

June 2, 2009

Representative Bobby Rush
Chairman, Subcommittee on Commerce, Trade and Consumer Protection
U.S. House of Representatives Energy and Commerce Committee
2135 Rayburn House Office Building
Washington, DC 20515

Representative George Radanovich
Ranking Member, Subcommittee on Commerce, Trade and Consumer Protection
U.S. House of Representatives Energy and Commerce Committee
2322 Rayburn House Office Building
Washington, DC 20515

Chairman Rush and Ranking Member Radanovich:

The undersigned trade associations wish to express our serious concerns with H.R. 2309, The Consumer Credit and Debt Protection Act. We believe that much of the legislation as currently drafted will likely result in harm to consumers.

First, giving the Federal Trade Commission (FTC) expedited rulemaking authority and authority to obtain civil penalties in connection with unfair and deceptive acts or practices (UDAP) could result in rushed and unfair decisions that have a broad negative impact on industry and consumers. This expedited rulemaking authority could lead to a serious “rush to judgment,” allowing the FTC to create major industry-wide regulatory changes without adequate time for business input and thoughtful consideration.

The Magnuson Moss rulemaking requirements, which have been in effect for more than 30 years, provide procedural safeguards that are appropriate when a federal agency is given a broad mandate to proscribe by regulation “unfair or deceptive acts or practices” in interstate commerce. When applied to the Commission’s consumer protection mission, “unfair or deceptive acts or practices” can be, and has been, interpreted very broadly. Without adequate opportunity for concerned public input, the agency could promulgate rules that are based on subjective notions of unfairness or on an incomplete understanding of an industry or of the full consequences of a rule.

In at least two instances, a Court of Appeals overturned the FTC’s final rule as unsupported by the record. In many other cases, the Magnuson Moss rulemaking process led the FTC to decline to publish a final rule or to promulgate a more reasonable rule than originally proposed. The deliberative process inherent in Magnuson Moss rulemaking has served the public interest well.

Second, if the FTC is allowed to obtain civil penalties in connection with UDAP, a defendant could face civil penalties of several thousand per violation, based on an act or practice that is adjudicated to be unfair or deceptive for the first time in the lawsuit against the defendant. We do not believe any company should face the prospect of civil penalties for an act or practice until there has been a prior determination that the act or practice is unfair or deceptive and the company has had actual knowledge of that determination. The FTC already takes civil penalty actions in U.S. District Court under Section 5 of the FTC Act that

are reserved for violations of rules or cease and desist orders. This process provides appropriate notice, not only to the target of the FTC enforcement action, but to the industry as a whole, and lets market participants reform their practices before facing crippling fines and penalties.

The requirement of knowledge that an act or practice is “unfair or deceptive” is based on the fact that these terms are very broad, susceptible to differing interpretations and applied to many different industries. “Unfairness” is a particularly evolving standard, in both the FTC’s interpretation and its use in enforcement actions.

Finally, allowing state attorneys general (AGs) enforcement is unnecessary, and without appropriate safeguards addressing the use of private counsel by the AGs, encourages litigation abuse and could create opportunities for public corruption. Moreover, if Congress were to give the AGs the authority to enforce the federal rules and statutes, the result would be the creation of new federal requirements and prohibitions based on state enforcement actions. State AGs lawsuits enforcing the federal law would likely result in duplicative and inconsistent lawsuits based on the same conduct. Such lawsuits would undermine the federal standards under the FTC rules and federal statutes. Moreover, state unfair or deceptive acts or practices statutes often provide that they are to be interpreted consistently with the federal law. As a result, an action by a state AG could create new law in other states, as well as new federal law.

We believe it is unnecessary to give state AGs this new power. As a matter of practice, the state attorneys general regularly join with the FTC in enforcement actions and settlements. When they do so, however, each attorney general proceeds under its own state law, which is how it should be. In addition, we need uniformity in laws and regulation in order to effectively compete in an ever increasing global economy. The ability to compete internationally will be a continuing factor in designing and evolving our regulatory system. While the country’s focus is currently directed at fixing the economy at home, the balkanization of enforcement powers to State Attorneys General will greatly hinder the ability of financial institutions in the United States to be effective market participants in the future.

Thank you for your consideration of our concerns. We hope these are addressed before the subcommittee moves forward in this process.

Sincerely,

American Bankers Association
American Financial Services Association
Consumer Bankers Association
Consumer Data Industry Association
The Financial Services Roundtable
National Association of Federal Credit Unions
U.S. Chamber of Commerce

CC: Members of House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection