

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



Office of the Chairman

October 26, 2009

U. S. House of Representatives
Committee on Energy and Commerce
Washington, D.C. 20515

Dear Members of the Committee on Energy and Commerce:

As all of us are aware, American consumers are going through a period of extreme financial distress. And all of us want to ensure that federal law enforcement agencies have effective tools to help them stop unfair and deceptive abusive business practices. For that reason, I want to thank the entire Committee for its expressions of support of the FTC's work. I appreciate the changes made to H.R. 3126, the "Consumer Financial Protection Act of 2009" ("CFPA Act"), in the Financial Services Committee that preserve the FTC's effective enforcement and consumer protection jurisdiction. I commend this Committee for its further, critical efforts in this regard during its consideration of the CFPA Act. I also urge you to support expanded authority for the Federal Trade Commission in connection with your markup of the CFPA Act. New tools for the FTC are critical for the FTC to provide the strongest possible protection for consumers, and President Obama has expressed his support for the FTC to have the "resources and the state-of-the-art tools to stop unfair and deceptive practices." My Republican colleague, Tom Rosch, and my Independent colleague, Pamela Jones Harbour, agree that having all of the additional authorities discussed below will help to achieve this enhanced protection for consumers.¹

In its current form, the CFPA Act contains three provisions to strengthen the FTC's authority: (1) consumer protection rulemaking under the streamlined procedures of the Administrative Procedures Act ("APA"), (2) aiding and abetting liability for violations of Section 5 of the FTC Act involving unfair or deceptive acts or practices in commerce, and (3) civil penalty liability for violations of Section 5 involving unfair or deceptive acts or practices in commerce. In addition, I would urge you to add a fourth tool to enable the FTC to protect consumers more effectively – independent litigating authority in civil penalty cases.

APA Rulemaking. The CFPA Act would allow the FTC to promulgate rules on consumer protection issues under more streamlined APA procedures and would replace the

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Commissioner Kovacic opposes the combination of proposed extensions of the FTC's authority. According

cumbersome and time-consuming process, referred to as “Magnuson-Moss” rulemaking, currently required of the FTC. Past rulemakings conducted under Magnuson-Moss often have taken 8 to 10 years to complete. APA rulemaking is generally available to other federal agencies – for example, all of the banking agencies, the Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission (“CFTC”) have authority to use APA procedures. Further, the CFPA Act contemplates that the *new* Consumer Financial Protection Agency (“CFPA”) would promulgate regulations under APA procedures. Congress has given the FTC authority to issue rules using APA rulemaking procedures under specific statutes, such as the Children’s Online Privacy Protection Act, 5 U.S.C. §§ 6501-6506, and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108. Across-the-board APA rulemaking authority would allow the FTC to adopt necessary and appropriate regulations efficiently, allowing the agency to protect consumers while keeping pace with changing business and industry practices. It doesn’t seem to make sense to allow every agency other than the FTC – which most people regard as an effective consumer protection agency – to have streamlined APA rulemaking.

Aiding and Abetting. The CFPA Act includes a provision that would allow the FTC to challenge conduct that aids or abets violations of the FTC Act. The proposed amendment to the FTC Act would make it unlawful, “knowingly or recklessly, to provide substantial assistance to another in violating” the FTC Act or any other act enforceable by the FTC that relates to an unfair or deceptive act or practice. Until the 1994 Supreme Court decision in *Central Bank of Denver v. First Interstate Bank of Denver*, which held that the SEC did not have aiding and abetting authority under the Exchange Act, it was understood that the FTC had aiding and abetting authority under the FTC Act. (The SEC’s aiding and abetting authority was restored by statute shortly after *Central Bank of Denver*.) Moreover, the FTC currently has aiding and abetting authority under the Telemarketing Act, and we have used this authority successfully to combat unlawful practices across a wide range of products and services that are sold over the telephone. Extending aiding and abetting authority to all deceptive and unfair practices would simply put all channels of commerce on equal footing.

The proposed amendment recognizes that effective law enforcement reaches not only direct participants engaged in unfair or deceptive practices, but also those who support or enable them. Aiding and abetting authority is especially critical for complex, electronic transactions that increasingly are the staple of FTC law enforcement efforts. New online business models often involve numerous actors with murky and varying roles in complex channels of distribution. Because of a lack of clear aiding and abetting authority, the FTC is not always able to pursue all of the actors responsible for a fraudulent online scheme. Also, the absence of such authority may make it harder for the FTC to respond effectively to cross-border fraud. Some businesses located abroad that harm American consumers rely on support from entities located in the United

to him, there is a need for the Commission and the Congress to engage in a far more extensive assessment of the likely consequences of removing, at one time, a wide range of prudential limits that Congress previously has imposed upon the agency’s exercise of its powers. For the reasons stated above, however, I believe that this issue has been thoroughly debated and we need to move forward to provide the FTC more effective tools to better protect American consumers.

States. An FTC prosecution of the domestic entity supporting the foreign online business may be the quickest and most effective means of preventing harm to American consumers.

For example, in a case of a domestic company that aids overseas scammers by printing and mailing to U.S. consumers facially fraudulent mailers written by the scammers, the FTC might not be able to reach the mailer without aiding and abetting authority, even though action against the domestic company would be the quickest way to stop the scam. The FTC also might not be able to stop companies that sell lists of consumers' names to be used as targets in illegal lottery or grant scams; for example, if the scams were conducted by mail or the Internet (and not by telephone), the TSR's "substantial assistance or support" liability does not apply. The FTC has faced such situations and has been frustrated by these impediments to its ability to protect consumers more quickly and completely. Thus, providing the FTC with aiding and abetting authority would provide broader and more effective protection for consumers.

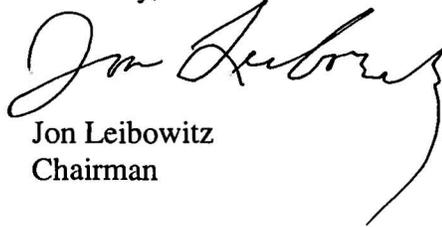
Civil Penalties. The CFPA Act would allow the FTC to seek civil penalties to deter violations of the FTC Act, not just for violations of rules or orders, as the FTC Act currently provides. Without civil penalty authority, there may be ineffective deterrence of fraud and other serious misconduct – bad actors may have little fear of consequences and so continue to prey on consumers until they are caught and enjoined to stop. In some cases, equitable monetary remedies currently available to the FTC, like redress and disgorgement, do not apply or are difficult to calculate. Under the provision in the CFPA Act, civil penalties would be levied only in cases where defendants knew or should have known that what they were doing was unlawful because section 5(m)(1)(a) of the FTC Act limits penalties to violations made “with actual knowledge or knowledge implied on the basis of objective circumstances” that an act or practice is unfair or deceptive. This position is echoed by former Republican FTC Chairman Caspar Weinberger, who advocated allowing the FTC to assess civil penalties administratively against respondents who knowingly committed consumer protection violations.²

Independent Litigating Authority for Civil Penalty Actions. Although the CFPA Act does not include a provision giving the FTC independent litigating authority, adding one would supply the FTC with an additional tool for protecting consumers. While the FTC has independent litigating authority for most of its law enforcement litigation, currently, in most civil penalty actions, the FTC must notify the Department of Justice (“DOJ”) of the proposed action and allow DOJ 45 days to decide whether to bring the case on the FTC’s behalf. In many cases, this means that the FTC must make a difficult choice: file a case quickly to stop ongoing harm but give up the possibility of civil penalties; or seek civil penalties but wait weeks for the DOJ to ramp up a case, allowing the misconduct to continue and more consumers to be harmed. The FTC would protect consumers more effectively if it had the same independent litigating authority that is held by comparable enforcement agencies, such as the SEC and the CFTC, and that is proposed for the new CFPA.

² See *Hearings on H.R. 14931 and Related Bills before the Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 53, 54 (1970) (statement of FTC Chairman Caspar Weinberger).

I strongly support providing the FTC with these additional tools and urge you to ensure that these provisions are included in H.R. 3126 when it is considered by the Committee on Energy and Commerce. Please call upon me or my staff if we can provide you with further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Leibowitz". The signature is fluid and cursive, with a long, sweeping underline that extends to the right and then curves back down.

Jon Leibowitz
Chairman

cc: Phil Barnett
David Cavicke