



March 17, 2010

The Honorable Mark Pryor  
Chairman  
Subcommittee on Consumer Protection, Product Safety and Insurance  
Senate Committee on Commerce, Science and Transportation  
508 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Roger Wicker  
Ranking Member  
Subcommittee on Consumer Protection, Product Safety and Insurance  
Senate Committee on Commerce, Science and Transportation  
508 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Pryor and Ranking Member Wicker:

We commend you for holding today's hearing on "Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II."

I appreciate the opportunity to submit for the hearing record this statement on behalf of the Association of National Advertisers (ANA). The focus of this hearing is on the powers of the FTC with regard to financial products and services. That was also the focus of the full Senate Commerce Committee hearing on February 4<sup>th</sup>. As you know, the FTC has very broad regulatory authority over many other sectors of the American economy as well.

We have very serious concerns about several changes that have been proposed in the broad consumer protection regulatory authority of the Federal Trade Commission (FTC). Those changes were included in H.R. 4173, the "Wall Street Reform and Consumer Protection Act of 2009," which passed the House of Representatives on December 11<sup>th</sup>. H.R. 4173 would make three critical changes in the regulatory authority of the Commission: expedited rulemaking authority; expanded liability for "aiding and abetting" an unfair act or practice; and immediate civil penalty authority.

We are also very concerned about the potential overlap between the regulatory powers of the FTC and any new federal agency or bureau created to regulate consumer financial products and services. H.R. 4173 would create a powerful new independent Consumer Financial Protection Agency (CFPA). Senator Chris Dodd (D-CT), Chairman of the Senate Banking Committee, just introduced legislation that would create a new Bureau of Consumer Financial Protection, to be housed at the Federal Reserve. It is far from clear in either bill how the FTC would interact with this new mega-regulatory agency in the financial arena. What would these changes mean for the current authority of the FTC? How would these agencies coordinate in order to avoid duplication and confusion for both consumers and the business community?

Congress is considering one of the largest regulatory reorganization efforts for the financial sector since the Great Depression of the 1930's. However, due to its scope and complexity, we believe critical aspects of this proposal, including the proposed changes in FTC regulatory authority, have received inadequate focus and analysis. We agree that our nation's consumer protection regulatory regime needs to be reformed. However, we are very concerned that this legislation would dramatically transform the regulatory powers of the FTC without any detailed hearings or opportunity for industry input.

### **Expedited Rulemaking Authority**

H.R. 4173 gives the FTC authority to conduct across the board rulemakings under the expedited Administrative Procedures Act (APA) rather than under the present Magnuson Moss rulemaking procedures. This would allow three commissioners to push through a sweeping new rule affecting entire industries with limited opportunity for industry input or thoughtful consideration.

Congress instituted the Magnuson-Moss rulemaking procedures in 1975 and expanded the Commission's powers in several areas, including the ability to impose fines and seek injunctions against false or deceptive acts. In light of the Commission's extremely broad powers over vast segments of the nation's economy, the Congress believed that expedited rulemaking authority (180 days) could lead to a serious "rush to judgment" allowing the FTC to make major, industry-wide regulatory changes without adequate time for industry input and thoughtful consideration.

Thus, the Magnuson Moss rulemaking procedures include a number of important checks and balances. These safeguards include: the requirement that the Commission must identify a pattern of activity – a prevalence, as opposed to one instance -- before engaging in a rulemaking; the requirement that a rule may be overturned by the courts if it is not supported by substantial evidence taken as a

whole; the requirement that the Commission provide a statement as to the economic effect of the rule.

All of these protections would be removed in the House bill. They are all sensible requirements that should be maintained.

Senator Warren Magnuson (D-WA) and Congressman Frank Moss (D-CA) were two of the leading consumer champions of their era and certainly would never have pushed this legislation if they thought it would handcuff the agency.

Timothy Muris, who served as Chairman of the FTC from 2001-2004, testified at a July 14<sup>th</sup> hearing of the U.S. Senate Commerce Committee Subcommittee on Consumer Protection, Product Safety, and Insurance to strongly urge the Congress to retain the Magnuson Moss rulemaking procedures at the FTC. Muris stated:

“The administration’s [CFPA] proposal would do more than just change the procedures used in rulemaking. It also would eliminate the requirement that unfair or deceptive practices must be prevalent, and eliminate the requirement for the Commission’s Statement of Basis and Purpose to address the economic effect of the rule. It also changes the standard for judicial review, eliminating the court’s ability to strike down rules that are not supported by substantial evidence in the rulemaking record taken as a whole. The current restrictions on Commissioners’ meetings with outside parties and the prohibition on *ex parte* communications with Commissioners also are eliminated. These sensible and important protections should be retained.”

The FTC is not an agency that has specific subject matter expertise over a particular area of the economy, such as the SEC, the CFTA or the EPA. Therefore, it is more important for the agency to follow the detailed and focused procedures of Magnuson Moss when carrying out an industry-wide rulemaking.

There has been no explanation why requirements to demonstrate a substantial basis for a rule or to require a showing of prevalence should make an FTC rulemaking unnecessarily cumbersome or time consuming. When regulating whole industry sectors, careful deliberation should be required.

We urge the members of the Senate Commerce Committee to either uphold the Magnuson Moss provisions or keep some hybrid version of the procedural safeguards in the Act.

### **Aiding and Abetting**

H.R. 4173 would give the FTC the authority to go after companies or persons that “aid or abet” a violation of the FTC Act. This would have serious implications for advertising agencies, media companies and other companies that play any role in the communication/sale/delivery process. For example, if a television station knowingly accepts an ad from a marketer and the FTC later decides that the ad was somehow false or deceptive, the television station could also be subject to very serious financial penalties. This also raises some serious practical and constitutional concerns for marketers. If there is any ambiguity about what is lawful, that may result in the chilling of speech because the media will reject ads that are in fact truthful and nondeceptive because of the blurring of the legal lines.

We are also very concerned that this change would import criminal law concepts into a civil statute.

### **Immediate Civil Penalty Authority**

H.R. 4173 would give the FTC general power to impose civil penalties without any prior rule or order by the agency for any violation of section 5 of the FTC Act, a sweeping scope of authority the Commission has never had before.

Currently, the FTC is generally limited to recovering civil penalties for violations of a rule or a final cease and desist order with respect to an unfair or deceptive act or practice. For example, unfairness is a very broad and evolving standard. Giving the FTC the authority to immediately impose civil penalties, without any understanding of or notice that particular conduct is “unfair,” could impose serious multimillion dollar financial burdens on a business. Honest companies could be faced with back-breaking burdens despite the fact that they made every effort to stay within the strictures of the FTC Act.

It is possible that these major revisions to FTC authority might be appropriate after careful review. However, we believe it is inappropriate to make such significant and fundamental changes to FTC powers without full hearings and analysis, as an afterthought in a legislative package focusing on financial regulatory reform.

### **Relationship between the CFPA and FTC**

We are very concerned that there has not been adequate consideration given to the potential overlapping jurisdiction of the FTC and any new agency or bureau that is created to regulate consumer financial products and services, broadly defined. This overlap and potential confusion could have very serious consequences for both the business community and consumers.

Under H.R.4173, much of the regulatory authority that the Congress has given to the FTC over financial products and services would be transferred to the new Consumer Financial Protection Agency (CFPA), with the FTC retaining backstop or residual authority in this area. Under the new bill introduced this week by Senator Dodd, a number of consumer financial protection functions of the FTC would be transferred to the Bureau of Consumer Financial Protection. However, that bill also provides that the FTC would continue to have authority to enforce section 5 of the FTC Act, the Credit Repair Organizations Act and the Telemarketing and Consumer Fraud and Abuse Prevention Act.

It is unclear which products and services would fall under the jurisdiction of the CFPA or the Bureau and which would remain under the jurisdiction of the FTC. For example, if an automobile company creates a consumer lease program, are the terms of the lease subject to the CFPA, the Commission or both? Cable television operators often provide digital video recorders and modems under a lease that is part of the monthly subscriber program. Does this convert the subscription to a financial instrument subject to the CFPA?

Also, which agency would take the lead in protecting consumers? Under the Dodd bill, the FTC would retain jurisdiction over the telemarketing fraud law. However, if a financial product that is subject to the jurisdiction of the CFPA is being sold through fraudulent telemarketing, would the FTC have to defer to the new Bureau?

We do not believe there has been sufficient consideration given to these and a host of other concerns about the relationship and potential overlap between the two agencies.

## **Conclusion**

H.R. 4173 not only attempts to totally transform consumer financial regulation. It also launches sweeping changes in the enforcement powers of the FTC in areas having nothing ostensibly to do with financial reorganization. These changes do not merely tinker at the margins of the Commission's authority. Instead, they substantially impact critical aspects of the FTC's functions and responsibilities.

Nevertheless, there has been no systematic examination of the implications of these changes or an opportunity for thorough examination by the numerous constituencies directly affected by these proposals.

Overlapping jurisdiction and inconsistent standards could lead to bureaucratic overregulation or confusion for companies that operate in a national and global marketplace. We urge you to reject these proposed changes in FTC authority.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel L. Jaffe". The signature is fluid and cursive, with the first name "Daniel" and last name "Jaffe" clearly distinguishable.

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ANA is the advertising industry's oldest trade association and the only group exclusively dedicated to enhancing the ability and protecting the right of companies to market their products on a national and regional basis. Our members are a cross section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 9,000 separate advertising entities, our member companies market a wide array of products and services to consumers and other businesses. ANA's members expend over 200 billion dollars annually on advertising and marketing in the U.S. More information is available at [www.ana.net](http://www.ana.net).

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