

**Oral Statement of J. Thomas Rosch
Commissioner of the Federal Trade Commission
before the
U.S. Senate Committee on Commerce, Science, and Transportation
Subcommittee on Consumer Protection, Product Safety, and Insurance
on
“Financial Services and Products: The Role of the Federal Trade Commission in
Protecting Consumers”
United States Senate
March 17, 2010**

Thank you, Chairman Pryor, Ranking Member Wicker, and distinguished Members for this chance to speak about proposals to provide the Federal Trade Commission with additional tools to protect consumers in the marketplace. I'd like to briefly discuss each of these proposed tools.

APA Rulemaking: The first is APA rulemaking. The need for APA rulemaking is rooted in the fact that our basic organic statute – Section 5 – is a very broad statute. On the consumer protection side, it prohibits “all unfair or deceptive acts or practices.”

Rules fleshing out this broad statute are good for both consumers and the industry. They describe with specificity what the “rules of the road” are. Take for example, the Franchise Rule and the Funeral Rule. They inform businesses about the particular information they must provide to consumers during their transactions, and the ways in which to provide it, in order to prevent deception. As such, they've been very helpful in improving the marketplace.

APA rulemaking isn't radical. The SEC, for example, has the authority to engage in “notice and comment” APA rulemaking; and it seeks civil penalties for violations of those rules.

Nor can any adverse inference be drawn from the Commission's existing Magnuson-Moss rulemaking procedures, under which rules can be enforced with civil penalties. I know because I was “Present at the Creation” in 1974 when the Magnuson-Moss Act was enacted. We

had rulemaking authority at the time, but not the authority to enforce a rule with civil penalties. We at the Commission suggested the current Magnuson-Moss statute to give us both. That statute has turned out to be enormously burdensome and expensive, involving lengthy hearings and cross-examination (in essence a trial), but nobody knew that then. Both we and the Congress just felt, as I say, that rules that had teeth in them were a good thing for both consumers and good corporate citizens.

Civil Penalty Authority: The second tool is enhanced new civil penalty authority. Let me make clear what I don't support and what I do support.

I don't support a scenario where the FTC ourselves can order civil penalties for violations of Section 5. I think Commissioner Kovacic is right that coupling that kind of civil penalty authority with a statute that is as expansive as Section 5 needs some checks and balances.

However, I do support a grant of authority to enable us to seek civil penalties for Section 5 violations in federal district court, where a federal judge would ultimately decide whether and how much of a civil penalty would be obtained. Settlements involving civil penalties also would be filed in federal district court and be subject to court review. As I say, that wouldn't be radical.

Independent Litigating Authority: The third tool is independent litigating authority. As matters now stand, we don't have authority to file and litigate civil penalty cases in our own name (although we can do this when we seek other remedies). Instead, any cases seeking civil penalties must be referred to the Department of Justice, which has 45 days within which to file a civil penalty action on our behalf. As a result, we often have to make a choice – even before the facts of a case have been thoroughly investigated – between seeking immediate relief and

pursuing consumer redress, or instead seeking civil penalties by referring the case to Justice (and foregoing the ability to pursue relief such as a TRO or asset freeze). That makes no sense. We should have the authority to pursue the most appropriate remedy in order to protect consumers. Again, as you probably know, other agencies, such as the SEC, routinely file such cases on their own behalf.

Aiding and Abetting: The fourth tool is clarification of our aiding and abetting authority. Historically we operated with the understanding that there was an implied cause of action for aiding and abetting under Section 5 of the FTC Act. Unfortunately, the 1994 decision in *Central Bank of Denver* threw this into doubt. I'd encourage you to clarify the law and provide us with explicit authority to take law enforcement action against those who provide substantial assistance to another while knowing, or consciously avoiding knowing, that the person is engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act.