dangers of one-size-fits-all trusts will raise awareness about this problem, preventing additional seniors from falling prey to these scams. To that end, the Commission today is issuing a new Consumer Alert (attached) about how to spot and avoid living trust scams.

The new Consumer Alert warns consumers about living trust scams, and how unscrupulous businesses may use marketing for estate planning services as a ruse to gain entrance to consumers' homes and their financial data for the purpose of selling them other investments. It also notes that often living trust scam artists claim affiliation or endorsement with legitimate nonprofit organizations such as AARP or claim that they got the consumer's name from AARP. Such claims are a red flag because AARP does not sell or endorse any living trust product, and does not partner with any company that promotes or sells such documents. AARP also never sells its members' names or sells its services door to door. The Alert also advises consumers to check with their local BBB for a reliability report before making any major purchases of goods or services.

Consumers who are concerned about probate and other estate issues should consult a reputable local attorney experienced in wills and trusts or a trusted financial advisor. Although a living trust may be useful for some, it is not for everyone. And, unless the trust is properly drafted and the assets properly transferred to the trust, it will not achieve its purpose. Consumers should beware of individuals or companies who portray living trusts as a panacea for all estate planning issues and probate as a necessarily protracted, hugely expensive process.

Consumers also should be aware of FTC and state laws that give them the right to cancel certain purchases. Under an FTC regulation known as the Cooling-Off Rule, consumers have a right to cancel, within three days, the purchase of goods or services, including estate planning products and services, they make in their homes or at a location that is not the seller's principal place of business (e.g., rented hotel space).(15) All states have similar laws or regulations.(16) To comply with these rules, sellers are required to advise consumers orally and in writing of their right to cancel. Although scam artists are not likely to provide such notices, consumers still have the right to cancel and should do so in writing if they have second thoughts about their purchases. No explanation for canceling need be given. Stopping payment on a check is also a good idea. If a consumer paid by credit card and the seller did not credit the consumer's account for the cancellation, the consumer should follow the dispute billing procedures provided by the Fair Credit Billing Act.(17)

Credit card issuers generally provide information on the back of credit card statements on how to dispute charges.

The Alert also advises consumers who have purchased a living trust or other financial planning services and who believe that they may be the victim of a scam to file complaints with the FTC in writing, online or by calling the FTC's new toll-free number, 1-877-FTC-HELP.

The Commission will distribute the Consumer Alert through its extensive network of contacts, including organizations for the aging, legal aid societies, community service organizations, extension home economic services, state and local consumer protection agencies and thousands of media. We also are seeking new partnerships with other organizations that have frequent contact with older Americans. We hope that this outreach effort will prevent additional consumers from being victimized and lead others to report complaints to the FTC or other authorities.

VI. Conclusion

The Commission greatly appreciates the Committee's effort to investigate the problems associated with abuses in the marketing of living trusts and to assess the potential scope of living trust scams. Putting the spotlight on this problem will help alert consumers to the dangers they may face by buying living trusts or other estate planning products from strangers who play on their fears that their loved ones will not get the benefit of their estates in a timely fashion because of probate costs and delays. Thank you for providing the Commission the opportunity to participate in this hearing.

Endnotes

1. This written statement represent the views of the Federal Trade Commission. My oral presentation and response to questions are my own, and do not necessarily represent the views of the Commission or any individual Commissioner.

2. 15 U.S.C. §§ 41 *et seq*. The Commission also has responsibilities under more than 40 additional statutes.

3. 15 U.S.C. §§ 45(a) and 53(b).

4. *See* FTC Press Release, "Cross-Border Lottery-Bond Scheme Alleged to Violate U.S. Laws," dated Jan. 21, 2000. Consumers complaining to the FTC about telemarketing activity often indicate that they are older citizens. Similarly, older Americans account for 60 percent of the fraud victims who call the National Consumer League's National Fraud Information Center.

5. *See, e.g*., FTC Press Release, "Operation Cure.All Nets Shark Cartilage Promoters: Two Companies Charged With Making False and Unsubstantiated Claims for Their Shark Cartilage and Skin Cream as Cancer Treatments," dated June 29, 2000 (Operation Cure.All is an ongoing federal and state law enforcement and education campaign launched in June 1999 targeting bogus health claims on the Internet); and FTC Press Release, "Marketers of 'Vitamin O' Settle FTC Charges of Making False Health Claims," dated May 1, 2000.

6. In March 2000, the FTC, the Department of Justice and the Department of Housing and Urban Development announced a settlement with Delta Funding Corporation, a national subprime lender, that resolved allegations that Delta engaged in asset-based lending, in violation of the Home Owners Equity Protection Act (HOEPA) (i.e., extending loans based on the borrower's collateral rather than considering the borrower's current and expected income obligations, etc.) In July 1999, as part of "Operation Home Inequity," the Commission obtained settlements with seven subprime mortgage lenders for violating HOEPA, the Truth in Lending Act and the FTC Act. *See* FTC Press Release, "FTC Testifies on Enforcement and Education Initiatives to Combat Predatory Lending Practices," May 24, 2000.

7. Other problems include misrepresenting affiliation with or endorsement by a legitimate nonprofit organization such as AARP, and using a "cookie-cutter" approach to trust documents, which should be customized to the individual's circumstances. *See* "Scams in the Marketing and Sale of Living Trusts: A New Fraud for the 1990s," by Lori A. Stiegel, Lee Norrgard and Robin Talbert, Clearinghouse Review,

Oct. 1992.

8. In 1998, for example, Florida Attorney General Bob Butterworth and AARP charged Senior Estate Services Inc., a Texas-based firm with offices in Florida, and Remington Estate Services of Florida Inc., an affiliated firm, which purported to sell living trusts, with using the sales presentation to persuade consumers to liquidate their assets and purchase insurance annuities, even if the annuities paid a lower rate of return than consumers already earned. *See* Florida Attorney General News Release, "Firm Charged With Deceiving Seniors Into Buying Trusts, Annuities," dated June 10, 1998.

9. At least nineteen states have issued ethics opinions specifically addressing the marketing of living trusts, concluding that the determination about whether a living trust is an appropriate estate planning device should be made by an attorney and that the trust documents should be prepared by an attorney.

10. *See* "Fraudulent *Notarios*, Document Preparers, and Other Nonattorney Service Providers: Legal Remedies for a Growing Problem," by Deanne Loonin, Kathleen Michon, and David Kinnecome, Clearinghouse Review at pp. 329, 335-36 and nn. 61-62, 70-71 (Nov.-Dec. 1997). The sale of self-help kits also may violate some state Unauthorized Practice of Law statutes. *Id; see also* The Florida Bar Re Advisory Opinion-Nonlawyer Preparations of Living Trusts, 613 So.2d 426 (Fla.1992).

11. *See* SEC Press Release, "SEC Halts Fraudulent Investment Scheme Targeting Senior Citizens," dated Sept. 1, 1999. The release also notes that in 1996 a state court had enjoined some of the defendants from offering trust and estate planning services because they were engaged in the unauthorized practice of law. The SEC obtained a temporary restraining order and was seeking a permanent injunction forbidding further violations of the antifraud provisions of the federal securities laws, disgorgement of wrongfully obtained profits and penalties. The four individual defendants also were indicted on October 20, 1999 and as of June 7, 2000, three had been sentenced to terms ranging from 52 months to 20 years. SEC Press Release, "United States v. Gary Davenport, *et al*.," dated June 7, 2000.

12. This may be because representations made in the promotion of living trusts often concern probate, a state and local issue, or because issues of validity and interpretation of living trusts are governed by state law. Thus, consumers may not direct complaints to the FTC.

13. In addition, Sentinel features include fraud trend analysis, an index of fraudulent telemarketing sales pitches available from the National Tape Library, a compilation of companies already sued for fraud and a catalog of companies currently under investigation. It also offers a contact list as well as how-to information to help agencies coordinate joint actions.

14. *See* AARP Press Release, "AARP, Granholm Take Aim at Generic 'Living Trust' Products," dated June 14, 2000.

15. Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. Part 429. The purchase price must be at least $25 for the rule to apply. *See* "FTC's Facts for Consumers on the Cooling Off Rule: When and How to Cancel," at <www.ftc.gov>.

16. Some state actions against living trust sellers have included charges that they failed to comply with applicable Cooling-Off rules.

17. 15 U.S.C. §§ 1666-1666j. *See* FTC's "Facts for Consumers, The Fair Credit Billing Act," at <www.ftc.gov>.