

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

IFC CREDIT CORPORATION,

Defendant.

Civil No. 07 C 3155

Judge Joan B. Gottschall

Magistrate Judge Cole

**Appendix B to FTC's Response to IFC's Motion to Dismiss**

**LIST OF APPENDICES**

These are materials cited by the FTC that may not be readily available from online sources.

Appendix B

- B - 1 S.REP. 93-151, 30-50 (1973), 73 Trade Reg. (CCH) (Report of Sen. Commerce Comm. on S. 356 , May 21, 1973)
  
- B - 2 Letter from FTC Chairman J.C. Miller, III (March 5, 1982), *reprinted in* H.R. REP. No. 156, Pt. 1, 98th Cong., 1st Sess., 27-33 (1983)

# Appendix B-1

*Securing of Documentary Evidence (section 207)*

This section is basically designed to simplify the securing of documentary evidence and testimony. It authorizes the Commission to seek documentary evidence from any "party", under the present terms of the Federal Trade Commission Act such evidence may be obtained only from "corporations".

As authorized in sections 202 and 205, the Commission may act through its own attorneys to enforce the Federal Trade Commission Act. Section 207 permits the FTC to use its own attorneys "to invoke the aid of a court in requiring the attendance and testimony of witnesses and the production of documentary evidence" and authorizes the Commission to go to court in its own behalf to seek "writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission issued under this Act."

*Reporting Requirements (section 208)*

This section streamlines reporting requirements under the Federal Trade Commission Act. The Commission is authorized to seek a civil penalty against any corporation which fails to file any annual or special report required by the Federal Trade Commission Act. Currently, a more complicated procedure involving the Department of Justice is necessary.

*Expansion of Jurisdiction (section 209)*

See discussion in section 201 supra.

*Injunctions (section 210)*

This section would permit the Commission to obtain either a preliminary or permanent injunction through court procedures initiated by its own attorneys against any act or practice which is unfair or deceptive to a consumer, and thus prohibited by section 5 of the Federal Trade Commission Act. The purpose of section 210 is to permit the Commission to bring an immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest. At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded.

Section 210 authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final within the meaning of section 5. The test the Commission would have to meet in order to secure this injunctive relief is similar to the test it must already meet when attempting to secure an injunction against false advertising of food, drugs, devices, or cosmetics. (See 15 USC §3(a).)

Provision is also made in section 210 for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be

assured of a early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date. Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.

*Enforcement Proceedings (section 211)*

This section permits the Commission to enforce penalties under the Federal Trade Commission Act. It is similar in concept to sections 202 and 205.

*Financial Institutions (section 212)*

This section removes from the Federal Trade Commission Act the presently existing exemption for banks insofar as unfair or deceptive acts or practices affecting commerce are concerned. The intent of the Committee in taking this action is to remove the anticompetitive situation which exists at present because some financial institutions are regulated for consumer protection purposes by the Federal Trade Commission and some are not, even though both types of institutions are offering substantially the same services to consumers. Second, presently existing Federal financial regulatory agencies either do not have the power or the desire to promulgate and enforce strong and uniform rules and regulations prohibiting unfair or deceptive acts or practices in the consumer credit field. The report of the National Commission on Consumer Finance has recommended that a single agency be given the power to promulgate rules and regulations in this area. It makes little sense to have agencies whose primary duty is to insure the solvency and liquidity of the institutions under their jurisdiction promulgating rules and regulations the violation of which may provide for potentially substantial civil penalties. The assumption of an active consumer protection role by such an agency could have a detrimental effect on the very solvency of the institution which the agency is required to protect. Furthermore, just as the Federal Reserve Board is authorized under the Truth In Lending Act to prescribe rules and regulations dealing with credit cost disclosure which apply to all creditors, it makes sense that the Commission should be empowered to issue rules and regulations to prevent unfair or deceptive acts or practices on the part of all business enterprises, including financial institutions.

The Federal Trade Commission would not issue rules or regulations in areas which are already adequately covered by the Federal Reserve Board's regulations under the Truth in Lending Act. If the Commission's legislative rulemaking authority is affirmed, then such rules would apply to financial institutions in the same manner as they would to all business enterprises. (See discussion of rulemaking infra.)

Section 212 requires that the Commission consult with the various Federal financial regulatory agencies listed therein prior to prescribing rules and regulations. Furthermore, section 212 requires the Commission to delegate the power to enforce these rules and regulations to the

various Federal financial regulatory institutions listed therein. The Commission, however, may at any time by rule in accordance with section 553 of title 5 of the United States Code, request and receive re-delegation of the enforcement powers under this section from any agency; this provision was included in order to insure that there is strong and uniform enforcement of the rules and regulations prohibiting unfair or deceptive acts or practices in the consumer credit field.

*Legislative Rationale*

During the 92d Congress, the Magnuson-Moss Warranty-FTC bill (S. 956) as passed by the Senate contained a provision reaffirming the legislative rulemaking authority of the Commission. A similar provision was included in S. 856 as introduced in the 93d Congress, but in a letter to Chairman Magnuson dated March 26, 1973, Chairman Jagnann informed the committee that:

\* \* \* the commission has concluded that it should await the imminent court decision and seek additional legislative authority only in the event of an adverse decision. The Commission, therefore, recommends that section 206 be deleted from the bill. Such a course will not jeopardize Commission rulemaking, and, in the meantime, American consumers can begin to reap the benefits associated with prompt enactment of the less controversial amendments provided in the legislation before this committee.

In accordance with the Commission's recommendation, the Committee deleted the rulemaking provisions from S. 856 in executive session. Chairman Magnuson has pledged, however, to reintroduce legislation granting the Commission the power to promulgate legislative rules in the event of a decision by the courts which is adverse to the Commission on this issue. In other words, the deletion of rulemaking powers by the Committee is not to be read in any way as a reversal of the Senate's position in the 92d Congress, when it passed legislation by a vote of 72-2 which expressly conferred legislative rulemaking power upon the Commission.

TEXT OF S. 356 AS REPORTED

A BILL TO provide disclosure standards for written consumer product warranties against defect or malfunction; to define Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act."

TITLE I—CONSUMER PRODUCT WARRANTIES

DEFINITIONS

Sec. 101. As used in this Title—

- (1) "Commission" means the Federal Trade Commission.
- (2) "Consumer product" means any tangible personal property

any real property regardless of whether it is so attached or installed. Notwithstanding the foregoing, the provisions of sections 102 and 103 of this title affecting consumer products apply only to consumer products each of which actually costs the purchaser more than five dollars.

(3) "Consumer" means the first buyer at retail of any consumer product; any person to whom such product is transferred for use for personal, family, or household purposes during the effective period of which is normally used for personal, family, or household purposes, including any such property intended to be attached to or installed in time of a written warranty or service contract which is applicable to such product; and any other person who is entitled by the terms of such written warranty or service contract or by operation of law to enforce the obligations of such warranty or service contract.

(4) "Reasonable and necessary maintenance" consists of those operations which the purchaser reasonably can be expected to perform or have performed to keep a consumer product operating in a predetermined manner and performing its intended function.

(5) "Repair" may, at the option of the warrantor include replacement with a new, identical or equivalent consumer product or component(s) thereof.

(6) "Replacement" or "to replace", as used in section 104 of this title, means in addition to the furnishing of a new, identical or equivalent consumer product (or component(s) thereof), the refunding of the actual purchase price of the consumer product—

- (1) if repair is not commercially practicable; or
  - (2) if the purchaser is willing to accept such refund in lieu of repair or replacement.
- If there is replacement of a consumer product, the replaced consumer product (free and clear of all liens and encumbrances) shall be made available to the supplier.

(7) "Supplier" means any person (including any partnership, corporation, or association) engaged in the business of making a consumer product or service contract available to consumers, either directly or indirectly. Occasional sales of consumer products by persons not regularly engaged in the business of making such products available to consumers shall not make such persons "suppliers" within the meaning of this title.

(8) "Warrantor" means any supplier or other party who gives a warranty in writing.

(9) "Warranty" includes guaranty; to "warrant" means to guarantee.

(10) "Warranty in writing" or "written warranty" means a warranty in writing against defect or malfunction of a consumer product.

(A) "Full warranty" means a written warranty which incorporates the uniform Federal standards for warranty set forth in section 104 of this title.

(B) "Limited warranty" means a written warranty subject to the provisions of this title which does not incorporate at a minimum the uniform Federal standards for warranty set forth in section 104 of this title.

(11) A "warranty in writing against defect or malfunction of a consumer product" means:

(A) any written affirmation of fact or written promise made at the time of sale by a supplier to a purchaser which relates to the

nature of the material or workmanship and affirms or promises that such material or workmanship is defect-free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing to refund, repair, replace, or take other remedial action with respect to the sale of a consumer product if such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between the supplier and the purchaser.

(12) "Without charge" means that the warrantor(s) cannot assess the purchaser for any costs the warrantor or his representatives incur in connection with the required repair or replacement of a consumer product warranted in writing. The term does not mean that the warrantor must necessarily compensate the purchaser for incidental expenses. However, if any incidental expenses are incurred because the repair or replacement is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the purchaser as a condition of securing repair or replacement, then the purchaser shall be entitled to recover such reasonable incidental expenses in any action against the warrantor for breach of warranty under section 110(b) of this title.

DISCLOSURE REQUIREMENTS

Sec. 102. (a) In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, the Commission is authorized to issue rules, in accordance with section 109 of this title, which may—

(1) prescribe the manner and form in which information with respect to any written warranty shall be clearly and conspicuously presented or displayed when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing; and

(2) require the inclusion in any written warranty, in simple and readily understood language, fully and conspicuously disclosed, items of information which may include, among others:

(A) clear identification of the name and address of the warrantor;

(B) identity of the class or classes of persons to whom the warranty is extended;

(C) the products or parts covered;

(D) a statement of what the warrantor will do in the event of a defect or malfunction—at whose expense—and for what period of time;

(E) a statement of what the purchaser must do and what expenses he must bear;

(F) exceptions and exclusions from the terms of the warranty;

(G) the step-by-step procedure which the purchaser should take in order to obtain performance of any obligation under the warranty, including the identification of any class of persons authorized to perform the obligations set forth in the warranty;

(H) on what days and during what hours the warrantor will honor from his obligations;

(I) the period of time within which, after notice of malfunction or defect, the warrantor will under normal circumstances repair, replace, or otherwise perform any obligations under the warranty;

(J) the availability of any informal dispute settlement procedure offered by the warrantor and a recital that the purchaser must resort to such procedure before pursuing any legal remedies in the courts; and

(K) a recital that any purchaser who successfully pursues his legal remedies in court may recover the reasonable costs incurred, including reasonable attorney's fees.

(b) Nothing in this title shall be deemed to authorize the Commission to prescribe the duration of warranties given or to require that a product or any of its components be warranted, except that the Commission may prescribe rules pursuant to section 558 of title 5, United States Code, that the term of a warranty or service contract shall be extended to correspond with any period in excess of a reasonable period (not less than ten days) during which the purchaser is deprived of the use of a product by reason of a defect or malfunction. Except as provided in section 104 of this title, nothing in this title shall be deemed to authorize the Commission to prescribe the scope or substance of written warranties.

(c) No warrantor of a consumer product may condition his warranty of such product on the consumer's using in connection with such product, any article or service which is directly or indirectly identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if it finds that the imposition of such a condition is reasonable and in the public interest.

DESIGNATION OF WARRANTIES

Sec. 103. (a) Any supplier warranting in writing a consumer product shall clearly and conspicuously designate such warranty as provided herein, unless exempted from doing so by the Commission pursuant to section 109 of this title:

(1) If the written warranty incorporates the uniform Federal standards for warranty set forth in section 104 of this title, and does not limit the liability of the warrantor for consequential damages, then it shall be conspicuously designated as "full (statement of duration)" warranty, guaranty, or word of similar meaning. If the written warranty incorporates the uniform Federal standards for written warranty set forth in section 104 of this title and limits or excludes the liability of the warrantor for consequential damages as permitted by applicable State law, then it shall be conspicuously designated as "full (statement of duration)" warranty, guaranty, or word of similar import. "Liability for consequential damages limited; remedy restricted to free repair or replacement within a reasonable time, without charge", or as otherwise prescribed by the Commission pursuant to section 109 of this title.

(2) If the written warranty does not incorporate the Federal standards for warranty set forth in section 104 of this title, then it shall be designated in such manner so as to indicate clearly and conspicuously the limited scope of the coverage afforded.

(b) Written statements or representations, such as expressions of general policy concerning customer satisfaction which are not subject to any specific limitations shall not be deemed to be warranties in writing for purposes of sections 102, 103, and 104 of this title but shall remain subject to the provisions of the Federal Trade Commission Act and section 110 of this title.

UNIFORM FEDERAL STANDARDS FOR WRITTEN WARRANTY

Sec. 104. (a) Any supplier warranting in writing a consumer product must undertake at a minimum the following duties in order to be deemed to have incorporated the uniform Federal standards for written warranty—

- (1) to repair or replace any malfunctioning or defective consumer product covered by such warranty;
- (2) within a reasonable time; and
- (3) without charge.

In fulfilling the above duties, the warrantor shall not impose any duty upon a purchaser as a condition of securing such repair or replacement other than notification unless the warrantor can demonstrate that such a duty is reasonable. In a determination by the Commission or a court of whether or not any such additional duty or duties are reasonable, the magnitude of the economic burden necessarily imposed upon the warrantor (including costs passed on to the purchaser) shall be weighed against the magnitude of the burdens of inconvenience and expense necessarily imposed upon the purchaser.

(b) If repair is necessitated an unreasonable number of times during the warranty period the purchaser shall have the right to demand and receive replacement of the consumer product.

(c) The above duties extend from the warrantor to the consumer.

(d) The performance of the duties enumerated in subsection (a) of this section shall not be required of the warrantor if he can show that damage while in the possession of the purchaser or unreasonable use (including failure to provide reasonable and necessary maintenance) caused any warranted consumer product to malfunction or become defective.

FULL AND LIMITED WARRANTIES OF A CONSUMER PRODUCT

Sec. 105. Nothing in this title shall prohibit the selling of a consumer product which has both full, full (with limitation of liability for consequential damages) and limited warranties if such warranties are clearly and conspicuously differentiated.

SERVICE CONTRACTS

Sec. 106. Nothing in this title shall be construed to prevent a supplier from selling a service contract to the purchaser in addition to or in lieu of a warranty in writing if the terms and conditions of such contract are fully and conspicuously disclosed in simple and readily understood language. The Commission is authorized to determine, in accordance with section 109 of this title, the manner and form in which the terms and conditions of service contracts shall be clearly and con-

DESIGNATION OF REPRESENTATIVES

Sec. 107. Nothing in this title shall be construed to prevent any warrantor from making any reasonable and equitable arrangements for representatives to perform duties under a written warranty except that no such arrangements shall relieve the warrantor of his direct responsibilities to the purchaser nor necessarily make the representative a co-warrantor.

LIMITATION ON DISCLAIMER OF IMPLIED WARRANTIES

Sec. 108. (a) There shall be no express disclaimer of implied warranties to a purchaser if any written warranty or service contract in writing is made by a supplier to a purchaser with regard to a consumer product.

(b) For purposes of this title, implied warranties may not be limited as to duration expressly or impliedly through a designated warranty in writing or other express warranty.

FEDERAL TRADE COMMISSION

Sec. 109. The Commission is authorized to establish rules pursuant to section 653 of title 5, United States Code, upon a public record after an opportunity for an agency hearing structured so as to proceed as expeditiously as practicable to—

(a) prescribe the manner and form in which information with respect to any written warranty shall be disclosed and the items of information to be included in any written warranty as provided in section 102 of this title;

(b) prescribe the manner and form in which terms and conditions of service contracts shall be disclosed as provided in section 106 of this title;

(c) determine when a warranty in writing does not have to be designed in accordance with section 103 of this title;

(d) define in detail the disclosure requirements in paragraph (2) of subsection (a) of section 103 of this title; and

(e) define in detail the duties set forth in subsections (a), (b), and (c) of section 104 of this title and their applicability to warrantors of different categories of consumer products with "full" warranties.

PRIVATE REMEDIES

Sec. 110. (a) Congress hereby declares it to be its policy to encourage suppliers to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. Such informal dispute settlement procedures should be created by suppliers in cooperation with independent and governmental entities pursuant to guidelines established by the Commission. If a supplier incorporates any such informal dispute settlement procedure in any written warranty or service contract, such procedure shall initially be used by any consumer to resolve any complaint arising under such warranty or service contract. The bona fide operation of any such dispute settlement procedure shall be subject to review by

the Commission on its own initiative or upon a written complaint filed by any injured party.

(b) Any purchaser damaged by the failure of a supplier to comply with any obligations assumed under a written warranty or service contract in writing subject to this title may bring suit for breach of such warranty or service contract in an appropriate district court of the United States subject to the jurisdictional requirements of section 1331 of title 28, United States Code. Any purchaser damaged by the failure of a supplier to comply with any obligations assumed under an express or implied warranty or service contract subject to this title may bring suit in any State or District of Columbia court of competent jurisdiction. Prior to commencing any legal proceeding for breach of warranty or service contract under this section, a purchaser must have afforded the supplier a reasonable opportunity to cure the alleged breach and must have used the informal dispute settlement mechanisms, if any, established under subsection (a) of this section. Nothing in this subsection shall be construed to change in any way the jurisdictional or venue requirements of any State.

(c) Any purchaser who shall finally prevail in any suit or proceeding for breach of an express or implied warranty or service contract brought under section (b) of this section shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by such purchaser for or in connection with the institution and prosecution of such suit or proceeding, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(d) (1) For the purposes of this section, an "express warranty" is created as follows:

(A) Any affirmation of fact or promise made by a supplier to the purchaser which relates to a consumer product or service and becomes part of the basis of the bargain creates an express warranty that the consumer product or service shall conform to the affirmation or promise.

(B) Any description of a consumer product which is made part of the bargain creates an express warranty that the consumer product shall conform to the description.

(C) Any sample or model which is made part of the basis of the bargain creates an express warranty that the consumer product shall conform to the sample or model.

It is not necessary to the creation of express warranty that the supplier use formal words such as "warranty" or "guaranty" or that he have a specific intention to make a warranty. An affirmation merely of the value of the consumer product or service or a statement purporting to be merely the supplier's opinion or commendation of the consumer product or service does not by itself create a warranty.

(2) Only the supplier actually making an affirmation of fact or promise, a description, or providing a sample or model shall be deemed to have created an express warranty under this section and any rights arising thereunder may only be enforced against such supplier and no other supplier.

GOVERNMENT ENFORCEMENT

Sec. 111. (a) It shall be unlawful and a violation of section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a) (1)) for any person (including any partnership, corporation, or association) subject to the provisions of this title to fail to comply with any requirement imposed on such person by or pursuant to this title or to violate any prohibition contained in this title.

(b) (1) The district courts of the United States shall have jurisdiction to restrain violations of this title in an action by the Attorney General or by the Commission by any of its attorneys designated by it for such purpose. Upon a proper showing, and after notice to the defendant, a temporary restraining order or preliminary injunction shall be granted without bond. *Provided, however,* That if a complaint is not filed within such period as may be specified by the court after the issuance of the restraining order or preliminary injunction, the order or injunction may, upon motion, be dissolved. Whenever it appears to the court that the interests of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) (A) Whenever the Attorney General has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material, relevant to any violation of this title, he may, prior to the institution of a proceeding under this section cause to be served upon such person, a civil investigative demand requiring such person to produce the documentary material for examination.

(B) Each such demand shall—

(i) state the nature of the conduct alleged to constitute the violation of this title which is under investigation;

(ii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(iii) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(iv) identify the custodian to whom such material shall be furnished.

(C) No demand shall—

(i) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in a proceeding brought under this section; or

(ii) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in any proceeding under this section.

(D) Any such demand may be served at any place within the territorial jurisdiction of any court of the United States.

(E) Service of any such demand or of any petition filed under subparagraph (G) of this subsection may be made upon any person, partnership, corporation, association, or other legal entity by—



(i) delivering a duly executed copy thereof to such person or to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, partnership, corporation, association, or entity;

(ii) delivering a duly executed copy thereof to the principal office or place of business of the person, partnership, corporation, association, or entity to be served; or

(iii) depositing such copy in the United States mails, by registered or certified mail duly addressed to such person, partnership, corporation, association, or entity at its principal office or place of business.

(F) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(G) The provisions of sections 4 and 5 of the Antitrust Civil Process Act (15 U.S.C. 1313, 1314) shall apply to custodians of material produced pursuant to any demand and to judicial proceedings for the enforcement of any such demand made pursuant to this section; *Provided, however*, That documents and other information obtained pursuant to any civil investigative demand issued hereunder and in the possession of the Department of Justice may be made available to duly authorized representatives of the Commission for the purpose of investigations and proceedings under this title and under the Federal Trade Commission Act, subject to the limitations upon use and disclosure contained in section 4 of the Antitrust Civil Process Act (15 U.S.C. 1313).

SAYING PROVISION

Sec. 112. Nothing contained in this title shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or any statute defined as an Antitrust Act.

SCOPE

Sec. 113. (a) The provisions of this title and the powers granted hereunder to the Commission and the Attorney General shall extend to all sales of consumer products and service contracts affecting interstate commerce: *Provided, however*, That such provisions and powers shall not be exercised in such a manner as to interfere with warranties applicable to consumer products, or components thereof, created and governed by other Federal law.

(b) Labeling, disclosure, or other requirements of a State with respect to written warranties and performance thereunder, not identical to those set forth in section 102, 103, or 104 of this title or with rules and regulations of the Commission issued in accordance with the procedures set forth in section 109 of this title, or with guidelines of the Commission, shall not be applicable to warranties complying therewith. However, if, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with the Federal Trade Commission Act, as amended) that any requirement of such State (other than a labeling or disclosure require-

(1) affords protection to consumers greater than the requirements of this title; and

(2) does not unduly burden interstate commerce, then transactions complying with any such State requirement shall be exempt from the provisions of this title to the extent specified in such determination for so long as such State continues to administer and enforce effectively any such greater requirement.

(c) Nothing in this title shall be construed to supersede any provision of State law regarding consequential damages for injury to the person or any State law restricting the ability of a warrantor to limit his liability for consequential damages.

EFFECTIVE DATE

Sec. 114. (a) Except for the limitations in subsection (b) of this section, this title shall take effect six months after the date of its enactment but shall not apply to consumer products manufactured prior to such effective date.

(d) Those requirements in this title which cannot be reasonably met without the promulgation of rules by the Commission shall take effect six months after the final publication of such rules which shall be published (subject to future amendment or revocation) as soon as possible but no later than one year after the date of enactment of this Act: *Provided*, That the Commission, for good cause shown, may provide designated classes of suppliers up to six months additional time to bring their written warranties into compliance with rules promulgated under this title.

(e) The Commission shall promulgate initial rules for initial implementation of this title, including guidelines for the establishment of informal dispute settlement procedures pursuant to section 110(a) of this title, as soon as possible after enactment but in no event later than one year after the date of enactment of this Act.

TITLE II—FEDERAL TRADE COMMISSION IMPROVEMENTS

Sec. 201. Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by striking out the words "in commerce" wherever they appear and inserting in lieu thereof "affecting commerce".

Sec. 202. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by inserting after paragraph (6) as amended by section 212 of this title the following new paragraph:

"(7) The Commission may initiate civil actions in the district courts of the United States against persons, partnerships, or corporations engaged in any act or practice which is unfair or deceptive to a consumer and is prohibited by subsection (a) (1) of this section with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by subsection (a) (1) of this section, to obtain a civil penalty of not more than \$10,000 for each such violation. The Commission may compromise, mitigate, or settle any action for a civil penalty if such settlement is accompanied by a public statement of its reasons and is approved by the court."

Sec. 203. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by inserting after paragraph (7) as added by section 202 of this title the following new paragraph:

"(8) After an order of the Commission to cease and desist from engaging in acts or practices which are unfair or deceptive to consumers and proscribed by section 5(a)(1) of this Act has become final as provided in subsection (g) of this section, the Commission, by any of its attorneys designated by it for such purpose, may institute civil actions in the district courts of the United States to obtain such relief as the court shall find necessary to redress injury to consumers caused by the specific acts or practices which were the subject of the proceeding pursuant to subsection (b) of this section and the resulting cease-and-desist order, including, but not limited to, rescission or reformation of contracts, the refund of money or return of property, public notification of the violation, and the payment of damages, except that nothing in this section is intended to authorize the imposition of any exemplary or punitive damages. The court shall cause notice to be given reasonably calculated, under all of the circumstances, to apprise all consumers allegedly injured by the defendant's acts of the pendency of such action. No action may be brought by the Commission under this subsection more than two years after an order of the Commission upon which such action is based has become final. Any action initiated by the Commission under this subsection may be consolidated as the court deems appropriate with any other action requesting the same or substantially the same relief upon motion of a party to any such action.

Sec. 204. Section 5(1) of the Federal Trade Commission Act (15 U.S.C. 45(1)) is amended by striking subsection (1) and inserting in lieu thereof the following new paragraph:

"(1) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States or by the Commission in its own name by any of its attorneys designated by it for such purpose. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Sec. 205. Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end thereof the following new subsection:

"(m) Whenever in any civil proceeding involving this Act the Commission is authorized or required to appear in a court of the United States, or to be represented therein by the Attorney General of the United States, the Commission may elect to appear in its own name by any of its attorneys designated by it for such purpose."

Sec. 206. Section 6 of the Federal Trade Commission Act (15 U.S.C. 46) is amended by striking out the words "in commerce" wherever they appear and inserting in lieu thereof "in or whose business affects commerce."

Sec. 207. Section 9 of the Federal Trade Commission Act (15 U.S.C. 49) is amended by—

(a) deleting the word "corporation" in the first sentence of the first unnumbered paragraph and inserting in lieu thereof the word "party";

(b) inserting after the word "Commission" in the second sentence of the second unnumbered paragraph the phrase "acting through any of its attorneys designated by it for such purpose"; and

(c) deleting the fourth unnumbered paragraph and inserting in lieu thereof the following:

"Upon the application of the Attorney General of the United States or of the Commission, acting through any of its attorneys designated by it for such purpose, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission issued under this Act."

Sec. 208. Section 10 of the Federal Trade Commission Act (15 U.S.C. 50) is amended by deleting the third unnumbered paragraph and inserting in lieu thereof the following:

"If any corporation required by this Act to file any annual or special report shall fail to do so within the time fixed by the Commission for filing such report, then, if such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure. Such forfeiture shall be payable into the Treasury of the United States and shall be recoverable in a civil suit brought by the Attorney General or by the Commission, acting through any of its attorneys designated by it for such purpose, in the district where the corporation has its principal office or in any district in which it does business."

Sec. 209. Section 12 of the Federal Trade Commission Act (15 U.S.C. 52) is amended by striking out the words "in commerce" wherever they appear and inserting in lieu thereof "in or having an effect upon commerce."

Sec. 210. Section 13 of the Federal Trade Commission Act (15 U.S.C. 53) is amended by redesignating "(b)" as "(c)" and inserting the following new subsection:

"(b) Whenever the Commission has reason to believe—  
"(1) that any person, partnership, or corporation is engaged in, or is about to engage in, any act or practice which is unfair or deceptive to a consumer, and is prohibited by section 5, and  
"(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final within the meaning of section 5, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may elect to appear in a district court of the United States to enjoin any

such act or practice. Upon a proper showing that such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint under section 5 is not filed within such period as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction may be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and, after proper proof, the court may issue a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business."

Sec. 211. Section 16 of the Federal Trade Commission Act (15 U.S.C. 56) is amended to read as follows:  
"Sec. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (1) of section 5 of this Act, it shall—

"(a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection; or

"(b) itself cause such appropriate proceedings to be brought."

Sec. 512. (a) Section 5(a)(6) of the Federal Trade Commission Act (15 U.S.C. 45(a)(6)) is amended—

(1) by striking out "banks"; and

(2) by adding at the end thereof before the period a colon and the following:

"*Provided, however*, That with respect to financial institutions such authority shall only be exercised to prevent unfair or deceptive acts or practices affecting commerce (including acts or practices which are unfair or deceptive to a consumer)."

(b) Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end of subsection (a), added by section 205 of this title, the following two new subsections—

"(1) Rules and regulations prescribed by the Commission in carrying out the authority conferred by this section with respect to unfair or deceptive acts or practices (including acts or practices which are unfair or deceptive to a consumer) shall, insofar as they apply to or affect any financial institution as defined in section 5(o)(2) of this Act, be issued only after consultation with—

"(A) the Comptroller of the Currency, if the institution is a national bank or a bank operating under the code of law of the District of Columbia;

"(2) the Board of Governors of the Federal Reserve System, if the institution is a member bank of the Federal Reserve System (other than a bank referred to in paragraph (1));

"(3) the Board of Directors of the Federal Deposit Insurance Corporation, if the institution is a bank the deposits of which are insured by such corporation (other than a bank referred to in paragraph (1) or (2));

"(4) the Federal Home Loan Bank Board, if the institution is a member of a Federal Home Loan Bank or the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; or

"(5) the Administrator of the National Credit Union Admin-

istration, if the institution is a credit union the accounts of which are insured by such Administrator.

"(o) (1) The power of the Commission to prevent financial institutions from using unfair or deceptive acts or practices affecting commerce (including acts or practices which are unfair or deceptive to a consumer), pursuant to paragraph (6) of subsection (a) of this section, shall be delegated by the Commission, subject to paragraph (2) of this subsection to—

"(A) the Comptroller of the Currency, if the institution is a national bank or a bank operating under the code of law of the District of Columbia;

"(B) the Board of Governors of the Federal Reserve System, if the institution is a member bank of the Federal Reserve System (other than a bank referred to in paragraph (A));

"(C) the Board of Governors of the Federal Deposit Insurance Corporation, if the institution is a bank the deposits of which are insured by such corporation (other than a bank referred to in paragraph (A) or (B));

"(D) the Federal Home Loan Bank Board, if the institution is a member of a Federal Home Loan Bank or the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; or

"(E) the Administrator of the National Credit Union Administration, if the institution is a credit union the accounts of which are insured by such Administrator.

"(2) At any time by rule in accordance with section 533 of title 5, United States Code, the Commission may request and shall receive redelegation of the power to prevent particular financial institutions regulated by a particular agency described in paragraph (1) of this subsection from using unfair or deceptive acts or practices affecting commerce (including acts or practices which are unfair or deceptive to a consumer) from any agency to which such power has been delegated in accordance with such paragraph, upon a finding that such redelegation is necessary to prevent any such financial institutions from using unfair or deceptive acts or practices.

"(3) As used in this section, the term "financial institution" means—

"(A) any bank the deposits of which are insured by the Federal Deposit Insurance Corporation;

"(B) any Savings and Loan Association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;

"(C) any thrift or home financing institution which is a member of a Federal Home Loan Bank; or

"(D) any credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

COSTS

The committee estimates that costs for implementation of title I of S. 356 would be as follows:

Average additional cost per year for five years following enactment:	\$375,000
Staff attorneys:	84,000
Clerical personnel:	92,000
Equipment, etc.	

It is estimated that cost for implementation of title II of S. 356 would be as follows:

Average additional cost per year for five years following enactment:	
Staff attorneys.....	\$100,000
Clerical personnel.....	80,000
Equipment, etc.....	20,000
Total.....	150,000

The letter from Lewis A. Engman, Chairman of the Federal Trade Commission to Chairman Magnuson estimating costs follows:

FEDERAL TRADE COMMISSION,  
Washington, D.C.

Hon. WARREN G. MAGNUSON,  
Chairman, Committee on Commerce,  
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in response to the request of your staff for an estimate of the additional cost which will be attributable to the enactment of S. 356.

It is estimated that Title I (Consumer Product Warranties) will result in an average additional cost per year for five years following enactment as follows:

Staff attorneys.....	\$375,000
Clerical personnel.....	54,000
Equipment, etc.....	22,000
Total.....	551,000

Total annual additional average cost of Title I for five years: \$551,000 per year.

It is estimated that Title II (FTC Act amendments) will result in an average additional cost per year for five years following enactment as follows:

Staff attorneys.....	\$100,000
Clerical personnel.....	80,000
Equipment, etc.....	20,000
Total.....	150,000

Total annual additional average cost of Title II for five years: \$150,000 per year.

Total annual additional average cost of Title I and Title II for five years: \$701,000 per year.

Lewis A. Engman, Chairman.

VOTE IN COMMITTEE ON MOTION TO ORDER S. 986 TO BE REPORTED  
A quorum being present, the Chairman moved, without objection, to order S. 986 to be reported. There being no objection, the bill was ordered to be reported.

CHANGES IN EXISTING LAW

In compliance with Subsection (4) of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law proposed to be omitted is

enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman.)

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, AS AMENDED  
(15 U.S.C. 43)

(a) (1) Unfair methods of competition [in] affecting commerce, and unfair or deceptive acts or practices [in] affecting commerce, are hereby declared unlawful.

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except [banks,] common carriers, subject to the Acts to regulate commerce, air carriers, and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 408 (b) of said Act, from using unfair methods of competition [in] affecting commerce and unfair or deceptive acts or practices [in] affecting commerce: Provided however, that with respect to financial institutions such authority shall only be exercised to prevent unfair or deceptive acts or practices affecting commerce (including acts or practices which are unfair or deceptive to a consumer).

(7) The Commission may initiate civil actions in the district courts of the United States against persons, partnerships, or corporations engaged in any act or practice which is unfair or deceptive to a consumer and is prohibited by subsection (a) (1) of this section with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unjust and deceptive and is prohibited by subsection (a) (1) of this section, to obtain a civil penalty of not more than \$10,000 for each such violation. The Commission may compromise, mitigate, or settle any action for a civil penalty if such settlement is accomplished by a public statement of its reasons and approved by the court.

(8) After an order of the Commission to cease and desist from engaging in acts or practices which are unfair or deceptive to consumers and proscribed by section 5(a) (1) of this Act has become final as provided in subsection (g) of this section, the Commission, by any of its attorneys designated by it for such purpose, may institute civil actions in the district courts of the United States to obtain such relief as the court shall find necessary to redress injury to consumers caused by the specific acts or practices which were the subject of the proceeding pursuant to subsection (b) of this section and the resulting cease-and-desist order, including, but not limited to, rescission or reformation of contracts, the refund of money or return of property, public notification of the violation, and the payment of damages, except that nothing in this section is intended to authorize the imposition of any exemplary or punitive damages. The court shall cause notice to be given reasonably calculated, under all of the circumstances, to apprise all consumers allegedly injured by the defendant's acts of the pendency of such action. No action may be brought by the Commission under this subsection more than two years after an order of the Commission upon

which such action is based has become final. Any action initiated by the Commission under this subsection may be consolidated as the court deems appropriate with any other action requesting the same or substantially the same relief upon motion of a party to such action.

(h) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice [in] affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. \* \* \*

(l) Any person, partnership, or corporation who violates an order of the Commission [to cease and desist] after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the [United States] Attorney General or the Commission in its own name by any of its attorneys designated by it for such purpose. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Whenever in any civil proceeding involving this Act the Commission is authorized or required to appear in a court of the United States, or to be represented therein by the Attorney General of the United States, the Commission may elect to appear in its own name by any of its attorneys designated by it for such purpose.

(n) Rules and regulations prescribed by the Commission in carrying out the authority conferred by this section with respect to unfair or deceptive acts or practices (including acts or practices which are unfair or deceptive to a consumer) shall, insofar as they apply to or affect any financial institution as defined in section 5(c) (3) of this Act, be issued only after consultation with—

- (1) the Comptroller of the Currency, if the institution is a national bank or a bank operating under the code of law of the District of Columbia;
- (2) the Board of Governors of the Federal Reserve System, if the institution is a member bank of the Federal Reserve System (other than a bank referred to in paragraph (1));
- (3) the Board of Directors of the Federal Deposit Insurance Corporation, if the institution is a bank the deposits of which are insured by such corporation (other than a bank referred to in paragraph (1) or (2));

(4) the Federal Home Loan Bank Board, if the institution is a member of a Federal Home Loan Bank or the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; or

(5) the Administrator of the National Credit Union Administration, if the institution is a credit union the accounts of which are insured by such Administrator.

(1) The power of the Commission to prevent financial institutions from using unfair or deceptive acts or practices affecting commerce (including acts or practices which are unfair or deceptive to a consumer) pursuant to paragraph (6) of subsection (a) of this section, shall be delegated by the Commission, subject to paragraph (2) of this subsection, to—

(A) the Comptroller of the Currency, if the institution is a national bank or a bank operating under the code of law of the District of Columbia;

(B) the Board of Governors of the Federal Reserve System, if the institution is a member bank of the Federal Reserve System (other than a bank referred to in paragraph (A));

(C) the Board of Governors of the Federal Deposit Insurance Corporation, if the institution is a bank the deposits of which are insured by such corporation (other than a bank referred to in paragraph (A) or (B));

(D) the Federal Home Loan Bank Board, if the institution is a member of a Federal Home Loan Bank or the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; or

(E) the Administrator of the National Credit Union Administration, if the institution is a credit union the accounts of which are insured by such Administrator.

(2) At any time by rule in accordance with section 553 of title 5, United States Code, the Commission may request and shall receive reauthorization of the power to prevent particular financial institutions regulated by a particular agency described in paragraph (1) of this subsection from using unfair or deceptive acts or practices affecting commerce (including acts or practices which are unfair or deceptive to a consumer) from any agency to which such power has been delegated in accordance with such paragraph, upon a finding that such reauthorization is necessary to prevent any such financial institutions from using unfair or deceptive acts or practices.

(3) As used in this section, the term "financial institution" means—

- (A) any bank the deposits of which are insured by the Federal Deposit Insurance Corporation;
- (B) any Savings and Loan Association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;
- (C) any thrift or home financing institution which is a member of a Federal Home Loan Bank; or
- (D) any credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

SECTION 6 OF THE FEDERAL TRADE COMMISSION ACT (15 U.S.C. 46)

That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require by general or special orders, corporations engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing

SECTION 9 OF THE FEDERAL TRADE COMMISSION ACT (15 U.S.C. 46)

That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any [corporation] party being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission acting through any of its attorneys designated by it for such purpose may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Upon the application of the Attorney General of the United States or the Commission, acting through any of its attorneys designated by it for such purpose, [at the request of the Commission] the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission [made in pursuance thereof] issued under this Act.

SECTION 10 OF THE FEDERAL TRADE COMMISSION ACT (15 U.S.C. 50)

\* \* \* \* \*

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing [the same, and] such report, then, if such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, [which] such forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit [in the name of the United States] brought by the Attorney General or by the Commission, acting through any of its own attorneys designated by it for such purpose, in the district where the corporation has its principal office or in any district in which it shall do business. [It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.]

SECTION 12 OF THE FEDERAL TRADE COMMISSION ACT (15 U.S.C. 52)

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) by United States mails, or in or having an effect upon commerce by any means, for the purpose of inducing or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) by any means, for the purpose of inducing or which is likely to induce directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or having an effect upon commerce within the meaning of section 5.

SECTION 13 OF THE FEDERAL TRADE COMMISSION ACT (15 U.S.C. 53)

(a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted

without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, any act or practice which is unfair or deceptive to a consumer, and is prohibited by section 5, and

(2) that the enjoined thereof pending the issuance of a complaint by the Commission under section 5 and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final within the meaning of section 5, would be to the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond. Provided, however, That if a complaint under section 5 is not filed within such period as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b)(3) (c) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction.

SECTION 16 OF THE FEDERAL TRADE COMMISSION ACT AS AMENDED, (15 U.S.C. 56)

Sec. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under Section 14 or under subsection (1) of Section 5 of this Act, it shall—

(a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings for the enforcement of the provisions of such section or subsection [ ]: or

(b) itself cause such appropriate proceedings to be brought.

AGENCY COMMENTS

Comments were requested from the following agencies and departments on February 20, 1973:

- Department of Commerce
  - Federal Trade Commission
  - General Accounting Office
  - Department of Justice
  - Office of Consumer Affairs
- As of May 2, 1973, only the Federal Trade Commission had commented on S. 356. The comments of the Commission follow:

FEDERAL TRADE COMMISSION,  
Washington, D.C., March 26, 1973.

Hon. WARREN G. MAGNUSON,  
Chairman, Committee on Commerce,  
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the Commission's comments on S. 356 dealing with consumer product warranties and Federal Trade Commission Act amendments.

As the Commission has previously provided the Committee with its detailed views on S. 956, a nearly identical measure passed by the Senate during the 92d Congress, this report will address only those areas in which the bill or the Commission's position has been significantly modified. Where appropriate, we propose specific modifications which the Commission believes will serve to strengthen and clarify the Act.

TITLE I—CONSUMER PRODUCT WARRANTIES

The Commission reaffirms its belief that the provisions of Title I will benefit both consumers and businessmen. By establishing uniform standards of content and clarity for warranties on goods moving in interstate commerce, the legislation should help to improve product integrity and bring warranty performance into line with consumer expectations. Everyone stands to gain from the resulting enhancement of consumer confidence in industry. The Commission therefore enthusiastically supports the objectives and substance of Title I, and would add to its previous comments in only two areas.

The Commission strongly supports the language which has been added to Section 102(b) of the bill, providing that the Commission may prescribe rules for extending the period of time a warranty is in effect to correspond with any unreasonable period of time during which the consumer is deprived of the use of a product by reason of a defect or malfunction. Extending the warranty period where a consumer is deprived of use of the product for an unreasonable time period should generally encourage prompt action by the warrantor and should bring an end to the ploy occasionally encountered whereby some unscrupulous manufacturers and repair facilities avoid their warranty obligations by deliberate procrastination until the warranty term has expired.

In addition, the Commission would urge inclusion in S. 356 of a new provision along the lines of Section 102(c) of H.R. 90, the corresponding bill in the House. This section provides that no warrantor of a

consumer product may unreasonably condition his warranty on the consumer's using, in connection with such product, any article or service which is identified by brand name. This provision addresses the anticompetitive practice which the Commission has opposed in numerous court actions wherein a manufacturer uses a warranty unreasonably to the his supplementary products or services to the warranted product. This leaves the consumer in the undesirable posture of losing his warranty protection if he purchases the supplementary items from another and perhaps less expensive source—even if he does so in complete ignorance of the warranty's provisions.

TITLE II—FEDERAL TRADE COMMISSION IMPROVEMENTS

The Commission regards the FTC Act improvements as the most important consumer legislation now pending in Congress. It is convinced that the public should be afforded without delay the benefit of basic improvements to the FTC Act which have so long been considered and recommended. For years, the Commission has sought preliminary injunction authority to counter the misuse for purposes of delay of the due process mechanisms which are part of the Commission's procedures. For at least as long, the Commission has been trying unsuccessfully to achieve autonomy in the handling of its own litigation in the Federal courts. The attainment of these two objectives—preliminary injunction authority and autonomy in litigation matters—would in itself be a milestone achievement for the consumer.

PRELIMINARY RESTRAINTS

The supplementation of its enforcement tools by the acquisition of authority to seek preliminary injunctions has long been a prime target in the Commission's program to streamline its procedures. The denial of consumer relief during the pendency of cease-and-desist proceedings, which average more than a year, and frequently require from three to five years, would be averted by use of injunctions in cases where this delay causes unusual harm.

While section 210 of this bill might afford considerable relief, it falls short of its potential by conditioning restraining orders and injunctions upon a showing by the Commission of "the same conditions and principles as injunctive relief against conduct or threatened conduct that will cause loss or damage as granted by courts of equity." Several considerations support the Commission's preference for a legislatively defined injunction based upon the criterion of public interest rather than upon traditional equity standards.

The equitable test requires proof of irreparable injury, no adequate remedy at law, and probability of success on the merits of the case-in-chief. Meeting such a standard is time-consuming and can involve proceedings which take on the dimensions of a trial. In view of the Commission's limited resources, this could significantly impair the usefulness of the injunctive approach. If provided with a more reasonably attainable standard, however, the Commission would be able to extend incipient relief to many more cases where public harm is mildly aggravated by the continuance of a consumer abuse.

Accordingly, the Commission endorses the standard already contained in section 13 (e) of the Federal Trade Commission Act, under which the Commission may seek an injunction against the false advertising of food, drugs, devices, and cosmetics. In *Federal Trade Commission v. Rhoades Pharmacal Co.*, 191 F. 2d 744 (9th Cir. 1951), the court construed that statutory "cause shown" standard to mean that "all the Commission had to show was a justifiable basis for believing derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged in the dissemination of false advertisements of a drug in violation of the Act." Thus, the court viewed the statute as vesting in the Commission the real authority to determine the questions of public interest, necessity, and "reason to believe"—determinations to be made before seeking the injunction in court.

This standard for obtaining preliminary injunctions is by no means without precedent outside the Federal Trade Commission Act. Various statutes establish similar standards as the grounds upon which injunctions may be obtained by other agencies. For example, under the Securities Exchange Act, 15 U.S.C. § 78 u(e), the Securities and Exchange Commission is authorized to seek injunctions "[w]henver it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder."

Similarly, the National Labor Relations Board, under the National Labor Relations Act, 29 U.S.C. § 160 (j), is authorized, upon issuance of a complaint "... charging that any person has engaged in or is engaging in an unfair labor practice ..." to petition a United States district court for appropriate temporary relief or a restraining order. The district court is given jurisdiction "... to grant to the Board such temporary relief or restraining order as it deems just and proper." The Food, Drug, and Cosmetic Act is yet another statute which provides authority to obtain injunctions upon meeting a statutory standard rather than upon traditional equitable grounds. It provides that for "cause shown," the district courts of the United States may restrain violations of section 331 of the Act. In bringing suits to obtain injunctions under this statute, the Justice Department has not been required to meet the traditional equitable standard.

Additional precedent for a statutory standard may also be found in both the Interstate Commerce Act, 49 U.S.C. § 5 (8), authorizing the district courts to issue writs of injunction "upon complaint of the [Interstate Commerce] Commission alleging a violation of any of the provisions of the section ..." and the Federal Communications Act, 47 U.S.C. § 36, authorizing the district courts, at the suit of the United States to enjoin the landing of cable in violation of sections 34-39 of Title 47, when the cable "... is about to be or is landed or is being operated without a license. ..." Neither statute includes any requirement that the traditional equitable standard be met before the court may issue the injunction.

Thus, it is clear that, in seeking a statutory standard for obtaining injunctions, the Commission is seeking a grant of authority which



Congress has in the past deemed necessary for other government agencies to enforce effectively statutes under their jurisdiction. Its necessity, in terms of effective enforcement of the Federal Trade Commission Act, is compelling. Based on these considerations the Commission supports the injunctive provisions of H.R. 20 which would clothe the Commission with injunctive authority substantially similar to section 13 of the Federal Trade Commission Act. It is recommended that the provisions of section 904 of H.R. 20 be substituted for the language now contained in section 209 of S. 356.

COMMISSION REPRESENTATION IN COURT PROCEEDINGS

The Commission strongly endorses the various sections of the bill which would afford it direct access to the courts. Specifically, S. 356 would authorize the Commission to appear in court in its own name and through its own attorneys in the following proceedings:

- (a) Civil actions to supplement cease-and-desist orders with remedies to redress consumer grievances (Sec. 208).
- (b) Civil actions to enforce cease-and-desist order violations (Sec. 204).
- (c) Civil actions to enforce its own subpoenas (Sec. 207 (b)).
- (d) Civil penalty actions for failure to furnish reports required by Commission order (Sec. 208).
- (e) Petitions for injunctions pendente lite and restraining orders (Sec. 210).

There are a number of compelling reasons supporting the Commission's firm conviction that it should have this authority to conduct its own litigation. In almost every case which is referred to the Justice Department, the investigation, pleadings, and briefs have been prepared by the Commission's staff. The additional hours which are required by both Justice Department and Commission personnel to brief trial attorneys are duplicative and nonproductive, and sometimes add greatly to the time required to dispose of Commission action.

In addition to this added time factor, further delay is attributable to the heavy caseload of the Justice Department's own cases and those of other agencies in the U.S. Attorneys' Offices. All of these cases are in competition for U.S. Attorneys' attention, and matters considered important to the Commission must often yield to the urgency of other matters. While these and other delays are often welcome by a respondent, they greatly hinder the Commission's efforts to expedite final disposition of its cases.

The Commission, therefore, firmly believes that it should have autonomy not only as regards those types of litigation covered by the provisions listed above, but over the entirety of its civil litigation under the Act. To accomplish this, we would leave undisturbed the Attorney General's present authority to represent the Commission in court proceedings, but would amend S. 356 to permit the Commission to elect to represent itself in all such matters. This arrangement would enable the Justice Department to continue to represent the Commission in these circumstances in which such representation would be in the overall interest of the Government, and would save valuable attorney hours in both agencies, expedite litigation, and make uniform the present ragged pattern of the Commission's representational authority.

RULEMAKING

Rulemaking authority is, of course, an essential and highly useful regulatory tool which has long been relied upon by the Commission. The drafters of the Federal Trade Commission Act imposed a broad mandate on the Commission to empower it to define with specificity harmful practices. They recognized that specific legislative definition was undesirable since precise definitions would not withstand the ingenuity of those hoping to evade the law.

The Commission—as have other administrative agencies, such as the SEC, the FPC and the FCC—has found that rulemaking is often the best method for filling in gaps in its broad mandate. Agencies which have insisted on utilizing adjudication for broad policymaking have been consistently criticized. Some of the most recent criticism comes from the Ash Council Report, which found that administrative agencies "should rely less on the case-by-case approach to policy formulation and move increasingly in the direction of rulemaking, especially informal rulemaking and other expeditious procedures" (p. 49). The Administrative Conference has recently adopted a recommendation which strongly advocates simple, flexible and efficient rulemaking. Rulemaking is an efficient technique by which the Commission can perform its law enforcement function. Adjudication of necessity forecloses from participation others in a group who may be ultimately subject to the rule of law laid down by a case. Rulemaking on the other hand enables participation in the development of the law by all individuals who are concerned with it. Moreover, there is reason to believe that responsible businessmen will welcome and voluntarily comply with an agency's interpretation of the law if it is presented clearly and in a readily accessible form.

Recognizing its advantages, courts have upheld rulemaking authority for all of the major administrative agencies, and hence rulemaking has become a cornerstone in the administrative process. The Commission is confident that its rulemaking authority will be upheld by the court of appeals in its decision in the pending *National Petroleum Refiners Ass'n* case.

During the last session of the Congress the Commission supported legislative reaffirmation of its rulemaking authority because it recognized that the doubt created by the possibility of judicial challenge could significantly hinder its use of the rulemaking function for some unknown time. But now, a year and a half later, a judicial resolution of this uncertainty seems imminent and the re-evaluation of legislative priorities is necessary.

The Commission is becoming increasingly apprehensive that the controversy over rulemaking authority could unnecessarily jeopardize the rapid passage of the other essential, but less controversial provisions in the legislation under consideration. Experience over the past several years has demonstrated that the procedural aspects of rulemaking are so complex that the time required for their thorough analysis and the search for a consensus solution far exceeds that necessary to the thorough consideration of the other components of the legislation.

In view of the pending litigation, moreover, the Commission would oppose any statutory rulemaking provision limiting the flexibility of

our present authority. The Commission recognizes the need to achieve a balance between procedural efficiency and procedural safeguards and feels that judicial affirmation of the Commission's rulemaking authority will provide the flexibility needed to develop procedures which strike this essential balance.

For these reasons, the Commission has concluded that it should await the imminent court decision and seek additional legislative authority only in the event of an adverse decision. The Commission, therefore, recommends that section 206 be deleted from the bill. Such a course will not jeopardize Commission rulemaking, and, in the meantime, American consumers can begin to reap the benefits associated with prompt enactment of the less controversial amendments provided in the legislation before this committee.

Sincerely,

Lewis A. Engman, *Chairman*.

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## Appendix B-2

in the computation of the periods specified in subsection (a)(2) and subsection (b).

(A) an adjournment sine die of the Congress which breaks the continuity of session (as specified in paragraph (1)(A)) occurs after the Commission has submitted a final rule under subsection (a)(1), but before any action necessary to disapprove the final rule is completed under subsection (a)(2)(B); and

(B) such adjournment occurs (i) before the end of the period specified in subsection (a)(2)(B), in a case in which a concurrent resolution disapproving such final rule has been introduced in either House before the end of the period specified in subsection (a)(2)(A); or (ii) before the end of the period specified in subsection (a)(2)(A), in a case in which no such concurrent resolution has been introduced before such adjournment; then the Commission shall resubmit such final rule at the beginning of the first regular session of the next Congress. The periods specified in subsection (a)(2) shall begin on the date of such resubmission.

(g) For purposes of this section:

(1) The term "concurrent resolution" means a concurrent resolution of the two Houses of the Congress the matter after the resolving clause of which is as follows: "That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of \_\_\_\_\_, which final rule was submitted to the Congress on \_\_\_\_\_, which final blank spaces shall be filled appropriately.)

(2) The term "rule" means any rule promulgated by the Commission pursuant to this Act, other than any rule promulgated under section 18(a)(1)(A).

Sec. 24. There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed \$42,000,000 for the fiscal year ending June 30, 1975; not to exceed \$47,091,000 for the fiscal year ending June 30, 1976; and not to exceed \$50,000,000 for the fiscal year ending in 1977, not to exceed \$70,000,000 for the fiscal year ending September 30, 1980; not to exceed \$75,000,000 for the fiscal year ending September 30, 1981; and not to exceed \$80,000,000 for the fiscal year ending September 30, 1982.]

Sec. 27. To carry out the functions, powers, and duties of the Commission there are authorized to be appropriated \$70,705,000 for the fiscal year 1984, \$75,654,000 for fiscal year 1985, and \$80,949,000 for fiscal year 1986.

SEC. [25.] 28. This Act may be cited as the "Federal Trade Commission Act".

FEDERAL TRADE COMMISSION IMPROVEMENTS ACT OF 1980

AN ACT to amend the Federal Trade Commission Act to extend the authorization of appropriations contained in such Act, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Trade Commission Improvements Act of 1980".

CONGRESSIONAL REVIEW OF RULES

SEC. 21. (a)(1) \* \* \*

(i) The provisions of this section shall take effect on the date of the enactment of this Act and shall cease to have any force or effect [after September 30, 1982.] with respect to any final rule submitted to the Congress by the Commission on or after the date of the enactment of the Federal Trade Commission Authorization Act of 1983.

FEDERAL TRADE COMMISSION, Washington, D.C., March 5, 1982.

Hon. BOB PACKWOOD, Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Hon. BOB KASTEN, Chairman, Subcommittee on Consumer, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN PACKWOOD AND CHAIRMAN KASTEN: This is in response to your letter of February 24, 1982, in which you ask for the Commission's views with respect to our jurisdiction over state-regulated professionals and unfair acts or practices as currently defined in Section 5 of the Federal Trade Commission Act. As you know, these issues have been raised by the recent introduction of S. 1984, a bill that could substantially restrict the Commission's authority in these and other areas. Thus, we welcome this opportunity to state our views on these matters and, where appropriate, shall refer to the pertinent provisions of S. 1984. In the near future, we shall respond to Chairman Packwood's request for a complete comment on S. 1984.

In brief, the Commission opposes any provision of law that grants, or would grant, state-regulated professionals (and associations of professionals) immunity from law enforcement that others do not enjoy. With respect to our jurisdiction over unfair acts or practice, we believe that a more precise statutory standard is appropriate.<sup>1</sup> Such a clarification, based on the statement on consum-

<sup>1</sup> Commissioner Pertschuk dissents on this point and wishes to add the following comment: "While I agree with most of the Commissioner's letter, I dissent from the view that the antitrust theory of the Commission to proscribe 'unfair acts or practices' should be restated in complex statutory language. The December 1980 Policy Statement of the Commission reviewed at length the history of Commission and court decisions construing Congressional intent for this authority since 1914 and demonstrated that a careful framework for Commission decision-making in this area has been achieved. To incorporate the principles of the Policy Statement into legislation will principally benefit the lawyers of our country by providing tempting opportunities for lengthy (and costly) battles over interpretation. If it is Congress' desire to do so, however, I support the principles of the Policy Statement and agree with my fellow Commissioners that it should serve as the basis for a statutory definition. An attempt to begin anew the task of writing a definition would take us into a legal quagmire from which another half century of court opinions might be needed to extricate us."

er unfairness issued by the Commission on December 17, 1980, would clarify the legal bounds of acceptable behavior and alleviate any uncertainty about the Commission's exercise of its authority under the provisions of the Federal Trade Commission Act. In our view, these two issues are interrelated. While we believe there is ample statutory authority for the Commission's activities concerning the professions, we also believe that it is entirely proper for Congress to specify more clearly the scope of our consumer unfairness jurisdiction based on our 1980 Policy Statement. Under these circumstances, a special exemption for professionals, which would restrict the Commission's ability to foster competition and promote consumer welfare in these significant sectors of the national economy, would be particularly unwise.

#### THE PROFESSORS AND CONSUMER WELFARE

The Federal Trade Commission has, over the last several years, examined certain practices of professionals and their organizations. Our activities do not derive from any desire to regulate the professions but rather from a basic concern that some restrictions on competition among professionals increase consumer costs without producing countervailing benefits. Our objectives, in both our petition and our consumer protection activities, is to enhance the ability of informed consumers to act as ultimate regulators of the market.

Professional services are an increasingly important sector of the economy, and the efficiency of this industry is of prime importance to consumers. The service sector has been the most rapidly growing component of the economy for many years. Health care, the major focus of recent Commission interest, is the largest single component of the service sector. In 1980 alone, Americans spent over \$247 billion on health care services or 9.4 percent of the Gross National Product.

In light of these facts, the Commission believes that effective consumer protection and the fostering of competition cannot exclude professional services. The Commission's activities in this area have not sought to interfere either the legitimate self-regulation or with the authority of the States to assure the quality of services to their citizens. Instead, the record shows that the Commission has concerned itself only with specific barriers to competition and restrictions that demonstrably harm consumers.

Acting under its current statutory authority, the Commission has pursued three specific types of matters concerning professionals. First, the Commission has brought traditional antitrust cases involving allegations of price fixing, boycotts, and other private agreements or conspiracies to restrain or eliminate competition. In the *American Medical Association* case now before the Supreme Court, the Commission found that the AMA had prohibited almost all forms of truthful advertising by physicians and had unnecessarily restricted the ability of physicians and had unnecessarily and other organizations not controlled by physicians. Accordingly, the Commission entered an order to prevent repetition of these anticompetitive practices, but the order expressly permits the AMA to adopt and enforce reasonable ethical guidelines to prevent false

or deceptive advertising and oppressive forms of solicitation. See *American Medical Ass'n*, 94 F.T.C. 701 (1978), aff'd, 638 F.2d 443 (2d Cir. 1980), cert. granted, 49 U.S.L.W. 3946 (U.S. June 22, 1981) (No. 80-1690) (argued Jan. 11, 1982). Other antitrust matters have involved alleged boycotts against health maintenance organizations, alleged conspiracies to obstruct cost-containment programs, alleged boycotts by doctors against a hospital emergency room because the hospital was planning to retain its own doctor, and alleged boycotts by doctors against a state Medicaid program that sought to contain health care costs.

Second, the Commission has sought to prevent false or deceptive advertising, and other fraudulent practices, by certain professional associations. For example, the Commission proceeded against advertisements for synthetic hair implants in which there was reason to believe that the medical risks involved in the implant process had not been adequately disclosed, *Terrance D. Maske, M.D.*, Docket No. C-3031 (July 28, 1980); *FTC v. Kazdin*, Civil No. 79-1857 (N.D. Ohio, June 30, 1980) (order granting permanent injunction).

Third, the Commission has examined the effects of restrictions by state and professional associations on certain business aspects of professional services. These activities have been designed primarily to free the market from burdensome, unnecessary regulation and not to add a new layer of federal regulation. For example, the Commission's one promulgated rule sought to eliminate restrictions on advertising the prices of eyeglasses and eye examinations on other areas of great importance to consumers, the Commission developed a model state statute regarding drug product anti-substitution laws.

In exercising its current antitrust and consumer protection authority regarding the professions, the Commission has closed investigations and declined to initiate a rulemaking in areas in which the Commission concluded that action would be inappropriate. For example, the Commission concluded that antitrust concerns about the alleged control of some medical prepayment plans by physician groups ought to be addressed on a case-by-case basis rather than through rulemakings. In another area, the Commission terminated an investigation of advertising prohibitions by a veterinary association because the group voluntarily amended certain of the restrictions.

The proposed exemption in S. 1984 would effectively foreclose all Commission activities involving any state-regulated professional, State-licensed and regulated professionals and their associations, would be exempted from all Commission activities, including studies, reports to the Congress and the public, investigations, law enforcement, and rulemaking conducted under the FTC Act. Because the bill does not define "professions," its intended scope is somewhat unclear, but Senator McClure, one of its principal sponsors, has stated that the term includes "lawyers, engineers, physicians, dentists, optometrists, architects, accountants, veterinarians, and the like." 127 Cong. Rec. at S. 15686 (Dec. 16, 1981). Given the imprecise nature of the bill's defining language, virtually any occupation would be able to argue that it too was exempt from FTC authority.

Another subsection of S. 1984 would, in effect, prohibit the Commission from bringing complaints under Section 5 against professionals and against professional associations, as long as the state licensing authority regulated the profession in some manner. Under this provision, any state regulation of any aspect of a profession results in a total exemption for all the activities of all members of the profession. For example, solely on the basis of a state regulatory scheme consisting of licensure and regulations to prevent negligent behavior, members of the profession would be exempted from Section 5's prohibitions against price fixing and fraud.

Other provisions would remove the authority that Section 6 of the FTC Act now provides for the Commission to investigate state- and national professions, their individual members, and their state's ability to study the economic effects of state and federal regulations concerning the professions, to participate in the proceedings of other agencies, or to assist the courts through amicus curiae briefs. It would also remove any authority under the FTC Act for the promulgation of rules that affect the professions or their members.

The consequences of these proposals are most disturbing. In sum, they would prohibit the Commission from taking any action against, or even investigating, classic collusive activities, such as price fixing and group boycotts, in the professions. The bill would also exempt state-regulated professions from challenges under the FTC Act to false advertising and fraudulent marketing practices, including practices in or affecting interstate commerce that might not be susceptible to effective state regulation. It would immunize the activities of individual professionals and groups of professionals on the sole ground that they were licensed and regulated in some manner by the state. The legislation might also render unenforceable the Commission's order in the *American Medical Association* case, which is awaiting decision in the Supreme Court, and cast doubt on our ability to enforce outstanding consent decrees and orders litigated before the Commission and upheld by the courts. Although the Department of Justice could still bring criminal and civil actions and private parties could still bring criminal actions challenging alleged violations of the Sherman Act and the other antitrust laws, there would be no general federal remedy for deceptive practices involving the professions. Moreover, the Commission could not apply its economic expertise to the investigation excessively anticompetitive. We believe that an agency equipped with economic expertise is especially suited to the analysis of the effects of public and private regulations concerning the professions, and that an agency whose authority is limited to the issuance of prospective, nonpunitive orders to cease and desist is especially able to adjudicate the sensitive issues raised by antitrust challenges involving the professions.

To repeat, we do not believe there is any sound justification for exempting "professionals" from the traditional investigational and law enforcement jurisdiction to which virtually all other business enterprises are subject. Even with a restricted definition, such an

exemption suggests that a special class of occupations is beyond the traditional rules of law. If professionals are free to enforce restrictions that result in barriers to free consumer choice and artificially inflated prices, immune from the safeguards of the FTC Act, the evidence is strong that consumers will suffer direct and tangible injury.

Another feature of S. 1984 would disrupt the ability of the Commission to promote the functioning of the free market with respect to both the professions and the entire industrial sector of the economy. That would appear to result through an extremely broad exemption related to activities "in conformance with" state law.

That operative phrase is potentially boundless and would surely invite unnecessary litigation. For example, the phrase might refer to conduct mandated by state law, conduct expressly sanctioned by state law, conduct regulated by state law, or conduct that simply does not violate state law. At its broadest reading, this provision would immunize against FTC action a practice illegal under federal law merely because a state had not itself legislated against the practice. Indeed, the FTC would be prohibited from so much as gathering information about such a practice. Such a result would be entirely inconsistent with federal responsibility for the efficient functioning of a national economy.

Even under a narrower reading, this provision would adversely affect the public interest because it would make the FTC Act much narrower than the Sherman Act and thus restrict the Commission's ability to prohibit essentially private restraints of trade merely because there is some tangential governmental involvement. Under the Sherman Act, conduct that constitutes "state action" is not subject to antitrust scrutiny, but private parties cannot use the existence of some government involvement as a shield to protect private restraints of trade. Under this bill, state regulation not intended to protect anticompetitive conduct would provide such a shield.

Finally, this provision would absolutely preclude Commission preemption of any state law. The only instance in which the Commission promulgated a rule challenging state laws regulating the professions was the 1978 Eyeglasses Rule, which eliminated state prohibitions on the truthful advertising of eyeglasses and eye examinations. During the 18 months that the rule was fully in effect, competition in the vision care market increased, and prices declined dramatically for eyeglasses and contact lenses. For example, industry observers cited increased competition in the contact lens market stimulated by the Eyeglasses Rule as the primary reason for a 28-percent reduction in wholesale prices for contact lenses. (Business Week, Nov. 5, 1979, at 125.) The Eyeglasses Rule was subsequently remanded by the Court of Appeals for the Commission to reconsider the need for a preemptive rule in light of changed legal circumstances, namely Supreme Court decisions on the First Amendment's protection of commercial speech.

We are, of course, cognizant of the importance of federalism and the need to consider carefully the values associated with state autonomy. Undeniably, preemption is a significant power and must be viewed as a remedy of last resort. At a minimum, certain conditions should be present before exercising this power. They include:

the costs to consumers of the state law should be clearly shown; the alleged benefits of the state law should be shown to be minimal or absent; there should be evidence that the states are not acting on their own to change the laws; and the benefits of competition among the states should be minimal or absent.

Although we believe that the Commission has acted carefully with respect to the professions and state regulation, we recognize that there is concern over some past interpretations of our authority in some other areas, such as the scope of our "unfair . . . acts or practices" authority. As we discuss below, we believe that the answer to these concerns is to define that phrase, not to exclude entire segments of the economy, such as the professions, from jurisdiction or to eliminate helpful remedial tools. In our view, the approach of S. 1984 simply suggests that certain persons are beyond the rules by which other members of our society are governed.

THE COMMISSION'S JURISDICTION OVER "UNFAIR . . . ACTS OR PRACTICES"

By letter dated December 17, 1980, the Commission stated its general views concerning the definition of an unfair act or practice. The Commission felt that one of the most crucial elements in finding an act or practice to be unfair was that consumers be injured: (1) the injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition produced by the practice; and (3) the injury must be an injury that consumers could not reasonably have avoided. As a federal body, the Commission believes its concerns should be with substantial injuries; it resources should not be used for trivial or speculative harm. As a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress or offenses to taste or social belief.

In addition, the injury should not be outweighed by consumer or competitive benefits resulting from the challenged practice. Clearly, most business practices involve an economic and social mixture of costs and benefits; hence, unless a particular practice has the net effect of being injurious, the Commission should refrain from finding it unfair. In reaching its decision, the Commission should take into account costs related to a prospective remedy, including but not limited to direct cost to the parties, increased paperwork and regulatory burdens, reduced incentives for innovation and capital formation and like matters.

Finally, an unfair act or practice must be one which consumers could not reasonably have avoided. The Commission should not be involved in rectifying the unfortunate choice of particular consumer decision. It should confine its activities to curb behavior that takes unfair advantage of consumers' inadequate knowledge in reaching a decision or inability to protect themselves from such behavior.

Additionally, although it is not a necessary element of the definition of unfairness, the Commission also looks to other established public policies in an effort to determine whether a particular practice is unfair. As the Commission indicated in its 1980 Policy State-

ment, reference to other public policies may provide additional evidence of consumer injury or, conversely, it may influence the Commission to reconsider its tentative view that a practice is injurious in its net effects and, therefore, unfair. A thorough analysis of such policies "can serve as an important check on the overall reasonableness of the Commission's action." Dec. 17, 1980, Policy Statement at page 10, note 27.

As a matter of practice, the Commission considers the foregoing factors in reaching any decision concerning an act or practice alleged to be unfair. That being so, it is appropriate and logical to include these three elements in a statutory definition of "unfairness." The codification of its acknowledged practices will not only aid the Commission but also consumers and sellers to understand the bounds of acceptable behavior without diminishing the ability of the Commission to police the marketplace.

In recommending the elements of a definition of consumer unfairness, the Commission recognizes the appropriateness of having Congress provide as much guidance as feasible to administrative agencies. Since the Commission has recently spelled out the criteria it will utilize in defining unfairness, codification of those criteria can help to provide specific guidance for those regulated as well as the regulator.

As to the element pertaining to the weighing of benefits and costs, however, the Commission believes there is an associated problem to consider, namely the risk that the analysis might unnecessarily complicate and delay an investigation or an ultimate litigation. For this reason, the Commission believes that a highly quantitative benefit/cost analysis may not be appropriate in each and every individual case, and that in some cases a far more subjective analysis would be the reasonable approach. We believe any legislative history of a refined definition of unfairness should reflect this view.

We appreciate this opportunity to comment on two of the central questions being addressed by the Congress during the reauthorization process.

By direction of the Commission.

JAMES C. MILLER III,  
Chairman.

FEDERAL TRADE COMMISSION,  
Washington, D.C., December 17, 1980.

Hon. WENDELL H. FORD,  
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, Washington, D.C.

Hon. JOHN C. DANFORTH,  
Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR SENATORS FORD AND DANFORTH: This is in response to your letter of June 13, 1980, concerning one aspect of this agency's jurisdiction over "unfair or deceptive acts or practices." You informed us that the Subcommittee was planning to hold oversight hearings on the concept of "unfairness" as it has been applied to