Association of National Advertisers
Advertising Law and Public Policy Conference

Remarks of Chairman Jon Leibowitz
As Prepared for Delivery
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Thank you very much to Dan Jaffe and the ANA for inviting me to be here today. I want to congratulate the ANA on your 100th anniversary this year and your sustained leadership in the marketing industry. We'll be having our 100th anniversary in 2014, by the way, so I feel like in some sense we've grown up together.

We applaud the ANA's efforts to promote socially responsible marketing and the organization's commitment of resources to this end. The ANA was instrumental in establishing self-regulatory programs for national advertising and children's advertising at the Council of BBBs. These programs make our job easier by taking care of problematic advertising – so that we don't have to. The ANA, of course, also helped establish the Ad Council to distribute public service ads.

I know this is the first time that ANA has held its annual conference in Washington, D.C., and I appreciate having the opportunity to talk to all of you about the Commission's plans and priorities for the future.

I want to use my time today to address a topic that I know is of great interest to the ANA – and that is the proposed strengthening of the FTC's authority included in the Consumer Financial Protection Agency proposal. Certainly we know that the ANA and other industry groups have expressed some concerns about some aspects of this legislation. I am grateful to have this opportunity to talk to you all, face to face, about what this legislative proposal means – and doesn't mean – for the agency and the industry.

First of all, one aspect we like about the House-passed version of legislation is that it doesn't take away our enforcement jurisdiction, which allows us to stay very active in financial consumer protection. In the past ten years, the Commission has obtained nearly half a billion dollars in redress for victims who were ripped off by con artists. Over the past five years, the FTC has filed 100 cases against financial scams. And just since the beginning of last year, the FTC has brought 40 cases against 200 defendants engaged in fraud targeting financially distressed consumers. We've shut almost all of them down.

The CFPA legislation would expand the FTC's authority in four areas: 1) APA rulemaking; 2) civil penalties; 3) aiding and abetting; and 4) independent litigating authority, all of which I will discuss today.

First, let me start with rulemaking under the Administrative Procedures Act – or APA; namely, why having this capability would make the FTC a better consumer protection agency,

and why this isn't the "end of the world" for business. In fact, we hope that most of you in the room will ultimately support this authority.

Currently, the FTC is required to do rulemaking under positively medieval procedures known as the Magnuson-Moss Act – also called "Mag-Moss." The requirements to promulgate a rule under these procedures are so onerous that the agency has not proposed a new Mag-Moss rule in 32 years.

Thirty-two.

For instance, under Mag-Moss, if any member of the public requests it, the agency has to hold a hearing where interested persons have the right to examine, rebut, and cross-examine witnesses.

I think many of you are probably familiar with our Funeral Rule, which the agency promulgated under Mag-Moss procedures. The rule requires funeral homes to provide consumers with itemized price lists for services and caskets so that they are able to comparison shop and pick and choose only the services they want. The rule provides much needed protections to consumers at a time when they are especially vulnerable to exploitation. This is a critical rule that brought order to an industry once rife with abuse. Consumers should not be forced to pay a small fortune for an elaborate bundle of funeral services, including a lavish casket, when they might be just as satisfied with more modest products and services instead.

The agency began the Mag-Moss rulemaking for the Funeral Rule in 1975. For this rule, the agency held 52 days of hearings. This wasn't a two-month period with a few days of hearings scattered here and there, but hearings that took place on 52 separate days. It took the Commission seven years and one month to actually promulgate the Funeral Rule under Mag-Moss procedures – and that doesn't even count the additional two years between 1973 and 1975 when the agency was working on the Rule before Mag-Moss took effect.

And a lot of the time we spent trying to promulgate other rules was for nothing. We spent over ten years on a rule regarding health spas – no rule enacted. We spent ten years and three months on a rule regarding hearing aids – no rule enacted. And we spent eleven years and eleven months working on a mobile home rule – but no rule was enacted.

It makes no sense to require the FTC to go to such lengths to promulgate rules. It is an incredible drain on agency resources, and it allows harmful business practices to continue unchecked during the time the rulemaking is underway. Sometimes you have an event like the current economic crisis, which generates new types of frauds, things like foreclosure rescue scams, debt relief, and phony economic stimulus grants. The agency has to be able to respond nimbly to new business practices and market conditions that are harming consumers.

Don't take my word for it; ask my colleague, Tom Rosch.

Now he's a Commissioner, but back then in the 1970s he was the Director of the FTC Bureau of Consumer Protection and present at the creation of Mag-Moss. He says that the

statute "has turned out to be enormously burdensome and expensive, involving lengthy hearings and cross-examination (in essence a trial), but nobody knew that then."[1]

Indeed, APA rulemaking is not "expedited" rulemaking – but rather is just the "standard" rulemaking available to almost all other federal agencies. It's only expedited in comparison to the glacial pace of Mag-Moss. Unlike bills in Congress that can be passed with little discussion, APA rulemakings at the FTC usually take at least a year.

If there was actually some benefit to the hoops we have to jump through with Mag-Moss, you could arguably defend the procedures – but there isn't.

In limited instances Congress has asked us to promulgate a rule and given us APA rulemaking ability for that particular rule. Viewed in the context of our history with such rulemakings, you can see that the FTC will be responsible and judicious with the APA rulemaking that President Obama proposed for the agency going forward. APA rulemaking has multiple procedural safeguards to ensure that all stakeholders are heard and carefully considered.

For instance, the National Do Not Call Registry was established using APA authority, and it is the single most popular consumer initiative the agency has ever undertaken. Almost every one of you is on it, and our dinner hours are much quieter as a result.

Last July – under APA rulemaking procedures – we announced a proposed rule that would amend the Telemarketing Sales Rule to combat deceptive and abusive telemarketing of debt relief services. The proposed rule would stop companies that offer to help consumers reduce or pay off their debt from charging fees until they have provided the promised services, require disclosures of how long it will take to obtain debt relief and how much it will cost, and prohibit misrepresentations as to success rates and whether a debt relief company is a non-profit.

We published the entire text of the proposed rule in a 37-page notice in the Federal Register and allowed a 60-day period for comment, which was then extended another 15 days. We received more than 300 comments, all of which are publicly viewable on the FTC website. In November, we held a public forum and invited public participation to discuss the potential ramifications of the proposed rule. The forum included 35 panelists representing stakeholders on all sides of the issue, who had a productive opportunity to discuss with FTC staff questions and concerns related to the proposed rule.

This procedure is typical for the Commission. We have held public workshops and forums during the course of rulemakings even though it is not required under APA procedures. We also often conduct informal – but extensive – outreach to affected parties to obtain their views and industry data. We think this approach generates more free-flowing and productive

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[1] *See* Prepared Statement of Commissioner J. Thomas Rosch on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance (Mar. 17, 2010).

discussion than what results from the formal hearing with a hearing examiner and cross-examination of witnesses that is required under Mag-Moss.

APA procedures do include important safeguards: a Notice of Proposed Rulemaking in the Federal Register setting forth the rule and its legal and factual basis; acceptance of public comments; and a final rule that includes its statement of basis and purpose with a summary and analysis of the record and an explanation for the rule provisions adopted. Then, the agency must submit a notification to Congress, initiating a period during which Congress may invalidate the rule by legislation. The final rule may be challenged in federal court and set aside if the court determines that the Commission's findings are arbitrary, capricious, or an abuse of discretion.

We have always acted thoughtfully and carefully when enacting rules under APA procedures, and there is no reason to think we would not continue to do so if given general APA rulemaking authority.

Now let me say a few words about how I envision we would use – and not use – APA rulemaking authority; that is, if we are fortunate enough to get it. Discretionary rulemaking is appropriate only where unfair or deceptive practices cause significant harm to consumers, where bad behavior is common throughout an industry, where setting standards likely would improve industry practices, and where the anticipated burdens are reasonable in light of the anticipated benefits of the rule.

Put differently, we'd be stupid if we tried to solve every problem with a rule; we'd be smart to use our authority very judiciously.

Let me try to give you some areas where rulemaking might make sense and where it wouldn't. One area that might be appropriate for rulemaking under APA procedures is the use of so-called "negative option" plans in online sales. You've been hit with a negative option when you find a mystery charge on your credit card for some kind of "club" membership. How did you get those charges?

Some unscrupulous web marketers put some fine print on a purchase page for an item you wanted to buy and you got roped into buying something else for a recurring monthly fee. Or, sometimes companies make "free" trial offers that automatically convert to a paid subscription – with the only disclosure buried in small text multiple mouse clicks away – and the company automatically begins charging a fee without delivering anything to you unless you affirmatively cancel. A rule in this area should enable consumers to more easily identify and avoid sellers that are deceptively using such techniques. But even if we were interested in taking this route, we would want to do some research – and get public and industry input – on what types of negative option scams exist and how common they are.

On the other hand, to me it doesn't make sense to initiate rulemakings in areas where business practices and consumer expectations are still quickly evolving, or self-regulation is already in place and is showing promise. For instance, with regard to behavioral advertising, technology is changing every day and self-regulatory efforts are beginning to coalesce.

Moreover, the possible First Amendment implications of some potential advertising rules are not something we want to get tangled up in. Food marketing to children is an area where self-regulation is showing some promise, and it would be misguided for us to inject ourselves into this area with a rulemaking.

What we are trying to do with expanded rulemaking authority is to stop fraud. What we are not trying to do is go after people in this audience who are responsibly marketing legitimate products.

The ANA has proposed a hybrid approach between Mag-Moss and the APA that would require a finding that a practice is prevalent before the agency begins a rulemaking, and allow a rule to be overturned by a court if it is not supported by substantial evidence. I'm not saying I endorse this proposal, but it's not unreasonable – and we want to keep talking with you to continue this discussion going forward.

The second area where the proposed CFPA legislation would expand the FTC's authority is civil penalties. We believe civil penalty authority is critical because the Commission prosecutes many types of cases where disgorgement or redress are hard to determine, or cases involving hard core fraud. For example, in many privacy-related cases, including those involving spyware, data security, and telephone records pretexting, the harm is real but difficult to measure, which makes it almost impossible to obtain redress for consumers. And truly bad actors, who are involved in outright fraud, will act with impunity if the biggest threat they face is, well, redress.

Civil penalties may be the only effective deterrent for all of these kinds of misconduct. Indeed, as far back as 1970, then FTC Chairman Caspar Weinberger called for the FTC to assess civil penalties administratively against respondents who knowingly committed violations. The President's proposal doesn't even ask for that. The current proposal would allow civil penalties to be imposed only by a federal court.

Third, the Obama proposal would give the FTC explicit aiding and abetting authority. Today, we have aiding and abetting authority for violations of the Telemarketing Sales Rule; until the *Central Bank of Denver* case in 1994,[2] we actively used it for other FTC Act violations. In the CFPA proposal, aiders and abetters would only be liable if they "knowingly or recklessly . . . provide substantial assistance" to another who violates the FTC Act. This aiding and abetting standard derives from existing SEC doctrine, and courts have developed a significant body of case law in the securities law context to address the "substantial assistance" requirement. We anticipate that case law would provide guidance and predictability to any cases we might bring under aiding and abetting authority.

Let me dispel a notion voiced by a few misguided critics: that we could use an aiding and abetting provision to go after media companies for disseminating deceptive advertising. Simply put, that is not the purpose of our seeking this authority. We are very mindful of First

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[2] *See Central Bank of Denver, N.A. v. First Insterstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

Amendment concerns and would never impose a general duty on newspapers, magazines, or other media to screen advertising. Having aiding and abetting authority would never require media outlets to affirmatively investigate the truth of advertising claims they disseminate.

What we do want to reach with aiding and abetting authority is hard core fraud. For example, the payment processor who knowingly provides substantial assistance to a scammer by continuing to process fraudulent payments, even after learning that they are unauthorized.

Finally, the CFPA legislation would give the FTC independent litigating authority when pursuing civil penalties. The FTC currently has the power to independently pursue violations of the FTC Act and other laws in federal court to seek injunctive relief, including consumer redress. But if the FTC wants to seek civil penalties – in those rare spam or do-not-call cases in which we can get them – we must refer the case to the Department of Justice. Other independent law enforcement agencies, such as the SEC, currently have the power to obtain civil penalties on their own in federal district court.

For some cases, like illegal robocall cases, this means that the FTC must make a difficult choice: file a case quickly to stop ongoing consumer harm but give up the possibility of civil penalties; or seek civil penalties but wait weeks for the DOJ to prepare a case, allowing the misconduct to continue and more consumers to be harmed. There's little disagreement that we should fix this and make government more efficient and effective.

We may not all be on the same page on all of these issues. But we should continue to have a dialogue to determine how the FTC can be most effective in preventing and stopping practices that harm all consumers, including everyone in this room, while leaving legitimate businesses and advertisers alone.

With that, I'm happy to take questions – about what you've heard today or about the wide variety of advertising issues that we're working on: from environmental marketing claims to Endorsement Guides to health claims about foods and dietary supplements.

Thank you.