

BEFORE THE
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE
OF THE
SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

HEARING ON
FINANCIAL SERVICES AND PRODUCTS: THE ROLE OF THE FEDERAL
TRADE COMMISSION ON PROTECTING CONSUMERS, PART II

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TESTIMONY OF

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I. INTRODUCTION AND SUMMARY

Good afternoon, Mr. Chairman and members of the Subcommittee. I am Linda Woolley, Executive Vice President of Government Affairs for the Direct Marketing Association. Thank you for the opportunity to appear before the Subcommittee and provide insight from industry's perspective regarding the regulatory powers of the Federal Trade Commission ("FTC" or "Commission").

The Direct Marketing Association, Inc. ("DMA") is the leading global trade association of more than 3,100 businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques. About fifty percent of our member companies are in the business of facilitating direct marketing, including analytics firms, list compilers, sellers of lists, printers, mailers, and Internet Service Providers. The other fifty percent of our members are those actually marketing products and services directly to consumers. Many of those companies are household names.¹ In addition to its education, research and advocacy roles, DMA has a Corporate and Social Responsibility Department that develops industry standards for ethical marketing practices. Those standards are published as "Guidelines for Ethical Business Practice" and enforced through a robust self-regulatory program.² DMA has an antitrust exemption

¹ Founded in 1917, DMA today represents more than 3,100 members across dozens of vertical industries in the U.S. and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them. DMA and our members appreciate the Subcommittee's continued outreach to the business community on significant issues such as FTC authority.

² The full text of DMA's *Guidelines for Ethical Business Practice*, as well as additional information regarding our robust self-regulatory program are available at <http://www.dmaresponsibility.org/>.

from the FTC that enables us to prosecute ethics cases that involve business-to-business complaints.³

Let me begin by emphasizing that the DMA and its member companies hold the FTC and its staff in very high regard. DMA regularly works with the FTC on public education campaigns, the development of industry self-regulation, and enforcement matters in order to protect consumers in a wide variety of areas.⁴ While we may not agree on every policy or legal matter affecting the marketing community, the DMA views the FTC as an essential partner in promoting reputable business practices and in protecting consumers from a small minority of companies that deceive consumers and, thus, negatively impact the image of responsible businesses. Through the work of its Corporate and Social Responsibility Department, DMA demonstrates the belief that consumer protection is one of its core functions.

Today, we wish to discuss the Commission's current authority, as well as the proposed grant of additional powers to the FTC in financial regulatory reform legislation. We do not believe providing the FTC with broad new authority of the type included in the "Wall Street Reform and Consumer Protection Act" – and as requested by the

³ DMA releases an annual Ethics Case Report summarizing the findings of the DMA Committee on Ethical Business Practice. The most recent report, covering the period between February 2009 and February 2010 is available online at <http://www.the-dma.org/guidelines/DMAEthicsCaseReport2-09-2-10-Final.pdf>.

⁴ For example, we have worked with the Commission in the following areas, among others: (1) Telemarketing Sales Rule (*Complying with the Telemarketing Sales Rule*, available at <http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm>); (2) Children's Online Privacy Protection (*How to Comply with the Children's Online Privacy Protection Rule: A Guide from the Federal Trade Commission, the DMA, and the Internet Alliance*, available at <http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus45.shtm>); and (3) Onguard Online, available at <http://www.onguardonline.gov/about-us/overview.aspx>.

Commission – is a necessary or relevant response to the causes of the current financial crisis. The kind of additional authority that the FTC seeks is in no way related to “credit default swaps” or “subprime mortgages,” and would have far-reaching effects on a multitude of businesses outside of the financial services area.

DMA and nearly thirty other associations recently wrote to this Committee about the far-reaching and unintended consequences that would result from expanding the FTC’s authority. With your permission, I would like to submit that letter for the record, but let me also note some of those signatories here in order to exemplify the breadth of industry concern over these proposed changes to the FTC’s authority: American Business Media, Consumer Electronics Association, Consumer Healthcare Products Association, International Franchise Association, National Association of Manufacturers, National Association of Realtors, National Association of Wholesaler-Distributors, National Automobile Dealers Association, National Retail Federation, Software & Information Industry Association, and the U.S. Chamber of Commerce.

Further, we believe that the safeguards and protections required by Magnuson-Moss – enacted in the early 1980s as a result of FTC abuse of APA rulemaking in the 1970s – continue to serve a valuable and useful purpose, and should not be repealed. These protections were established to achieve balance in government policymaking, limit regulatory overreaching, and to maintain Congress’ authority to legislate on policy issues. We do not believe that a complete elimination of important procedural safeguards is necessary, or that it will ultimately be in the best interest of businesses and consumers.

My remarks today will focus on the following four areas, which have been the subject of recent discussion surrounding FTC reauthorization: (1) Rulemaking under the Administrative Procedure Act (“APA”); (2) Authority to assess civil penalties; (3) Authority to pursue aiding and abetting; and, (4) Authority for independent litigation.

II. THE PROCEDURAL SAFEGUARDS CURRENTLY GOVERNING THE FTC’S “UNFAIR OR DECEPTIVE” AUTHORITY SHOULD REMAIN INTACT.

A. PROCEDURAL SAFEGUARDS ARE NECESSARY GIVEN THE FTC’S BROAD JURISDICTION.

As I mentioned earlier, DMA has joined with nearly thirty major trade associations – representing virtually every industry – in expressing concerns about the proposed repeal of statutory protections that currently govern the FTC’s rulemaking ability. These statutory protections were enacted precisely to ensure appropriate checks and balances on FTC rulemaking under its “unfair or deceptive” authority, which gives the Commission sweeping jurisdiction over all but a few sectors of the American economy. The legislation currently under consideration would give the FTC streamlined APA authority to promulgate rules regarding any “unfair or deceptive” acts or practices across dozens of industries and countless marketing practices. Such a sweeping allocation of power would mitigate the need for congressional oversight and specific grants of authority to regulate on particular issues.

DMA believes that the potential economic impact of such broad, new authority should be fully evaluated by Congress in the process of considering such a dramatic

change. Many DMA member companies were severely impacted by the current economic downturn. Our most recent *Quarterly Business Review* suggests that marketing spending – the principle measure of economic productivity – is “finally reversing the endemic downward spiral that began, for many, as early as mid-2007,”⁵ but that economic recovery in the marketing community remains very slow in gaining steam. We strongly believe that the addition of new regulatory burdens at this time would limit market innovation and reduce the number of new jobs that the business community is able to create.

B. THE FTC ALREADY HAS APA RULEMAKING AUTHORITY IN MANY SIGNIFICANT AREAS AND CONGRESS HAS THE POWER TO GRANT ADDITIONAL AUTHORITY AS IS APPROPRIATE AND NECESSARY.

Let me address several items that must be clarified with regard to the FTC’s current rulemaking authority. The Commission has indicated that all other agencies have APA rulemaking authority. First, not every other agency has APA rulemaking authority. Second, the agencies currently using APA rulemaking have mandates that are very different from that of the FTC. Third, the FTC already has APA rulemaking authority under many different statutes,⁶ and DMA supports those specific grants of APA authority. It is only in the expansive area of “unfair and deceptive” practices – where the

⁵ *DMA/Winterberry Group Quarterly Business Review: Fourth Quarter of 2009*. Pg. 6. New York: Direct Marketing Association. March 2010.

⁶ *See e.g.*, Controlling the Assault of Non-Solicited Pornography and Marketing Act, Children’s Online Privacy Protection Act, Fair Credit Reporting Act, Gramm-Leach-Bliley Act, American Recovery and Reinvestment Act (i.e., health data security breach notification), Energy Policy and Conservation Act (i.e., appliance labeling, testing procedures and labeling for recycled oil), Fair Debt Collection Practices Act, Fairness to Contact Lens Consumers Act, Telemarketing and Consumer Fraud and Abuse Prevention Act, Omnibus Appropriations Act of 2009 as clarified by the Credit CARD Act of 2009 (i.e., mortgage loans).

standards and jurisdiction are very broad – that the FTC must follow the protections and safeguards of the Magnuson-Moss Act.

Prior to the implementation of the Magnuson-Moss safeguards in 1975 and 1980, the FTC followed APA rulemaking procedures to fulfill its exceptionally broad mandate. The Commission exercised little restraint and began conducting rulemakings on a wide range of subjects, including a proposal to completely ban children’s advertising. The *Washington Post* viewed such rulemakings as “preposterous intervention[s] that would turn the agency into a great national nanny.”⁷ As a result, Congress took steps to curb such FTC overreaching by enacting the Magnuson-Moss Act.

The FTC’s extremely broad authority spans innumerable industries and, therefore, is quite different in nature from that of other federal agencies, whose powers tend to be more industry-specific. When a federal agency has authority over particular industry, such as pharmaceuticals or education, its staff can become expert in that area. Even in the case of the Environmental Protection Agency, whose regulatory powers span many industries, its rulemaking authority is limited to particular areas by congressionally-approved and narrowly focused statutes, such as the Clean Air Act that limits air pollutants. By contrast, the FTC has authority to determine on its own what constitutes an “unfair or deceptive” practice, and to regulate such a practice wherever it occurs. Based on the Commission’s record of past overreaching, we are concerned that providing the FTC with comprehensive APA rulemaking authority would once again lead the agency to overstep its bounds. Given the FTC’s broad mandate and the historical need

⁷ Editorial, *The FTC as National Nanny*, *Washington Post*. Mar. 1, 1978, at A22.

for the imposition of safeguards, we believe that the Magnuson-Moss provisions should not be repealed.

C. THERE IS NO NEED FOR COMPREHENSIVE APA RULEMAKING AUTHORITY AND SPECIFIC SHORTCOMINGS OF MAGNUSON-MOSS HAVE NOT BEEN DEMONSTRATED.

We question the Commission's claims that it needs APA rulemaking authority in order to properly protect consumers, and strongly believe that the FTC has done a superb job heretofore without such broad authority. Just last month, FTC Chairman Jon Leibowitz testified before this Committee that, "...in 2009 alone, the FTC and the states, working in close coordination, brought more than 200 cases against firms that peddled phone mortgage modification and foreclosure rescue scams."⁸ He went on to say,

"The FTC is primarily a law enforcement agency, and it has used its authority proactively to protect financially distressed consumers. In many of these cases, the Commission has used its powers to seek temporary restraining orders, asset freeze orders, and other immediate relief to stop financial scams in their tracks and preserve money for ultimate return to consumers. Even prior to the economic downturn, the Commission acted aggressively to stop financial fraud and assist consumer victims. For example, the agency brought a series of cases against a number of the nation's subprime mortgage lenders and services challenging a variety of unfair and deceptive practices. Over the past five years, the FTC has filed over 100 actions against providers of financial services, and in the past ten

⁸ "Prepared Statement of the Federal Trade Commission on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, before the Senate Committee on Commerce, Science, and Transportation." Pg. 1. February 4, 2010.

years, the Commission has obtained nearly half a billion in redress for consumers of financial services.”⁹

Over the past fifteen years, there is no record of the FTC requesting broad APA rulemaking authority from Congress. Further, if such rulemaking authority is critical, the Commission should be able to specifically enumerate the areas in which it would use such authority. Instead, during last month’s hearing, in response to a request from Senator Johanns that he enumerate areas in which APA rulemaking authority would be helpful, Chairman Leibowitz indicated “...we’d really want to [...] think for a while if we got this authority about what we wanted to do and what we wouldn’t want to do...”¹⁰

If there are specific areas in which such streamlined rulemaking authority is necessary, then we believe that Congress should consider and pass legislation detailing those areas. In general, DMA supports granting APA rulemaking authority to the FTC in order to address very specific problems. For example, the Commission was appropriately given APA rulemaking authority when implementing rules regarding children’s privacy, commercial email, telemarketing, and (jointly with other financial regulators) financial privacy. Just last year, Congress provided APA rulemaking authority to the FTC in order to address specific problems in the mortgage industry.

⁹ “Prepared Statement of the Federal Trade Commission on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, before the Senate Committee on Commerce, Science, and Transportation.” Pg. 4. February 4, 2010.

¹⁰ “Senate Commerce, Science and Transportation Committee Holds Hearing on the Role of the Federal Trade Commission Concerning Financial Services and Products As it Relates to Consumers.” CQ Congressional Transcripts. February 4, 2010.

Similarly, while it has been suggested that the Magnuson-Moss safeguards make it impossible to promulgate a rule in less than eight to ten years, the Commission has not shown any specific evidence to support this assertion, or to show that a particular procedure under Magnuson-Moss results in an unduly lengthy rulemaking process. In the absence of such evidence, Congress should not change the Magnuson-Moss procedures. If the FTC were to make such a specific showing, then we believe that Congress should evaluate the particular aspects of Magnuson-Moss that the Commission finds problematic, and it should seek to identify a targeted solution in order to preserve the policy goals behind these important and longstanding safeguards.

We are particularly concerned about the unintended consequences of repealing the “prevalence” requirement under Magnuson-Moss. This provision requires the FTC to issue a finding that an “unfair or deceptive” practice has become “prevalent” in the marketplace before proceeding with a rule. Requiring that the Commission show prevalence of an “unfair or deceptive” practice by industry ensures that responsible businesses across the country are not burdened with regulations that stifle innovation or legitimate commerce as a result of the bad practices of a few actors. The FTC has asserted that it has had difficulty making a showing of prevalence, and that such a requirement is burdensome, since the Commission is required to amass a body of evidence before a rulemaking can proceed.

Currently, the FTC independently decides to expend considerable resources on enforcement actions, workshops, and other educational and information-gathering

activities in order to establish weighty hearing records on a particular issue for the purpose of commencing a rulemaking. We are not aware that the FTC has documented any difficulty in establishing a finding under the “prevalence” standard, and we do not believe that Congress should repeal it until or unless the FTC can document evidence to support such a claim.

Likewise, there has been no evidence to suggest that the Commission has experienced difficulty in demonstrating “prevalence” in our Nation’s courts, or that the courts are incapable making such an interpretation. Both business and consumers will benefit if Congress continues to require the FTC to produce evidence of “prevalence” that will survive independent legal scrutiny. Business will not have to bear the expense of unnecessary litigation, which is sure to arise if a lesser standard of proof were to be created. Consumers will be sure that the FTC was focusing its attention and resources on the most prevalent and egregious problems in the marketplace.

D. MAGNUSON-MOSS PROTECTIONS SHOULD REMAIN IN PLACE TO AVOID LIMITING INNOVATION IN CRITICAL AREAS OF THE ECONOMY SUCH AS THE INTERNET.

The DMA is particularly concerned that the Commission would use its expanded rulemaking authority to regulate in the areas where it has been most actively involved in policy discussion and enforcement activity, and that its involvement in those areas would hinder new and emerging business practices, such as mobile and interactive marketing. Currently, the Commission has an especially good track record of working with business to encourage the establishment of meaningful and effective self-regulatory standards in

the marketplace. Just this year, following proposed standards by the FTC, DMA partnered with the American Association of Advertising Agencies (4A's), Association of National Advertisers (ANA), Interactive Advertising Bureau (IAB) and Better Business Bureau (BBB) – collectively representing the entire advertising industry – to develop self-regulatory standards for online advertising practices. We believe that the context for such collaborative efforts would change significantly if the rulemaking safeguards were repealed.

Specifically, we are concerned that over time regulations could emerge without affording Congress the opportunity to exercise its important oversight function to ensure that the appropriate checks and balances are in place. Such unchecked regulation might occur in areas such as information-sharing, privacy, Internet advertising and marketing, mobile marketing, affiliate marketing, targeted marketing, online behavioral marketing, marketing to children and teenagers, and numerous other topics where the best-intentioned rulemaking almost certainly cannot anticipate innovation and change, and may not be able to achieve its intended purpose without significant unintended consequences.

For example, regulation could limit Internet development – one of the continued key economic drivers and areas of job growth. DMA recently forecast that the Internet marketing workforce has the potential to grow 6.1 percent over the next five years – with 11 percent growth in the social networking medium alone – generating more than 2.6 million new jobs. Growth of the mobile marketing workforce was projected at more than

30 percent by 2014.¹¹ Instead, such rules could limit market innovation, and jeopardize the corresponding jobs and products that flow from such innovation.

III. THE COMMISSION ALREADY HAS SUFFICIENT ENFORCEMENT POWERS TO DETER AND PUNISH BAD ACTORS.

We are also concerned with proposals to remove checks on the FTC's enforcement powers, including the proposal to grant the agency civil penalty authority. DMA believes that the FTC's existing enforcement tools are sufficient to protect consumers. Currently, the FTC can impose settlement orders on companies and seek the disgorgement of ill-gotten gains. If a company subsequently violates the order, then the FTC can also seek to obtain civil penalties. Based on feedback from DMA's members, this system provides very strong and effective incentives for companies to work cooperatively with the Commission in reaching settlements, which in turn provide industry with valuable guidance on the scope of acceptable practices in a timely fashion. We, therefore, strongly recommend against granting the FTC new authorities that could have significant unintended consequences, such as disrupting and even discouraging the cooperative spirit in negotiating settlements, and unduly lengthening the settlement process, thus leaving more time when consumers are unprotected.

¹¹ *The Power of Direct Marketing 2009-2010*. Produced by IHS Global Insight for DMA. 13th Edition. Pg. 184-185. New York: Direct Marketing Association. October 2009.

IV. ADDITIONAL AUTHORITY TO PURSUE AIDING AND ABETTING IS UNNECESSARY.

Likewise, DMA is concerned with the proposals to grant the FTC authority to treat persons that “knowingly or recklessly” provide “substantial assistance” to others in committing “unfair or deceptive” acts or practices as primary wrongdoers even when they lack actual knowledge of a violation. The FTC already has authority to pursue those who commit “unfair or deceptive” acts or practices. We also caution that granting authority specifically over aiders and abettors in this manner would be unworkable because it would put a wide range of service providers in the position of policing the actions of clients over which they exercise no control. Examples of service providers who would be put in the position of having to police the actions of their clients – were the FTC to have authority over aiders and abettors – include agencies involved in the creation of a campaign advertising a product that was later found to be faulty, printers of catalogues, web hosting companies, or publishers who place advertisements in their newspapers or on their websites.

V. CURRENT LITIGATING AUTHORITY THAT IS COORDINATED THROUGH THE DEPARTMENT OF JUSTICE IS EFFECTIVE.

Finally, we oppose proposals to grant the FTC independent litigating authority to seek civil penalties. Such proposals would remove the current requirement that the FTC provide the Department of Justice (“DOJ”) with 45 days to determine whether it will take a case on behalf of the FTC, and instead permit the agency to bring suits immediately on its own. We believe that inclusion of the DOJ in this process is necessary to provide a

check on agency discretion and that it has the added benefits of promoting orderly access to the federal courts, as well as providing for consistent and coordinated federal litigation.

VI. CONCLUSION

In summary, DMA believes that the FTC does a commendable job in protecting consumers against unfair or deceptive acts or practices through its existing enforcement actions under the more than twenty statutes that it currently administers. Given the broad organic jurisdiction of the FTC, however, we oppose the repeal of important safeguards provided by the Magnuson-Moss Act over “unfair and deceptive” practices. Similarly, we believe that the current enforcement regime provides effective tools to both combat bad practices and to deter wrongdoers.

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I thank you for your time and for the opportunity to speak before your Subcommittee. I look forward to your questions.