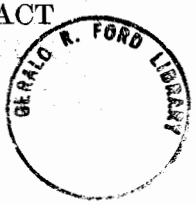
The original documents are located in Box 21, folder "1975/01/04 S356 Product Warranties and Federal Trade Commission Act Amendments (2)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1606

CONSUMER PRODUCT WARRANTY AND FEDERAL TRADE COMMISSION IMPROVEMENT ACT



DECEMBER 16, 1974.—Ordered to be printed

Mr. STAGGERS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 356]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 356) 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, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Magnuson-Moss Warranty—Federal Trade Commission Improvement Act".

TITLE I—CONSUMER PRODUCT WARRANTIES

DEFINITIONS

SEC. 101. For the purposes of this title:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or

written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such materia 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 in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that 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 a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under state law (as modified by sections 108 and 104(a)) in connection with the sale by a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term "remedy" means whichever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term "Federal law" excludes any State law.

WARRANTY PROVISIONS

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, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b)(1)(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this title (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(c) No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver for the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $5.

DESIGNATION OF WARRANTIES

SEC. 103. (a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "limited warranty".

(b) Sections 102, 103, and 104 shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) In addition to exercising the authority pertaining to disclosure granted in section 102 of this Act, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $10 and which are not designated "full (statement of duration) warranties".

FEDERAL MINIMUM STANDARDS FOR WARRANTY

SEC. 104. (a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum remedy such consumer products within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 108(b), such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b)(1) In fulfilling the duties under subsection (a) respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an ad-

ministrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a), that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in section 104(a) of this Act and the applicability of such duties to warrantors of different categories of consumer products with "full (statement of duration)" warranties.

(4) The duties under subsection (a) extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) For purposes of this section and of section 102(c), the term "without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such product shall, for purposes of any action under section 110(d) or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

FULL AND LIMITED WARRANTING OF A CONSUMER PRODUCT

SEC. 105. Nothing in this title shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

SERVICE CONTRACTS

SEC. 106. (a) The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.

(b) Nothing in this title shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer

in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.

DESIGNATION OF REPRESENTATIVES

SEC. 107. Nothing in this title shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: Provided, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

LIMITATION ON DISCLAIMER OF IMPLIED WARRANTIES

SEC. 108. (a) No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this title (other than section 104(a)(2)), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law.

COMMISSION RULES

SEC. 109. (a) Any rule prescribed under this title shall be prescribed in accordance with section 553 of title 5, United States Code; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions. A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 18(e) of the Federal Trade Commission Act (as amended by section 202 of this Act) in the same manner as rules prescribed under section 18(a)(1)(B) of such Act, except that section 18(e)(3)(B) of such Act shall not apply.

(b) The Commission shall initiate within one year after the date of enactment of this Act a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this title, shall prescribe rules dealing with such warranties and practies. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this title, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

REMEDIES

SEC. 110. (a)(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer dis-

putes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considering in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this title or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d), the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) for any person to fail to comply with any requirement imposed on such person by this title (or a rule thereunder or to violate any prohibition contained in this title (or a rule thereunder).

(c)(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purposes, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this title or from violating any prohibition contained in this title. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 5 of the Federal Trade Commission Act is not filed within such period (not exceeding 10 days) 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. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends 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) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d)(1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may 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 the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) No action (other than a class action or an action respecting a warranty to which subsection (a)(3) applies) may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) applies) brought under subsection (d) for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be estabilshed in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

EFFECT ON OTHER LAWS

SEC. 111. (a)(1) 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 therein as an Antitrust Act.

(2) Nothing in this title shall be construed to repeal, invalidate, or supersede the Federal Seed Act (7 U.S.C. 1551–1611) and nothing in this title shall apply to seed for planting.

(b)(1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this title (other than sections 108 and 104(a) (2) and (4)) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c)(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections), and

(C) which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

(d) This title (other than section 102(c)) shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this title.

EFFECTIVE DATE

SEC. 112. (a) Except as provided in subsection (b) of this section, this title shall take effect 6 months after the date of its enactment but shall not apply to consumer products manufactured prior to such date.

(b) Section 102(a) shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this title.

(c) The Commission shall promulgate rules for initial implementation of this title as soon as possible after the date of enactment of this Act but in no event later than one year after such date.

TITLE II—FEDERAL TRADE COMMISSION IMPROVEMENTS

JURISDICTION OF COMMISSION

SEC. 201. (a) Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by striking out "in commerce" wherever it appears and inserting in lieu thereof "in or affecting commerce".

(b) Subsections (a) and (b) of section 6 of the Federal Trade Commission Act (15 U.S.C. 46(a), (b)) are each amended by striking out "in commerce" and inserting in lieu thereof "in or whose business affects commerce".

(c) Section 12 of the Federal Trade Commission Act (15 U.S.C. 52) is amended by striking out "in commerce" wherever it appears and inserting in lieu thereof in subsection (a) "in or having an effect upon commerce," and in lieu thereof in subsection (b) "in or affecting commerce".

RULEMAKING

SEC. 202. (a) The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by redesignating section 18 as section 21, and inserting after section 17 the following new section:

"SEC. 18. (a)(1) The Commission may prescribe—

"(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting

commerce (within the meaning of section 5(a)(1) of this Act), and

"(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

"(2) The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

"(b) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section in sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (3) provide an opportunity for an informal hearing in accordance with subsection (c); and (4) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

"(c) The Commission shall conduct any informal hearings required by subsection (b)(3) of this section in accordance with the following procedure:

"(1) Subject to paragraph (2) of this subsection, an interested person is entitled—

"(A) to present his position orally or by documentary submissions (or both), and

"(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (2)(B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

"(2) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (1) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact.

"(3)(A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (1) and (2) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross examination, the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes and (ii) governing the manner in which such cross-examination shall be limited.

"(B) When any person who is a member of a group with respect to which the Commission has made a determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

"(4) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

"(d)(1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a)(1)(B) shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

"(2)(A) The term 'Commission' as used in this subsection and subsections (b) and (c) includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

"(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection. An exemption under subsection (g) shall not be treated as an amendment or repeal of a rule.

"(3) When any rule under subsection (a)(1)(B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of this Act, unless the Commission otherwise expressly provides in such rule.

"(e)(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of title 28, United States Code, shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

"(B) For purposes of this section, the term 'rulemaking record' means the rule, its statement of basis and purpose, the transcript required by subsection (c)(4), any written submissions, and any other

information which the Commission considers relevant to such rule.

"(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule, and the rule's statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

"(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5, United States Code (taking due account of the rule of prejudicial error), or if—

"(A) the court finds that the Commission's findings and conclusions, with regard to disputed issues of material fact on which the rule is based, are not supported by substantial evidence in the rulemaking record taken as a whole, or

"(B) the court finds that—

"(i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

"(ii) a Commission rule or ruling under subsection (c) limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

The term 'evidence', as used in this paragraph, means any matter in the rulemaking record.

"(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

"(5)(A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

"(B) The United States Courts of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a)(1)(B), if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

(C) A determination, rule, or ruling of the Commission described in paragraph (3)(B)(i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3)(B). Section 706(2)(E) of title 5, United States Code, shall not apply to any rule promulgated under subsection (a)(1)(B). The contents and adequacy of any statement required by subsection (b)(4) shall not be subject to judicial review in any respect.

"(f)(1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks, each agency specified in paragraph (2) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks subject to its jurisdiction. The Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practiecs, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a)(1)(B) of this section, then within 60 days after such rule takes effect such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless such Board finds that (A) such acts or practices of banks are not unfair or deceptive, or (B) that implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board, and publishes any such finding and the reasons therefor, in the Federal Register.

"(2) Compliance with regulations prescribed under this subsection shall be enforced under section 8 of the Federal Deposit Insurance Act, in the case of—

"(A) national banks and banks operating under the code of law for the District of Columbia, by the division of consumer affairs established by the Comptroller of the Currency;

"(B) member banks of the Federal Reserve System (other than banks referred to in subparagraph (A)) by the division of consumer affairs established by the Board of Governors of the Federal Reserve System; and

"(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)), by the division of consumer affairs established by the Board of Directors of the Federal Deposit Insurance Corporation.

"(3) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

"(4) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not

impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

"(5) Each agency exercising authority under this subsection shall transmit to the Congress not later than March 15 of each year a detailed report on its activities under this paragraph during the preceding calendar year.

"(g)(1) Any person to whom a rule under subsection (a)(1)(B) of this section applies may petition the Commission for an exemption from such rule.

"(2) If, on its own motion or on the basis of a petition under paragraph (1), the Commission finds that the application of a rule prescribed under subsection (a)(1)(B) to any person or class or persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates, the Commission may exempt such person or class from all or part of such rule. Section 553 of title 5, United States Code, shall apply to action under this paragraph.

"(3) Neither the pendency of a proceeding under this subsection respecting an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action or failure to act under this subsection, shall stay the applicability of such rule under subsection (a)(1)(B).

"(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

"(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000."

(b) Section 6(g) of the Federal Trade Commission Act (15 U.S.C. 46(g)) is amended by inserting "(except as provided in section 18(a)(2) of this Act)" before "to make rules and regulations".

(c)(1) The amendments made by subsections (a) and (b) of this section shall not affect the validity of any rule which was promulgated under section 6(g) of the Federal Trade Commission Act prior to the date of enactment of this section. Any proposed rule under section 6(g) of such Act with respect to which presentation of data, views, and arguments was substantially completed before such date may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.

(2) If a rule described in paragraph (1) of this subsection is valid and if section 18 of the Federal Trade Commission Act would have applied to such rule had such rule been promulgated after the date of enactment of this Act, any substantive change in the rule after it has been promulgated shall be made in accordance with such section 18.

(d) The Federal Trade Commission and the Administrative Conference of the United States shall each conduct a study and evaluation of the rulemaking procedures under section 18 of the Federal Trade Commission Act and each shall submit a report of its study (including any legislative recommendations) to the Congress not later than 18 months after the date of enactment of this Act.

INVESTIGATIVE AUTHORITY

SEC. 203. (a)(1) Section 6(a) of the Federal Trade Commission Act (15 U.S.C. 46(a)) is amended by striking out "corporation" and inserting "person, partnership, or corporation"; and by striking out "corporations and to individuals, associations, and partnerships", and inserting in lieu thereof "persons, partnerships, and corporations".

(2) Section 6(b) of such Act is amended by striking out "corporations" where it first appears and inserting in lieu thereof "persons, partnerships, and corporations,"; and by striking out "respective corporations" and inserting in lieu thereof "respective persons, partnerships, and corporations".

(3) The proviso at the end of section 6 of such Act is amended by striking out "any such corporation to the extent that such action is necessary to the investigation of any corporation, group of corporations," and inserting in lieu thereof "any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations,".

(b)(1) The first paragraph of section 9 of such Act (15 U.S.C. 49) is amended by striking out "corporation" where it first appears and inserting in lieu thereof "person, partnership, or corporation".

(2) The third paragraph of section 9 of such Act is amended by striking out "corporation or other person" both places where it appears and inserting in each such place "person, partnership, or corporation".

(3) The fourth paragraph of section 9 of such Act is amended by striking out "person or corporation" and inserting in lieu thereof "person, partnership, or corporation".

(c)(1) The second paragraph of section 10 (15 U.S.C. 50) of such Act is amended by striking out "corporation" each place where it appears and inserting in lieu thereof in each such place "person, partnership, or corporation".

(2) The third paragraph of section 10 of such Act is amended by striking out "corporation" where it first appears and inserting in lieu thereof "persons, partnership, or corporation"; and by striking out "in the district where the corporation has its principal office or in any district in which it shall do business" and inserting in lieu thereof "in the case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business".

REPRESENTATION

SEC. 204. (a) Section 16 of the Federal Trade Commission Act is amended to read as follows:

"SEC. 16. (a) (1) Except as otherwise provided in paragraph (2) or (3), if—

"(A) before commencing, defending, or intervening in, any civil action involving this Act (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

"(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

"(2) Except as otherwise provided in paragraph (3), in any civil action—

"(A) under section 13 of this Act (relating to injunctive relief);

"(B) under section 19 of this Act (relating to consumer redress);

"(C) to obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under section 5 of this Act; or

"(D) under the second paragraph of section 9 of this Act (relating to enforcement of a subpena) and under the fourth paragraph of such section (relating to compliance with section 6 of this Act);

the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so. The Commission shall inform the Attorney General of the exercise of such authority and such exercise shall not preclude the Attorney General from intervening on behalf of the United States in such action and any appeal of such action as may be otherwise provided by law.

"(3) (A) If the Commission makes a written request to the Attorney General, within the 10-day period which begins on the date of the entry of the judgment in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), to represent itself through any of its attorneys designated by it for such purpose before the Supreme Court in such action, it may do so, if—

"(i) the Attorney General concurs with such request; or

"(ii) the Attorney General, within the 60-day period which begins on the date of the entry of such judgment—

"(a) refuses to appeal or file a petition for writ of certiorari with respect to such civil action, in which case he shall give written notification to the Commission of the reasons for such refusal within such 60-day period; or

"(b) the Attorney General fails to take any action with respect to the Commission's request.

"(B) In any case where the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), the Attorney General may not agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

"(C) For purposes of this paragraph (with respect to representation before the Supreme Court), the term 'Attorney General' includes the Solicitor General.

"(4) If, prior to the expiration of the 45-day period specified in paragraph (1) of this section or a 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to any procedural requirement of any court with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or appeal may be taken, the Attorney General shall have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of commencing, defending, or intervening in the civil action pursuant to paragraph (1) or for the purpose of refusing to appeal or file a petition for writ of certiorari and the written notification or failing to take any action pursuant to paragraph 3(A)(ii).

"(5) The provisions of this subsection shall apply notwithstanding chapter 31 of title 28, United States Code, or any other provision of law.

"(b) Whenever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under this Act, the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought."

(b) Section 5(m) of such Act is repealed.

(c) The amendment and repeal made by this section shall not apply to any civil action commenced before the date of enactment of this Act.

CIVIL PENALTIES FOR KNOWING VIOLATIONS

SEC. 205. (a) Section 5 of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by inserting after subsection (l) the following new subsection:

"(m) (1) (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

"(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a

final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

"(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

"(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

"(C) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

"(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

"(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement ofi ts reasons and is approved by the court."

(b) The amendment made by subsection (a) of this section shall not apply to any violation, act, or practice to the extent that such violation, act, or practice occurred before the date of enactment of this Act.

CONSUMER REDRESS

SEC. 206. (a) The Federal Trade Commission Act (15 U.S.C. 45 (a)) is amended by inserting after section 18 the following new section:

"SEC. 19. (a)(1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

"(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

"(b) The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

"(c)(1) If (A) a cease and desist order issued under section 5(b) has become final under section 5(g) with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5(b) with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 5(g)(1), in which case such finding shall be conclusive if supported by evidence.

"(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

"(d) No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection(a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5(b) which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

"(e) Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."

(b) The amendment made by subsection (a) of this section shall not apply to—

(1) any violation of a rule to the extent that such violation occurred before the date of enactment of this Act, or

(2) any act or practice with respect to which the Commission issues a cease-and-desist order, to the extent that such act or practice occurred before the date of enactment of this Act, unless such order was issued after such date and the person, partnership or

corporation against whom such an order was issued had been notified in the complaint, or in the notice or order attached thereto, that consumer redress may be sought.

AUTHORIZATION OF APPROPRIATIONS

SEC. 207. The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by inserting after section 19 the following new section:

"SEC. 20. 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 $46,000,000 for the fiscal year ending June 30, 1976; and not to exceed $50,000,000 for the fiscal year ending in 1977. For fiscal years ending after 1977, there may be appropriated to carry out such functions, powers, and duties, only such sums as the Congress may hereafter authorize by law."

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the Senate bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the amendment of the House to the title of the Senate bill, insert the following: "An Act to provide minimum disclosure standards for written consumer product warranties; to define minimum 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."

And the House agree to the same.

HARVEY O. STAGGERS,
JOHN E. MOSS,
W. S. (BILL) STUCKEY, JR.,
BOB ECKHARDT,
JAMES T. BROYHILL,
JOHN H. WARE,
JOHN Y. MCCOLLISTER,
Managers on the Part of the House.

WARREN G. MAGNUSON,
FRANK E. MOSS,
P. A. HART,
TED STEVENS, (with separate views),
J. GLENN BEALL,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 356) 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, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

TITLE I—CONSUMER PRODUCT WARRANTIES

Title I of the Senate bill and the House amendment thereto were substantially similar. Both prescribed disclosure and designation standards for written warranties, defined Federal content standards for full warranties and established meaningful consumer remedies for breach of warranty or service contract obligations. The conference substitute basically follows the House amendment to the Senate bill, with the exceptions or modifications discussed below.

1. Depreciation

The Senate bill did not allow the warrantor who was refunding the purchase price of a consumer product to make a deduction for depreciation based upon actual use. In contrast, the House amendment allowed the warrantor to make a deduction for depreciation based upon actual use when refunding the purchase price.

The conference substitute provides that a warrantor refunding the purchase price may make a deduction for reasonable depreciation based on actual use, where that deduction is permitted by rules of the Commission. Until the Commission establishes rules permitting deduction for depreciation based upon actual use, the warrantor is prohibited from making such deduction from the purchase price when fulfilling his obligation to refund. The term "refund" is used only in the context of full warranties but this principle may serve as a useful guide in other warranty situations.

2. Designation of Warranties

Both the Senate bill and the House amendment required warrantors to designate the particular kind of warranty they were offering. The Senate bill provided for three categories of designation: (1) "full" (statement of duration); (2) "full" (statement of duration; limitation on consequential damages); or (3) a designation expressing a particular limitation applicable to a warranty. The House amendment provided for only two designation categories: (1) "full" (statement of duration) warranties, or (2) "limited" warranties.

The conference substitute contains the same designation requirement as those which were in the House amendment. However, the conference substitute includes an additional provision providing that a supplier may not exclude or limit consequential damages for breach of a full warranty, unless such exclusion or limitation is conspicuous and appears on the face of the warranty.

3. Dollar Limitations

Under the Senate bill, the labeling and designation provisions applied only to consumer products actually costing $5 or more. Any warrantor who was selling a consumer product costing less than $5 who used the full warranty designation would have been subject to the full warranty requirements in the bill. The House amendment excluded from the disclosure requirements of the bill products costing less than $5; it excluded from the designation requirements of the bill products costing less than $10. The minimum Federal standards applicable to full warranties was not applicable to products costing less than $10, even in situations where warrantors of products costing less than $10 used the full warranty designation.

The conference substitute excludes from the disclosure requirements of the bill warranties on consumer products actually costing less than $5 and excludes from the designation requirements of the bill warranties on consumer products actually costing less than $10. However, the conference substitute provides that any warrantor giving a warranty characterized as a full warranty must comply with the minimum Federal standards set forth in section 104, no matter what the actual cost of the consumer product to which the warranty applies.

4. Federal minimum standards for warranties

The Senate bill and the House amendment provided almost identical Federal minimum warranty standards for warrantors who offered full warranties for their consumer products. The conference substitute adopts the language in the House amendment with certain modifications.

The conference substitute provides that the Commission can promulgate rules determining, in the so-called "anti-lemon" provision, what constitutes a reasonable number of attempts. This provision entitles a consumer to elect either refund, or replacement without charge, of a consumer product (or part thereof) which has not been remedied after a reasonable number of attempts. The Senate bill was silent as to who determined "reasonable number of attempts"; the House amendment provided that the Commission would determine what constitutes a reasonable number of attempts, but did not explain what happened if the Commission did not make such a determination. Under the conference substitute, if the Commission does not determine by rule what constitutes a reasonable number of attempts in a given situation, then the parties or, ultimately, a third party (arbiter or judge) would decide.

The conference substitute also provides that the warrantor offering a full warranty cannot impose any duty other than notification upon any consumer as a condition of securing remedy of a consumer product not in conformity with the full warranty, "unless the warrantor can demonstrate in a rulemaking or enforcement proceeding that such a duty is reasonable." For example, a warrantor providing a full warranty could require the consumer to take a consumer product that was not working to a particular place for repair if the Commission, by rule, permitted the warrantor (or a class of warrantors) to impose such requirement after the warrantor established that the requirement was reasonable. If no such rule by the Commission were applicable, but the warrantor had imposed such requirement, the consumer could challenge the reasonableness of such requirement by bringing an action for breach of warranty and arguing that the warrantor had breached his full warranty obligation. The burden would then be upon the warrantor to establish before an arbiter or in a court that the requirement to take the product to a repair facility was reasonable—*e.g.*, that out of pocket costs to the consumer and inconvenience were justified because this cost was outweighed by some corresponding benefits. Of course, the Commission, in an enforcement action (including a cease and desist order proceeding), could seek to enjoin the imposition of such a requirement without undertaking a rulemaking proceeding, and the Commission or a court could decide whether the warrantor had met the burden of showing that the requirement was reasonable. Nothing in the conference substitute precludes the imposition of an additional duty by a warrantor prior to any determination of the reasonableness of the duty by the Commission, an arbiter, or a court.

5. Limitation on duration of implied warranties

The Senate bill and the House amendment prohibited the disclaimer or modification of implied warranties, if a supplier made a written warranty or if he entered into a service contract at the time of sale (or within 90 days thereafter, under the House amendment). Both also prohibited warrantors who offered full warranties from limiting in the express warranty the duration of an implied warranty. The Senate bill extended such prohibition to all other warranties, but the House amendment permitted a limited warranty to limit the duration of an implied warranty if the limitton was conscionable and if it was set forth in clear and unmistakable language that was prominently displayed on the face of the warranty.

The conference substitute contains a provision identical to the House provision.

6. Rulemaking

Both the Senate bill and the House amendment specifically required the Federal Trade Commission to promulgate rules implementing certain provisions in title I. The Senate bill required that the Commission utilize procedures prescribed in section 553 of title 5 of the United States Code, but specifically provided that there would be an agency hearing "structured to proceed as expeditiously as possible" and that a public record of such a hearing would be maintained. The House amendment required the Commission to follow the same procedures

that it would follow in promulgating trade regulation rules defining with specificity unfair or deceptive acts or practices, as specified in title II of the House amendment.

The conference substitute provides for informal rulemaking resembling that provided for in the Senate bill. The Commission is to follow the requirements of section 553 of title 5 of the United States Code, but the opportunity for oral presentation is required rather than optional. A written transcript of the hearing would be made, and a rulemaking record containing such transcript and other data, views, and arguments would be subject to review in an appropriate Federal Court of Appeals. A rule being reviewed would not be affirmed unless supported by substantial evidence in such a record.

7. Remedies for breach of express warranties not in writing

The Senate bill afforded reasonable attorney's fees to a consumer who successfully sued for the breach of an express oral warranty. The House amendment did not provide reasonable attorney's fees in that situation. The conferees adopted the House approach, but stated that they would reexamine the issue if oral express warranties became more prevalent.

8. Informal dispute settlement mechanisms

Both the Senate and House versions provided for the establishment of informal dispute settlement procedures in order to simplify and expedite the resolution of the warranty disputes. The conferees adopted the House version. It should be recognized, however, that provision for governmental or consumer participation in internal or other private dispute settlement procedures under the bill is required by this legislation. Consequently warranties providing that consumers must first resort to informal dispute settlement procedures before initiating a suit are contrary to the intent of the legislation where there is no provision for governmental or specific consumer participation in the procedure or where the procedure is otherwise unfair.

The conference substitute provides that the Federal Trade Commission shall establish rules for dispute settlement procedures which operate under the legislation, and may disapprove noncomplying procedures. Commission rules must provide for participation in such procedures by independent or governmental entities. An independent entity is one which is not under the control of any party to the dispute. A governmental entity would include a state or local agency or a small claims court.

This is not intended to exclude the courts from reviewing the fairness, and compliance with FTC rules, of such procedures even where the FTC has not acted to disapprove them. In this connection the conferees recognize the limited resources of the Commission and the fact that its other responsibilities may preclude it from acting in some cases where private dispute settlement procedures may not comply with the legislation or the Commission's rules thereunder. Accordingly, the courts would be free to determine that a given dispute settlement procedure need not be exhausted because it was not fair, had no provision for governmental or consumer participation, or did not comply with FTC rules. Since the supplier creating the procedure would have more knowledge about it than the plaintiff-consumer, the initial burden of showing that the procedure complies with this legislation and any FTC rules would be on any party seeking to require exhaustion of such procedure. Of course, if a consumer chooses to seek redress without utilizing the provisions of section 110, section 111(b) preserves all alternative avenues of redress, and utilization of any informal dispute settlement mechanism would then not be required by any provision of this Act.

9. Suits in Federal court for breach of warranty or service contract obligations

The Senate bill prohibited suits in Federal courts for breaches of warranty or service contract obligations unless a $10,000 jurisdictional limit was satisfied. The House amendment specifically authorized suits to be brought in an appropriate United States district court if: (1) each individual claim exceeded the sum or value of $25; and (2) the matter in controversy exceeded the sum of value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in the suit. In addition, the action could be brought as a class action only if the number of named plaintiffs equalled or exceeded 100. The House amendment also provided that a consumer might not bring an action for failure of a supplier to comply with his obligations under title I or under a warranty or service contract on a consumer product with respect to which no informal dispute settlement mechanism was available unless the person obligated under the warranty or service contract had been afforded a reasonable opportunity to cure the breach.

The conferees adopted the House provisions.

10. Enforcement of rights

The Senate bill did not expressly state, as did the House amendment, that any rights arising under a written warranty could only be enforced against the supplier "actually making" a written affirmation of fact, promise, or undertaking. The conference substitute is the same in this respect as the House amendment except that the term "warrantor" is used instead of "supplier".

The conferees intend that, if under State law a warrantor or other person is deemed to have made a written affirmation of fact, promise, or undertaking he would be treated for purposes of section 110 as having made such affirmation of fact, promise, or undertaking.

The conferees also agreed that the term warrantor is not intended to include a newspaper, magazine or broadcaster, which merely publishes an offer or an advertisement on behalf of another person. If such newspaper, magazine or broadcaster goes beyond the publication of such an offer or advertisement for another person, or offers a warranty or guarantee itself it would not be excluded from the definition of warrantor.

The Senate bill defined "warrantor" as any supplier or other party who gives a warranty in writing. The House amendment defined "warrantor" to mean any supplier who gave or offered to give a warranty. The conferees agreed that both the Senate bill and House amendment were intended to cover third party warranties and, therefore, adopted the language of the Senate bill which made that intention clear.

11. Enforcement by the Attorney General

Under the Senate bill, the Attorney General was authorized to enjoin any action prohibited under title I, and to serve civil investigative demands. The House amendment contained no comparable provision.

The conference substitute provides that either the Attorney General or the Commission on its own initiative may bring an action in the District Courts of the United States to restrain a warrantor from making a deceptive warranty or from failing to comply with a requirement imposed on such person by or pursuant to title I or from violating any prohibition contained in title I.

12. Effect of bill on liability imposed under State law

The Senate bill provided that title I should not 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. The House amendment provided that nothing in title I would affect the liability of, or impose liability on, any person for personal injury. In addition, the House bill provided that nothing in title I would invalidate or restrict any right or remedy of any consumer under State law.

The conference substitute provides that nothing in title I "shall invalidate or restrict any right or remedy of any consumer under State law." It also provides that nothing in title I "shall affect the liability of, or impose liability on, any person for personal injury, or supersede any provision of State law regarding consequential damages for injury to the person or other injury." Thus a third party warrantor or other warrantor of a consumer product is not liable under title I of the bill for damages resulting from personal injury (either direct or consequential), but he could still be liable if State law imposed liability.

The provisions relating to the effect of title I on State law should be considered in the context of two other provisions. Section 108 of the bill (relating to prohibition on disclaimers on implied warranties) could be read to impose liability on persons to the extent it prohibits the disclaimer of implied warranties. The disclaimer on the imposition of liability contained in section 111(b)(2)(A) does not operate to negate the provisions of section 108 since the imposition of liability language relates to the consequences flowing from the existence of a warranty or service contract.

13. Designation of representatives

Section 107 of the conference substitute contains the "designation of representatives" section which was in the House amendment. The conferees agreed that, while the policy of both the Senate bill and the House amendment were identical, the House amendment better expressed the policy. The conferees were unanimously of the opinion that the word "compensation" did not necessitate cash payment, so long as whatever method used insures that such compensation was equitable. For instance, the manufacturer could make reasonable arrangements allowing the retailer, as his representative, to perform warranty obligations in exchange for allowing him a greater margin between the wholesale and retail price than the margin allowed by another manufacturer who provided a cash payment to the retailer who performed that manufacturer's warranty duties.

14. Warranties on used automobiles

The Senate bill contained detailed provisions relating to warranty practices with respect to used automobiles. The House amendment contained no similar provisions, leaving warranties applying to used

automobiles subject only to the provisions of title I of the House amendment.

The conference substitute provides in section 109(b) that the Commission shall within one year initiate a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used automobiles and shall prescribe such rules as the Commission determines are needed to supplement the provisions of title I and rules thereunder in order to offer reasonable protection to average purchasers of used automobiles. In prescribing such rules, the FTC could exercise any authority which it has under title I or other law.

The conferees agreed that any such rules could not require that a warranty be given on any used car which is sold, but if a warranty is not given, such rules could require that there be clearly set forth the seller's lack of obligation for any subsequent repairs to such car.

Conforming changes in the definition of "consumer" were made to eliminate any possible construction that title I did not apply to the commercial sale of used consumer products.

Title II—Federal Trade Commission Improvements

Section 201—Jurisdiction of the Commission

Senate bill and House amendment

Both the Senate bill and the House amendment amended sections 5, 6, and 12 of the Federal Trade Commission Act (hereinafter the "Act") so as to expand the FTC's jurisdiction from acts and practices "in" commerce to those "in or affecting" commerce.

Conference substitute

The conference substitute is the same in form as the House bill. As noted above there was no substantive difference between the two versions.

Section 202—Rulemaking

Senate bill

The Senate bill contained no provisions relating to rulemaking procedures to be followed by the Federal Trade Commission. However, title III of the Senate bill would have required the Federal Reserve Board (FRB) to prescribe regulations applicable to financial institutions defining with specificity unfair or deceptive acts or practices affecting commerce, including acts or practices unfair or deceptive to consumers. In addition the Senate bill would have required the FRB to issue substantially similar regulations proscribing acts or practices of financial institutions substantially similar to acts or practices proscribed by rules of the FTC within 60 days after the effective date of the FTC rule.

The FRB would not have had to issue such regulations if it found that (1) such acts or practices of financial institutions were not unfair or deceptive to consumers, or (2) implementation of such regulations would have seriously conflicted with essential monetary and payments systems policies of the FRB.

Compliance with the regulation prescribed by the FRB would have been enforced with respect to financial institutions over which they had regulatory authority by—

(1) the Federal Reserve Board,

(2) the Comptroller of the Currency,
(3) the Federal Deposit Insurance Corporation,
(4) the Federal Home Loan Bank Board, and
(5) the Administrator of the National Credit Unions Administration.

For the purpose of enforcing the FRB regulations under the legislation, each of the aforementioned regulatory agencies would have been required to establish a separate division of consumer affairs.

House amendment

The House amendment would have added a new section 18 to the Act which would have established detailed procedures which the FTC would have had to follow in prescribing all substantive rules under the Act.

These rules would have been limited to defining acts or practices which were unfair or deceptive within the meaning of section 5(a)(1) of the Act. The FTC would have been prohibited from prescribing rules with respect to unfair competitive practices.

In issuing such rules the FTC would have had to—

(1) issue an order of proposed rulemaking stating with particularity the reason for the proposed rule,

(2) allow interested persons an opportunity to comment on the proposed rule in writing and make such comments available to the public,

(3) provide an opportunity for interested persons to comment orally on the proposed rules with a verbatim transcript made of any hearing in which such oral comments were presented and with such transcripts made available to the public, and

(4) if appropriate, promulgate the final rule together with a statement of the basis and purpose based on information and comments compiled pursuant to paragraphs (1)–(4).

In any oral hearing a party would be entitled to present his case by oral or documentary evidence and would be entitled to submit rebuttal evidence and to conduct cross-examination with respect to disputed issues of material facts. This right would have been subject to rules and rulings of the Commission (1) directed at avoiding unnecessary costs or delays, and (2) with respect to the manner in which cross-examination would be conducted where parties with the same or similar interests could not agree upon a single representative to conduct such cross-examination.

The Commission's statement accompanying the adoption of a final rule would have had to at least include statements (1) as to the extent of the acts and practices covered by the rule, (2) as to the manner and extent such acts or practices were unfair or deception, and (3) the economic impact of the rule taking into account the impact on small business.

After any rule prescribed in accordance with these provisions became final, a violation thereof would have been an unfair or deceptive act or practice in violation of section 5(a)(1) of the Act unless the Commission expressly provided otherwise in the rule.

Any rule adopted pursuant to these provisions would have been subject to judicial review by the United States Court of Appeals for the District of Columbia or for the circuit in which the person seeking review resided or at his principal place of business. Such review would

have been available for 60 days after the rule was prescribed to any person adversely affected by it. The rule would not have been affirmed unless supported by substantial evidence in the record taken as a whole.

Any person to whom such a rule applied would have been able to petition the Commission for an exemption from it based on special circumstances. The Commission's actions or failure to act on a petition for an exemption would have been subject to judicial review and would not have been affirmed unless supported by substantial evidence in the record taken as a whole.

Proposed section 18(b) of the Act as it would have been written in the House amendment was substantially the same as title III of the Senate bill except that the House version did not apply to nonbanking institutions, that is, savings and loan associations, credit unions, and thrift and home financial institutions. Under the House version these nonbanking institutions would have been subject to the rules on unfair or deceptive acts or practices prescribed by the FTC. Consequently, the House version did not provide duties for the Federal Home Loan Bank Board or the Administrator of the National Credit Union Administration.

Conference substitute

The conference substitute adds a new section 18 to the Federal Trade Commission Act which would codify the Commission's authority to make substantive rules for unfair or deceptive acts or practices in or affecting commerce (referred to hereafter as "trade regulation rules"). This authority is regarded by the conferees as an important power by which the Commission can fairly and efficiently pursue its important statutory mission. Because the prohibitions of section 5 of the Act are quite broad, trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct.

Under subsection (a), the Commission would be authorized to prescribe interpretive rules, general statements of policy, and substantive trade regulation rules with respect to unfair or deceptive acts or practices in or affecting commerce within the meaning of section 5(a)(1) of the Act. Section 18 would be the exclusive authority for such rules.

In Section 18(a)(1) the conferees added a phrase which states that rules which define with specificity acts or practices which are unfair and deceptive "may include requirements prescribed for the purpose of preventing such acts or practices." This phrase was not intended to grant the Commission additional authority in the area of rulemaking but was added for the purpose of clarifying what was perhaps a technical deficiency in the House rulemaking provision. In an otherwise valid trade regulation rule the Commission may specify what must be done in order to avoid engaging in an unfair or deceptive practice. For example, in the present Commission rule relating to "octane rating," the Commission required that certain testing procedures be followed in order to determine what octane rating should be posted on gasoline pumps. The conferees intend that the Commission may continue to specify such matters in rules which are otherwise valid under Sec. 18. It should be noted, however, that inasmuch as such requirements are a part of the rule, they are subject to judicial review in the same manner as is the portion of the rule which defines the specific act or practice which is unfair or deceptive.

The conference substitute does not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition in or affecting commerce.

When prescribing any substantive trade regulation rule under section 18 the Commission would be required to (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule, (2) allow interested persons to submit written data, views, and arguments and make such submissions available to the public, (3) provide an opportunity for an informal oral hearing, and (4) if appropriate, promulgate a final rule (together with a statement of basis and purpose for it) based on the rulemaking record. The conferees wish to emphasize that use of the term "rulemaking record" is not intended to trigger the provisions of section 554 of title 5, United States Code. "Rulemaking record" is defined in the legislation to mean the transcript which is made of oral presentations and cross-examination in any oral hearing referred to in (4) above, any written submission referred to in (2) above, and any other information which the Commission includes as being relevant to the rule. Such "other information" could, for instance, include data, views, and arguments submitted, and transcripts of hearings conducted, in a rulemaking proceeding which was in progress but not substantially completed on the date of enactment of this legislation.

The statement of basis and purpose which would have to accompany promulgation of a rule would have to include a statement as to (1) the prevalence of the acts or practices treated by the rule, (2) the manner and context in which the acts or practices are unfair or deceptive, and (3) the economic effect of the rule, taking into account the effect on small business and consumers. This statement is not intended to be a voluminous or detailed document, but a concise means of specifying the reasons for the rule, the acts and practices prohibited by it, and the Commission's best estimate of the economic effects of the rule which would include any anticipated cost or benefits the rule is expected to have for small business or consumers. The statement is intended as a means of informing (1) the Congress of the way in which those of its powers which it has delegated to the Federal Trade Commission are being exercised through the rulemaking process and (2) the general public, including those affected by the rule, of the acts and practices prohibited by, and the affirmative requirements of, a trade regulation rule.

Although such a statement must accompany promulgation of a rule, its contents are not to be subject to court review on any basis at any time.

Section 18 would permit interested persons to present their views and substantiating documentation on any proposed rule either in written form or orally. This should permit the fullest possible participation in any such rulemaking proceeding and make available to the Commission the widest possible expression of views and data on the issues presented by proposed rules. This legislation will neither discourage written submission nor restrict the Commission in their use.

Oral hearings

Any interested person would be entitled to present his position on a proposed rule in an oral hearing.

If the Commission determines (1) that there are disputed issues of material fact, and (2) that it is necessary to resolve such issues, interested persons would be entitled to present such rebuttal submissions and to conduct (or have conducted by the Commission) such cross-examination of persons commenting orally as the Commission determines to be appropriate and required for a full and true disclosure with respect to such issues. The only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact.

It was the judgment of the conferees that more effective, workable and meaningful rules will be promulgated if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous.

Participation of any interested person in an oral hearing would be subject to rules and rulings which the Commission is authorized to make to avoid unnecessary costs or delay. This would assure that oral presentations and cross-examination could not be used as devices to interfere with the Commission's effective use of rulemaking.

Such rules or rulings could impose reasonable time limits on each person's oral presentation and could require that any cross-examination to which a person might be entitled be conducted by the Commission on his behalf in such manner as the Commission determines to be appropriate and to be required for a full and true disclosure with respect to disputed issues of material fact. The conferees recognized the need to afford the Commission adequate discretion to control the examination of those who present oral statements. Accordingly, the presiding official at the public hearing may receive proposed questions from interested representatives and conduct the necessary cross-examination so long as such cross-examination is consistent with the overall requirement of fairness in the legislation.

The authority to impose time limits on oral presentations coupled with the authority of presiding officers to conduct necessary and appropriate examination, is intended to improve the quality of information available to the Commission, and at the same time, to avoid rigid or cumbersome procedures that could involve undue costs and delay.

In view of the large numbers of persons who may be interested in Commission rulemaking proceedings, the conferees felt it was also necessary to confer express authority on the Commission to aggregate persons with the same or similar interests and provide for their representation by single representatives.

If the Commission determines that cross-examination is appropriate a group of persons who want to engage in cross-examination have the same or similar interests, and that the group cannot agree upon a single representative of such interests, the Commission may make rules and rulings (a) limiting representation of such interests for purposes of cross-examination, and (b) governing the manner in which such cross-examination is limited. However, the bill provides a specific exception from this authority in the case of a person who the Commission has determined is a member of a group with the same or similar interests, who is unable to agree upon group representation with other members of the group, and who shows to the satisfaction of the Com-

mission that he has made a reasonable and good faith effort to reach agreement upon group representation. Such a person (if he is otherwise entitled to cross-examination or to have cross-examination conducted on his behalf) may not be denied entitlement to conduct or have conducted cross-examination as to issues affecting his particular interest if the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representation.

A verbatim transcript of any oral rulemaking proceeding must be made and copies of such transcript shall be made available to the public. The conferees are aware that under existing law copies of such transcripts may not be sold at a cost higher than the cost of duplication. However, because of the vital information which may be included in some of the transcripts which it would be in the public interest to disseminate as widely as possible, the conferees intend that the Federal Trade Commission evaluate transcripts of such oral hearings and if it determines that it would serve the public interest to do so, to make any of such transcripts available without cost or at a reduced cost to nonprofit entities such as public interest research groups, schools, and institutions of higher learning, and to individuals and groups engaged in nonprofit activities such as teaching and research and to small businesses.

Effect of rule violation

After any substantive trade regulation rule takes effect, a violation thereof would be an unfair or deceptive act or practice in violation of section 5(a)(1) of the Federal Trade Commission Act unless the rule specifically provides otherwise.

Judicial review

The conference report provides for judicial review of final rules in appropriate U.S. Circuit Courts of Appeals. The venue for preenforcement review (whether under this subsection or under chapter 7 of title 5 of the United States Code) is exclusively vested in such courts. If a petitioner desires such review in accordance with the review standards set forth in section 18(e)(3)(c), he must file a petition not later than sixty days after the rule is promulgated.

The conference report generally incorporates the standards for judicial review of rules under section 706(2) of title 5, United States Code (subject to certain exceptions discussed below). The courts in applying those provisions would (as under section 706) be directed to take into account the rule of prejudicial error, the so-called "harmless error" rule, which provides that errors having no substantial affect on the ultimate rights of the parties will be disregarded. See *Attorney General's Manual on the Administrative Procedure Act*, 1947, p. 110.

In addition, the court would set aside a rule under section 18 if it found that the findings and conclusions of the Commission with regard to disputed issues of material fact on which the rule is based are not supported by substantial evidence in the rulemaking record taken as a whole. Of course, this test would not apply to findings or determinations of legislative fact.

Such a rule would also be set aside if the court found that any Commission action in excluding or limiting cross-examination or rebuttal submissions precluded disclosure of disputed material fact necessary

for fair determination of the rulemaking proceeding taken as a whole.

Section 18(e)(5)(C) provides that the only "substantial evidence rule" review of a section 18(a)(1)(B) rule which is available to a person challenging a rule is under section 18(e)(3)(A). Likewise, the only review of a Commission determination, rule, or ruling under section 18(c) limiting cross-examination or rebuttal submissions would be under section 18(e)(3)(B). Thus, neither substantial evidence review nor review of limitations on cross examination and rebuttal submissions could be obtained in enforcement proceedings, or in a preenforcement judicial review action brought after the 60-day period specified in section 18(e)(1). In addition, section 706(2)(E) of title 5, United States Code, would not be applicable in any judicial review of such a rule, and section 706(2)(D) of such title would not be the basis of reviewing limitations on cross examinations and rebuttal submissions.

The judicial review provisions in the bill specifically authorize the court to receive application from a petitioner or the Commission for permission to make additional oral or written presentations if there were reasonable grounds for failure to make such presentations in the proceeding before the Commission. Thus, a person who is contending in a review proceeding that any inability to engage in cross-examination or submit rebuttal information has resulted in unfairness may be able to cure any alleged unfairness by applying to the court to make additional presentations.

The judicial review standards established by the bill are not intended to alter the established principle pursuant to which courts give weight to interpretations by expert agencies of the laws such agencies were created to administer and enforce.

The judicial review provided for in section 18 is not exclusive. Such review, for example, could also be obtained under the provisions of chapter 7 of title 5 of the United States Code, subject to the limitations described above. For such review, the United States Courts of Appeal would be the exclusive forums for such review, except where it occurs in the course of an enforcement proceeding.

Banks

Under section 18(f) of the conference report the Federal Reserve Board (FRB) is required to prescribe regulations applicable to banks to prevent unfair or deceptive acts or practices in or affecting commerce including acts or practices which are unfair or deceptive to a consumer. Within 60 days after any substantive trade regulation rule of the FTC takes effect, the Federal Reserve Board would be required to issue substantially similar regulations prohibiting acts or practices of banks which are substantially similar to those acts or practices prohibited by rules of the Federal Trade Commisison and which impose substantially similar requirements, unless the Federal Reserve Board finds that such acts or practices of banks are not unfair or deceptive or that the implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board.

Compliance with the FRB's regulations will be enforced by (1) the Comptroller of the Currency, (2) the FRB, and (3) the Federal Deposit Insurance Corporation, with respect to the banks over which they have regulatory jurisdiction.

Each of these agencies will be required to establish a separate division of consumer affairs to carry out the agencies enforcement responsibilities under this legislation and to receive and take appropriate action upon complaints with respect to unfair or deceptive acts or practices by banks under the agencies jurisdicton.

Each of the three agencies must transmit a detailed report of its activities under the legislation during the preceding calendar year to the Congress not later than March 15 of each year.

Exemptions

Any person to whom a substantive trade regulation rule applies may petition the Commission for an exemption from it. If, on its own motion or on the basis of such a petition, the Commission finds that application of such a rule to any person or persons is not necessary to prevent the unfair or deceptive act or practice at which the rule is directed, the Commission may exempt such person or persons from the rule.

The Commission's action with respect to any petition for an exemption would not be subject to judicial review under section 18(e) of the Federal Trade Commission Act but to those provisions of chapter 7 of title 5, United States Code, applicable to rules prescribed under section 553 of such title.

Compensation for Certain Representation

In order to provide to the extent possible that all affected interests be represented in rulemaking proceedings so that rules adopted thereunder best serve the public interest, the FTC is authorized to provide compensation for reasonable attorneys and expert witness fees and other costs of participating in rulemaking proceedings. The FTC could pay such compensation to any person who has or represents an interest which would not otherwise be adequately represented in such proceeding, and representation of which is necessary for a fair determination of the proceeding taken as a whole and who but for the compensation would be unable effectively to participate in such proceeding because such person would otherwise not be able to afford the cost of such participation.

Not more than 25 percent of the amount paid as such compensation in any fiscal year could be paid to persons who the proposed rule would regulate or who represent the interests of such persons.

No more than $1 million could be expended for such compensation in any fiscal year. Because the utilization of these funds may be critical to the full disclosure of material facts in rulemaking proceedings, the conferees expect the Commission to assign a high priority to their proper expenditure.

Study of Section 18

The Federal Trade Commission and the Administrative Conference of the United States are each required to conduct a study of the rulemaking procedures under the legislation and to submit a report on its study to the Congress not later than 18 months after the date of enactment of the legislation.

SECTION 203—INVESTIGATIVE AUTHORITY

Senate bill

The Senate bill would have amended section 9 of the Act (1) to give the FTC authority to obtain documentary evidence from a party being investigated or proceeded against, and (2) to permit the FTC acting on its own behalf through its attorneys to obtain an order from a Federal district court to compel any person or corporation to comply with the provisions of the Act or any order of the Commission made pursuant to the Act.

The Senate bill would have also amended section 10 of the Act to authorize the Commission to act on its own behalf through its own attorneys to obtain a civil penalty against the corporation failing to file a required report.

House amendment

The House amendment would have amended sections 6, 9, and 10 of the Act to give the FTC the same authority to obtain information and enforce the processes for obtaining information against persons and partnerships as it has under existing law with regard to corporations.

Conference substitute

The conference substitute is the same as the House amendment.

SECTION 204—REPRESENTATION

Both the Senate bill and the House amendment contained provisions relating to the Commission's authority to represent itself through its own legal representatives in civil proceedings before courts of the United States.

Senate bill

The Senate bill granted to the Commission the authority to elect to appear in its own name through its own attorneys in any civil proceeding involving the Federal Trade Commission Act whenever it was 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.

House amendment

The House amendment authorized the Commission, with the concurrence of the Attorney General, to appear in any civil action in its own name and through its own legal representative for the purpose of enforcing the laws subject to its jurisdiction.

Conference substitute

The Conference substitute grants to the Commission exclusive authority to appear in its own name through its own legal representatives and to supervise the litigation in any of the following civil actions:

(1) those under section 13 (relating to injunctive relief);
(2) those under section 19 (relating to consumer redress);
(3) those to obtain judicial review of a rule prescribed by the Commission or cease and desist order issued under section 5; and
(4) those under the second paragraph of section 9 to enforce a subpena, or under the fourth paragraph of section 9 to require compliance with section 6 of the Act.

The Commission may authorize the Attorney General to appear in these actions. The Commission is to inform the Attorney General of the exercise of its exclusive authority and this exercise by the Commission does not preclude the Attorney General from intervening on the behalf of the United States in these actions or any appeal of these actions as is otherwise provided for by law.

In any other civil action involving the Federal Trade Commission Act, the Commission may appear in its own name through its own legal representatives only if the Commission gives written notification and undertakes to consult with the Attorney General and thereafter the Attorney General fails within 45 days after receiving such notification to commence, defend, or intervene in, such action.

With respect to the Commission representing itself before the Supreme Court, the conference substitute provides that if the Commission makes a written request to the Attorney General, within the ten-day period which begins on the date of the entry of the judgment in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), to represent itself through any of its attorneys designated by it for such purpose before the Supreme Court in such action, it may do so, if the Attorney General concurs with such request; or if the Attorney General, within the 60-day period which begins on the date of the entry of such judgment, refuses to appeal or file a petition for writ of certiorari with respect to such civil action, in which case he shall give written notification to the Commission of the reasons for such refusal within such 60-day period, or the Attorney General fails to take any action with respect to the Commission's request.

The conference substitute further provides that, in any case where the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), the Attorney General cannot agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

The conference substitute states that if, prior to the expiration of the 45-day period specified in paragraph (1) of this section or the 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to any procedural requirement of any court with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or appeal may be taken, the Attorney General will have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of commencing, defending, or intervening in the civil action pursuant to paragraph (1), or for the purpose of refusing to appeal or file a petition for writ certiorari and the written notification or failing to take any action, pursuant to paragraph 3(A)(ii).

The conference substitute repeals section 5(m) of the Federal Trade Commission Act.

Senators Stevens and Beall (who were Senate conferees) had the following views with regard to section 204:

The expansion of traditional litigating authority of the Federal Trade Commission contained in this legislation (Sec. 204) will not continue the process of centralizing the authority of the Attorney General over litigation involving the United States Government. It has been the long-standing policy of the Executive Branch that representation of Federal agencies in court should be with the supervision and control of the Attorney General. That policy as it applied to the FTC was modified in the amendments to the Federal Trade Commission Act which were contained in the Alaska Pipeline Act. However, those amendments did not specifically alter the relationship of the Department of Justice, particularly the Solicitor General, to Supreme Court litigation involving the United States. It is premature to determine that this departure from the traditional role of the Department of Justice should be extended to the Supreme Court. The Solicitor General serves an important administrative function by providing central authority designed to coordinate a uniform position for Federal Government litigation.

While the authority of the FTC in Supreme Court litigation is limited under this legislation, even this invasion of the Solicitor General's role should be approved only after reviewing the experience of the FTC under its increased authority to represent itself in the trial and intermediate Federal courts.

On November 9, 1971, Chief Justice Warren E. Burger wrote to Hon. John E. Moss, Chairman of the Subcommittee on Commerce and Finance in the House of Representatives:

> DEAR MR. CHAIRMAN: I was not able to present the matter of your October 20 letter to the Conference until last Friday.
>
> It is the unanimous view of the Justices that it would be unwise to dilute the autority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies. It is very likely that there would be an increase in the work load of the Supreme Court if matters could be brought here without the concurrence of the Solicitor General. Even more important, perhaps, the Solicitor General exercises a highly important role in the selection of cases to be brought here in terms of the long-range public interest.

We fully concur in this viewpoint. At the very least, Congress should not change the Solicitor General's role without solid evidence that such action is necessary to assure that the functions of the FTC would be seriously jeopardized without such a change. No such evidence exists, to our knowledge, at this time.

SECTION 205—CIVIL PENALTIES FOR KNOWING VIOLATIONS

Senate bill

Section 202 of the Senate bill authorized the Federal Trade Commission to initiate civil actions in district courts against persons who had engaged in an act or practice which was unfair or deceptive to a consumer and was prohibited by Section 5(a)(1) of the Federal Trade Commission Act, with actual or implied knowledge that such act or practice was unfair or deceptive.

Section 202 authorized a civil penalty of not more than $10,000 for each such violation and provided that the Commission could compromise, mitigate, or settle such action if the settlement was approved by the court and accompanied by a public statement of its reasons.

House amendment

The House bill contained no similar provision.

Conference substitute

The conference substitute is based on the Senate provision authorizing civil actions for knowing violations of the Federal Trade Commission Act, with certain modifications. The Conference substitute provides that the Commission may initiate such actions in two situations:

1. Against any person, partnership, or corporation which engaged in an act or practice which the Commission has determined in a cease and desist proceeding to be unfair or deceptive, where that person, partnership, or corporation had actual knowledge that the act or practice was unfair or deceptive and prohibited by section 5(a)(1) of the Act. While the defendant in such an action need not have been a respondent in a proceeding before the Commission, actual knowledge that the act or practice is a violation of the Federal Trade Commission Act is required. In the case of a corporate respondent, the knowledge of responsible corporate officials would, under usual principles of law, be imputed to the corporation.

2. Against any person, partnership, or corporation which engaged in an act or practice which is prohibited by a rule of the Federal Trade Commission, where the defendant had actual knowledge or knowledge fairly implied on the basis of objective circumstances that the act or practice was prohibited by the rule. In determining whether knowledge of a Commission rule may be fairly implied, it is intended that the courts hold a defendant responsible where a reasonable and prudent man under the circumstances would have known of the existence of the rule and that the act or practice was in violation of its provisions.

The Conference substitute adds a new provision clarifying that where a defendant in such an action was not subject to a cease and desist order, the issues of fact shall be tried *de novo* in the district court. Of course, where the defendant was the subject of a final cease and desist order regarding such acts and practices by the Commission, the determination of the Commission as to the facts would normally be conclusive if supported by substantial evidence. The Conference substitute also provides that the Commission may compromise such an action in the same manner as provided by the Senate bill and that civil penalty actions may not be brought with regard to any act or practice occurring prior to the date of enactment of this Act.

SECTION 206—CONSUMER REDRESS

Senate bill

Section 203 of the Senate bill would have authorized the Commission to bring actions for consumer redress in the district courts after an order of the Commission to cease and desist from engaging in acts or practices which were unfair or deceptive to consumers had become

final. The action could have been commenced against any person who was a party to the cease and desist order proceeding relating to the specific acts or practices which were the subject of the proceeding. The court was directed to give notice reasonably calculated to apprise all consumers allegedly injured by the acts or practices of the action. Under the Senate bill such actions could not have been brought more than two years after an order of the Commission upon which they were based became final.

House amendment

The House bill contained no similar provision.

Conference substitute

The conference substitute is based on the Senate provision authorizing actions by the Commission to redress injury, with certain modifications. The conference substitute provides that the Commission may initiate such actions in two situations.

1. If any person, partnership, or corporation violates a rule of the Commission respecting unfair or deceptive acts or practices, the Commission may commence an action for redress for persons injured by such a violation.

2. If any person, partnership, or corporation engages in an unfair or deceptive act or practice resulting in the issuance of a cease and desist order by the Commission against such respondent, the Commission may commence an action for redress of the injuries caused by such respondent's act or practice. If in addition the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant redress.

It is not intended that the court in applying the statutory standard must find that a reasonable man under the circumstances would have considered such act or practice to be criminal.

In both cases described, where the court determines that relief is proper, it may grant such relief as it finds necessary to redress the injury resulting from the violation. While this section enumerates several types of relief which may be granted, the nature of the relief authorized is limited only by the nature of the injury done and the remedial powers of the court. The enumeration of specific types of relief available are not exclusive and do not limit the Commission in pleading, or the court in fashioning, other appropriate remedies. The section is not, however, intended to authorize punitive or exemplary damages.

It is not the intention of the conferees that private actions for redress based on the acts or practices which are the subject of a Commission consumer redress action be barred by a Commission action. In any such case the defendant in the private action would be able to assert a defense of payment or similar defenses. Failure of a consumer to appear or accept settlement would therefore not affect private rights. Nor would an action under these consumer redress provisions prevent the FTC from bringing an action under section 5(m) of the Federal Trade Commission Act for a civil penalty. Similarly, actions by the Commission under section 5(m) of the Act would not affect the Commission's authority to seek consumer redress nor the court's authority to grant such redress under this section.

The conference substitute also provides that if a cease and desist order has become final with respect to a rule violation or an unfair or deceptive act or practice, the findings of the Commission as to the material facts in that proceeding shall be conclusive, unless (i) the terms of the cease and desist order provide to the contrary or (ii) the defendant did not seek judicial review of the cease and desist order, in which case such findings are to be supported by substantial evidence.

The conference substitute incorporates the Senate provision regarding notice to persons allegedly injured by the violation and also authorizes the giving of public notice in the discretion of the court. The conference substitute modified the Senate provision to require that no action may be brought by the Commission under the section more than 3 years after the violation of a rule or the commission of an unfair or deceptive act or practice. However, if a final cease and desist order is issued by the Commission regarding an unfair or deceptive act or practice or a violation of a rule, and the proceeding for such order was commenced not later than 3 years after such rule violation or act or practice occurred, a civil action could be commenced to obtain consumer redress within 1 year after such cease and desist order becomes final.

The conference substitute provides that the section shall not apply to any violation of a rule occuring prior to the effective date of this Act or to any act or practice with respect to which the Commission issues a cease and desist order to the extent that such act or practice occurred before the date of enactment of the Act, unless the cease and desist order was issued after that date and the respondent had been notified in the Commission's complaint, notice, or order attached thereto, that redress might be sought.

The authority of the Commission to seek consumer redress encompassed by the Conference substitute deals exclusively with civil actions brought by the Commission and relief granted by the courts in those actions. The section is intended to supplement the ability of the Commission to redress consumer and other injury resulting from violations of its rules or of section 5(a) of the Federal Trade Commission Act and is not intended to modify or limit any existing power the Commission may have to itself issue orders designed to remedying violations of the law. That issue is now before the courts. It is not the intent of the Conferees to influence the outcome in any way.

SECTION 207—AUTHORIZATION OF APPROPRIATIONS

Senate bill

No provisions.

House amendment

For the overall operation of the Federal Trade Commission the House amendment would have authorized $41 million for fiscal year 1975, $45 million for fiscal year 1976, and $49 million for fiscal year 1977. For fiscal years ending after June 30, 1977, only such sums could be appropriated to carry out the FTC's operation as were authorized by law.

Conference substitute

The conference substitute would authorize an additional $1 million for each of the three years covered by the House amendment. This additional authorization is to cover compensation for attorneys fees, expert witness fees, and other costs of participation in rulemaking proceedings which the Commission is authorized to pay under proposed section 18(g) of the Act, as added by section 202 of the conference report.

The Senate bill provided the following title: "An Act 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."

The House amended the title.

The substitute title agreed to in conference is as follows:

> An Act to provide minimum disclosure standards for written consumer product warranties; to define minimum 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.

HARLEY O. STAGGERS,
JOHN E. MOSS,
W. S. (BILL) STUCKEY, JR.,
BOB ECKHARDT,
JAMES T. BROYHILL,
JOHN H. WARE,
JOHN Y. MCCOLLISTER,
Managers on the Part of the House.

WARREN G. MAGNUSON,
FRANK E. MOSS,
P. A. HART,
TED STEVENS, (with separate views),
J. GLENN BEALL,
Managers on the Part of the Senate.

○

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1107

CONSUMER PRODUCT WARRANTIES AND FEDERAL TRADE COMMISSION IMPROVEMENTS ACT

JUNE 13, 1974.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

together with

SEPARATE AND INDIVIDUAL VIEWS

[To accompany H.R. 7917]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 7917) to provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum 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, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows (page and line numbers refer to page and line numbers of the reported bill):

(1) Page 1, strike out lines 3 through 5, and insert in lieu thereof the following:

> That this Act may be cited as the "Consumer Product Warranties-Federal Trade Commission Improvements Act".

(2) Page 2, strike out line 3 and all that follows down through line 9 on page 5, and insert in lieu thereof the following:

TITLE I—CONSUMER PRODUCT WARRANTIES

DEFINITIONS

SEC. 101. For the purposes of this title:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or house-

hold purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means the first buyer at retail of any consumer product, any person to whom such product is transferred during the duration of a warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or contract).

(4) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating in the manner (if any) specified in the warranty.

(5) The term "remedy" means whichever the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(6) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted product.

(7) The term "refund" means refunding the actual purchase price (less depreciation based on actual use).

(8) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(9) The term "warrantor" means any supplier who gives or offers to give a warranty.

(10) The term "warranty" means—

(A) (i) 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

(ii) any undertaking in writing in connection with the sale of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that 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 a supplier and the first buyer at retail of such product; or

(B) an implied warranty arising under State law.

(11) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair of a consumer product.

(12) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(13) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(14) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term "Federal law" excludes any State law.

(3) Page 9, strike out line 21 and all that follows down through line 6, on page 13, and insert in lieu thereof the following:

WARRANTY PROVISIONS

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, any supplier warranting a consumer product to a consumer in writing shall fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty pursuant to any rules issued by the Commission. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer 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.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the procedure so provides, that the purchaser must resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform his obligations.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b) (1) (A) The Commission shall prescribe rules requiring that the terms of any warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this title (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than ten days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or contract).

(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 (other than

a service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the product or service so identified is used in connection with the warranted product, and

(2) the Commission finds that the waiver is in the public interest.

The Commission shall publish in the Federal Register for public comment all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its decision, including the reasons therefor.

(d) The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) The provisions of this section apply only to consumer products actually costing the consumer more that $5.

(4) Page 17, strike out line 7 and all that follows down through line 11, on page 18, and insert in lieu thereof the following:

DESIGNATION OF WARRANTIES

SEC. 103. (a) Any supplier warranting a consumer product in writing shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty incorporates the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "full (statement of duration)" warranty or guaranty.

(2) If the written warranty does not incorporate the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "limited" warranty or guaranty.

(b) Statements or representations similar to expressions of general policy concerning customer satisfaction which are not subject to any specific limitations are excluded from sections 102, 103, and 104 of this Act, but shall remain subject to the provisions of the Federal Trade Commission Act and requirements in section 110(c) of this Act.

(c) In addition to the authority given in section 102 of this Act pertaining to disclosure, the Commission may prescribe rules to define in detail the duties set forth in section 104(a) of this Act and their applicability to warrantors of different categories of consumer products with "full (statement of duration)" warranties, and to determine when a warranty in writing does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) The provisions of this section and section 104 apply only to consumer products actually costing the consumer more than $10.

(5) Page 19, strike out line 19 and all that follows down through line 6, on page 21, and insert in lieu thereof the following:

FEDERAL MINIMUM STANDARDS FOR WARRANTY

SEC. 104. (a) In order for a supplier warranting a consumer product in writing to incorporate the Federal minimum standards for warranty—

(1) such supplier must as a minimum undertake the remedy, within a reasonable time and without charge, of such consumer product in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 108(b), such supplier may not impose any limitation on the duration of any implied warranty on the product; and

(3) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts (determined under rules of the Commission) by the warrantor to remedy such defect or malfunction, such warrantor must permit the consumer to elect either a refund or replacement without charge of such product or part (as the case may be).

(b)(1) In fulfilling the duties under subsection (a) the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which does not conform to the written warranty unless the warrantor can demonstrate that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a), that the replaced consumer product shall be made available to the supplier free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The duties under subsection (a) extend from the warrantor to each person who is a consumer with respect to the product.

(c) The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance), caused any warranted consumer product to fail to conform to the written warranty.

(d) For purposes of this section and section 102(c), the term "without charge" means that the warrantor cannot assess the consumer for any costs the warrantor or his representatives incur in conection with the required remedy of a warranted consumer product. The obligation under subsection (a)(1)(A) to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such product shall, for the purposes of any action under section 110(d) or under any State law, be deemed to incorporate at least the minimum requirements of this section.

(6) Page 23, strike out line 19 and all that follows down through line 24, on page 23, and insert in lieu thereof the following:

FULL AND LIMITED WARRANTING OF A CONSUMER PRODUCT

SEC. 105. Nothing in this title shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

(7) Page 24, strike out line 7 and all that follows down through line 17, on page 24, and insert in lieu thereof the following:

SERVICE CONTRACTS

SEC. 106. Nothing in this title shall be construed to prevent a supplier from entering into a service contract with the consumer in addition to or in lieu of a warranty in writing if such contract fully and conspicuously discloses in simple and readily understood language its terms and conditions. The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be clearly and conspicuously disclosed.

(8) Page 25, strike out line 3 and all that follows down through line 10, on page 25, and insert in lieu thereof the following:

DESIGNATION OF REPRESENTATIVES

SEC. 107. Nothing in this title shall be construed to prevent any warrantor from designating representatives to perform duties under the warranty: *Provided*, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

(9) Page 25, strike out line 19 and all that follows down through line 9, on page 26, and insert in lieu thereof the following:

LIMITATION ON DISCLAIMER OF IMPLIED WARRANTIES

SEC. 108. (a) No supplier may disclaim or modify any implied warranty to a consumer with respect to a consumer product of (1) such supplier makes any express warranty in writing to the consumer with respect to such consumer product, or (2) at the time of sale, or within ninety days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this title, implied warranties may be limited in duration of an express warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of any action under this title or under State law.

(10) Page 27, strike out lines 1 through 20 and insert in lieu thereof the following:

COMMISSION RULES

SEC. 109. Any rule prescribed under this title shall be prescribed in accordance with, and shall be subject to judicial review under, section 18 of the Federal Trade Commission Act (as amended by section 202 of this Act).

(11) Page 28, strike out line 1 down through line 3 on page 31, and insert the following:

REMEDIES

SEC. 110. (a)(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth requirements for any informal dispute settlement procedure which is incorporated into the terms of a warranty to which any provision of this title applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more suppliers may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a supplier establishes a procedure which meets such requirements and he incorporates in a warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty, and

(B) the Commission has not found, under paragraph (4), that such procedure or its implementation fails to comply with rules under paragraph (2),

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of Rule 23 of the Federal Rules of Civil Procedure for the District Courts of the United States.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in the consumer product warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this title or any other provision of law.

(b) It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45 (a)(1)) for any person 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.

(c)(1) The district courts of the United States shall have jurisdiction of any action brought by the Commission to restrain (A) any supplier from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this title or from violating any prohibition contained in this title. Upon proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. If a complaint under section 5 of the Federal Trade Commission Act is not within such period (not exceeding ten days) 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. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business. Whenever it appears to the court that the ends 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 severed in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a warranty (as defined in section 101(10)) which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances would mislead a reasonable individual exercising due care; or (ii) fails to contain information that is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a warranty (as so defined) created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d)(1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier to comply with any obligation under this title, or under a warranty or service contract (as defined in section 101(10) and (11)), may bring suit—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may 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 the plaintiff for or in connection with the institution and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) unless each individual claim exceeds the sum or value of $25;

(B) unless the matter in controversy exceeds the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; and

(C) if the action is brought as a class action, unless the number of named plaintiffs equals or exceeds one hundred.

(e) No action (other than a class action or an action respecting a warranty to which subsection (a)(3) applies) may be brought under subsection (d) for breach of any warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a breach except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such breach. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) applies) brought under subsection (d) for breach of any warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of Rule 23 of the Federal Rules of Civil Procedure for the District Courts of the United States.

(f) For purposes of this section, only the supplier actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a warranty described in section 101(10)(A), and any rights arising thereunder may be enforced under this section only against such supplier and no other person.

(12) Page 37, strike out lines 3 through 14 and insert in lieu thereof the following:

EFFECT ON OTHER LAWS

SEC. 111. (a)(1) 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 therein as an Antitrust Act.

(2) Nothing in this title shall be construed to repeal, invalidate, or supersede the Federal Seed Act (7 U.S.C. 1551–1611) and nothing in this title shall apply to seed for planting.

(b)(1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law.

(2) Nothing in this title shall affect the liabiilty of, or impose liability on, any person for personal injury.

(c)(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling, disclosure, or other matters (i) respecting written warranties or performance thereunder and (ii) within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections), and

(B) which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder),

shall not be applicable to warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for as long as the State continues to administer and enforce effectively any such greater requirement.

(d) This title (other than section 102(c)) shall be inapplicable to any warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this title.

(13) Page 39, strike out lines 5 through 21, and insert in lieu thereof the following:

EFFECTIVE DATE

SEC. 112. (a) Except as provided 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 date.

(b) Those requirements in this title which cannot be reasonably met without the promulgation of rules of the Commission shall take effect six months after the final publication of such rules; except that the Commission, for good cause shown, may provide designated classes of suppliers up to an additional six months to bring their written warranties into compliance with rules promulgated pursuant to this title.

(c) The Commission shall promulgate rules for initial implementation of this title as soon as possible after the date of enactment of this Act but in no event later than one year after the date of enactment of this Act.

(14) Page 41, strike out line 6 and all that follows down through line 25 on page 46, and insert in lieu thereof the following:

RULEMAKING AUTHORITY

SEC. 202. (a) The Federal Trade Commission Act is amended by redesignating section 18 as section 19, and inserting after section 17 the following new section:

"RULEMAKING

"SEC. 18. (a)(1) The Commission shall have the power to issue (A) procedural, administrative, and advisory rules,

and (B) rules defining with specificity acts or practices which are unfair or deceptive and which are within the scope of section 5(a)(1) of this Act. The Commission shall have no authority under this Act, other than its authority under this section, to prescribe rules.

"(2)(A) When using rules under paragraph (1)(B) of this subsection, the Commission shall proceed in accordance with section 553 of title 5, United States Code (not including any reference to sections 556 and 557), and shall also: (i) issue an order of proposed rulemaking stating with particularity the reason for the proposed rule; (ii) allow interested persons to comment on the proposed rule in writing and make all such comments publicly available; (iii) provide an opportunity for an informal hearing at which interested persons may comment orally on the proposed rule; and (iv) promulgate, if appropriate, a final rule together with a statement of basis and purpose based on the information and comments compiled in accordance with clauses (i), (ii), and (iii). A verbatim transcript of any oral hearing under clause (iii) shall be taken and such transcript shall be publicly available.

"(B) The Commission shall afford the following process for its hearings pursuant to subparagraph (A)(iii) of this paragraph:

"(i) Subject to clauses (ii) and (iii) of this subparagraph, a party is entitled to present his position by oral or documentary evidence and to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of all disputed issues of material fact.

"(ii) The Commission may make such rules and rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay.

"(iii) When parties with the same or similar interests cannot agree upon a single representative, the Commission may make rules and rulings governing the manner in which such cross examination is limited; but when any party has the same or similar interests with other parties but is unable to agree upon group representation with these parties, such party shall not be denied the opportunity to conduct cross examination as to issues affecting his particular interests if he shows to the satisfaction of the Commission that he has made a good-faith effort to other parties having same or similar interests and that there are substantial issues which are not adequately presented by the group representative.

"(C) The agency statement to accompany the adoption of a rule shall include, among other things, statements (i) as to extent of the acts and practices treated by the rule; (ii) as to the manner in which and extent to which such acts or practices are unfair or deceptive; and (iii) as to the economic impact of the rule, taking into account the impact on small business.

"(D) When any rule under this paragraph (2) is promulgated and becomes final a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of this Act, unless the Commission otherwise expressly provides in the rule.

"(E) The term "Commission" as used in this paragraph (2) includes anyone authorized to act in behalf of the Commission in any part of the conduct of the rulemaking process.

"(3) (A) Not later than sixty days after a rule to which paragraph (2) of this subsection applies is prescribed by the Commission, any person adversely affected by such rule (including a consumer or consumer organization) may file a petition with the United States Court of Appeals for the District of Columbia or for the circuit in which such person resides or has his principal place of business for a judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The Commission shall file in the court the record of the proceedings on which the Commission based its rule as provided in section 2112 of title 28, United States Code. For purposes of this section, the term 'record' means such rule, the transcript required by paragraph (2) (A) of any oral presentation, any written submission of interested parties, and any other information which the Commission considers relevant to such rule.

"(B) If the petitioner applies to the court for leave to adduce additional data, views, or arguments and shows to the satisfaction of the court that such data, views, or arguments are material and that there were reasonable grounds for the petitioner's failure to adduce such data, views, or arguments in the proceeding before the Commission, the court may order the Commission to provide additional opportunity for the oral presentation of data, views, or arguments and for written submissions. The Commission may modify its statement or make a new statement by reason of the additional data, views, or arguments so taken and shall file such modified or new statement, and its recommendations, if any, for the modification or setting aside of its original rule, with the return of such additional data, views, or arguments.

"(C) Upon the filing of the petition under subparagraph (A) of this paragraph, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The rule shall not be affirmed unless the Commission's action is supported by substantial evidence in the record taken as a whole.

"(D) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

"(E) Remedies under this paragraph (3) are in addition to and not in lieu of any other remedies provided by law.

"(b)(1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to a consumer) by banks, each agency specified in paragraph (2) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks subject to its jurisdiction. The Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or receptive acts or practices. In carrying out its responsibilities under this subsection, the Board shall issue substantially similar regulations proscribing acts or practices of banks which are substantially similar to those proscribed by rules of the Commission within sixty days of the effective date of such Commission rules unless the Board finds that such acts or practices of banks are not unfair or deceptive to consumers or it finds that implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

"(2) Compliance with the requirements imposed under this subsection shall be enforced under section 8 of the Federal Deposit Insurance Act, in the case of—

"(A) national banks and banks operating under the code of law for the District of Columbia, by the division of consumer affairs established by the Comptroller of the Currency;

"(B) member banks of the Federal Reserve System (other than banks referred to in subparagraph (A)) by the division of consumer affairs established by the Board of Governors of the Federal Reserve System; and

"(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)), by the division of consumer affairs established by the Board of Directors of the Federal Deposit Insurance Corporation.

"(3) For the purpose of the exercise by any agency referred to in that paragraph, (2) of its powers under any Act referred to in that paragraph, a violation of any requirement imposed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any requirement imposed under this subsection, any other authority conferred on it by law.

"(4) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated

in this subsection to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subsection.

"(5) Each agency exercising authority under this subsection shall transmit to the Congress not later than March 15 of each year a detailed report on its activities under this paragraph during the preceding calendar year.

"(c)(1) Any person to whom a rule under subsection (a)(1)(B) of this section applies may petition the Commission for an exemption from the rule based on special circumstances. If the petitioner satisfies the Commission that special circumstances are applicable to him, the Commission shall grant the petitioner an exemption from such rule. Paragraphs (2)(A), (2)(B), and (2)(E) of subsection (a) of this section shall apply to petitions for exemptions under this subsection to the same extent as such paragraphs apply to rules under paragraphs (1)(B) of subsection (a).

"(2) For purposes of this subsection, the term 'special circumstances' means factors which are applicable to a particular petitioner (as distinguished from others subject to the rule) and which are so different or unique that applying the rule to the petitioner would result in significant hardship which would outweigh any public benefit resulting from application of the rule to the petitioner.

"(3) Neither the pendency of an application under this subsection for an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action under this subsection, shall stay the applicability of such rule.

"(4) Judicial review of the Commission's action or failure to act under paragraph (1) of this subsection shall be in accordance with chapter 7 of title 5, United States Code. The Commission's action shall not be affirmed unless it is supported by substantial evidence in the record taken as a whole (including any material evidence in the record of the rulemaking proceeding for the rule from which the exemption is sought)."

(b) Section 6(g) of the Federal Trade Commission Act (15 U.S.C. 46(g)) is amended to read as follows:

"(g) From time to time to classify corporations."

(c)(1) The amendments made by subsections (a) and (b) of this section shall not affect the validity of any rule which was promulgated under section 6(g) of the Federal Trade Commission Act prior to the date of enactment of this section. Any proposed rule under section 6(g) of such Act with respect to which presentation of data, views, and arguments substantially completed before such date may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.

(2) If a rule described in paragraph (1) of this subsection is valid, any substantive change in the rule after it is promulgated shall be made in accordance with section 18 of the Federal Trade Commission Act (added by this section).

(15) Page 55, insert after line 22 the following:

INVESTIGATIVE AUTHORITY

SEC. 203. (a)(1) Section 6(a) of the Federal Trade Commission Act is amended by striking out "corporation" and inserting "person, partnership, or corporation" and by striking out "corporations and to individuals, associations, and partnerships", and inserting in lieu thereof "persons, partnerships, and corporations".

(2) Section 6(b) of such Act is amended by striking out "corporations" where it first appears and inserting in lieu thereof "persons, partnerships, and corporations,", and by striking out "respective corporations" and inserting in lieu thereof "respective persons, partnerships, and corporations".

(3) The proviso at the end of section 6 of such Act is amended by striking out "any such corporation to the extent that such action is necessary to the investigation of any corporation, group of corporations," and inserting in lieu thereof "any such person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations,".

(b)(1) The first paragraph of section 9 of such Act is amended by striking out "corporation" where it first appears and inserting in lieu thereof "person, partnership, or corporation".

(2) The third paragraph of section 9 of such Act is amended by striking out "corporation or other person" both places where it appears and inserting in each such place "person, partnership, or corporation".

(3) The fourth paragraph of section 9 of such Act is amended by striking out "person or corporation" and inserting in lieu thereof "person, partnership, or corporation".

(c)(1) The second paragraph of section 10 of such Act is amended by striking out "corporation" each place where it appears and inserting in lieu thereof in each such place "person, partnership, or corporation".

(2) The third paragraph of section 10 of such Act is amended by striking out "corporation" where it first appears and inserting in lieu thereof "person, partnership, or corporation"; and by striking out "in the district where the corporation has its principal office or in any district in which it shall do business" and inserting in lieu thereof "in the

case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business".

(16) Page 57, strike out line 19 and all that follows down through line 24 on page 59, and insert in lieu thereof the following:

REPRESENTATION

SEC. 204. (a) Section 5(m) of the Federal Trade Commission Act of (15 U.S.C. 45(m)) is amended to read as follows:

"(m) For the purpose of enforcing the laws subject to its jurisdiction, the Commission shall have the power, with the concurrence of the Attorney General, to appear in any civil action in its own name and through its own legal representative."

(b) Section 16(b) of such Act is amended by striking out "after compliance with the requirements with section 5(m)" and insert in lieu thereof "with the concurrence of the Attorney General".

(17) Page 60, insert after line 13 the following:

AUTHORIZATION OF APPROPRIATIONS

SEC. 205. There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $41,000,000 for the fiscal year ending June 30, 1975; not to exceed $45,000,000 for the fiscal year ending June 30, 1976; and not to exceed $49,000,000 for the fiscal year ending June 30, 1977. For fiscal years ending June 30, 1977, there may be appropriated only such sums as the Congress may hereafter authorize by law.

(18) Page 61, strike out line 1 and all that follows down through line 9 on page 62.

Amend the title so as to read:

A bill to provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; to authorize appropriations for the Federal Trade Commission for fiscal years 1975, 1976, and 1977; and for other purposes.

Section 201 of the bill was not amended by the Committee and therefor does not appear in the preceding series of committee amendments. Section 201 of the bill reads as follows:

JURISDICTION OF COMMISSION

SEC. 201. (a) Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by striking out "in commerce" wherever it appears and inserting in lieu thereof "in or affecting commerce".

(b) Subsections (a) and (b) of section 6 of the Federal Trade Commission Act (15 U.S.C. 46) are each amended by striking out "in commerce" and inserting in lieu thereof "in or whose business affects commerce".

(c) Section 12 of the Federal Trade Commission Act (15 U.S.C. 52) is amended by striking out "in commerce" wherever it appears and inserting in lieu thereof in subsection (a) "in or having an effect upon commerce," and in subsection (b) "in or affecting commerce".

Purpose

The purpose of this legislation is (1) to make warranties on consumer products more readily understood and enforceable, (2) to provide the Federal Trade Commission (FTC) with means of better protecting consumers and (3) to authorize appropriations for the operations of FTC for fiscal years 1975, 1976, and 1977.

Summary of Legislation as Amended by the Committee Amendments

Title I—Consumer Product Warranties

This title applies to warranties which are given in connection with consumer products. A consumer product is defined as any tangible personal property distributed in commerce and normally used for personal, family, or household purposes. The legislation does not require that a warranty be given on any consumer product. In summary title I would provide as follows:

(1) It would authorize the FTC to prescribe rules providing for disclosure of the terms and conditions of written warranties on consumer products. These provisions would apply only to consumer products actually costing the consumer more than $5.

(2) It would require written warranties given on consumer products (other than those exempted by the FTC) to be designated as either "full" or "limited" warranties and would specifiy the duties of a warrantor under a "full" warranty. These provisions would only apply to consumer products actually costing more than $10. Under a "full" written warranty of a consumer product the warrantor would be (a) required to remedy the consumer product within a reasonable time and without charge in case of a defect, malfunction, or failure to conform with such written warranty, (b) prohibited from imposing any limitation on the duration of any implied warranty on the consumer product, and (c) required to permit the consumer to elect either a refund or replacement of the warranted consumer product if it continued to be defective or to malfunction after a reasonable number of attempts are made to remedy such defect or malfunction.

(3) A service contract on a consumer product could be given in addition to or in lieu of a warranty in writing. The FTC would be authorized to prescribe by rule the manner and form in which the terms and conditions of service contracts must be clearly and conspicuously disclosed.

(4) Congressional endorsement is given to the establishment of informal dispute settlement procedures. The FTC must prescribe rules applicable to any informal dispute settlement procedure which is incorporated in the terms of a warranty on a consumer product. A warrantor may make initial resort to such an informal dispute settlement procedure a condition precedent to obtaining other remedies under title I of the legislation.

(5) The FTC would enforce the legislation and would be empowered to obtain injunctive relief against any person violating its provisions or issuing deceptive warranties in writing.

(6) Any person damaged by the failure of a supplier to comply with any obligation under title I or under a warranty or service contract as defined in such title would be authorized to bring suit in an appropriate district court of the United States (subject to certain jurisdictional limitations) or in any State court of competent jurisdiction. Before bringing such a suit the plaintiff would have to give the warrantor reasonable opportunity to cure the breach to which the action or proceeding relates.

(7) If a consumer prevails in any action described in paragraph (6) (above) the court would be allowed to award him as a part of his judgment a sum equal to the aggregate amount of his costs and expenses (including attorney's fees based on actual time expended). However, no such action could be brought and such costs and expenses would not be allowed unless the defendant was afforded a reasonable opportunity to cure the breach on which the suit was based.

Title II—Federal Trade Commission Act Amendments

Title II would amend the Federal Trade Commission Act as follows:

(1) The FTC's jurisdiction would be expanded from matters and entities *in* commerce to those *in or affecting* commerce (sec. 201).

(2) The FTC's power to issue substantive rules defining and prohibiting unfair and deceptive practices is clarified and confirmed. Specific and detailed procedures would be established which the FTC would have to follow in prescribing substantive rules under the Federal Trade Commission Act (sec. 202).

(3) The FTC's investigational authority would be broadened to cover persons, partnerships, and corporations instead of only corporations as at present (sec. 203).

(4) The FTC could be represented in any civil action in its own name and through its own representative only with the concurrence of the Attorney General (sec. 204).

The legislation would also authorize the appropriation of funds to the Federal Trade Commission to carry out its functions, powers, and duties. $41 million would be authorized for fiscal year 1975, $45 million for fiscal year 1976, and $49 million for fiscal year 1977.

Committee Action

Your committee acting through its Subcommittee on Commerce and Finance held six days of hearings (March 19, 20, 27, 28, 29, and 30, 1973) on H.R. 20 (introduced by Mr. Moss, for himself and Mssrs. Eckhardt, Carney, Dingell, Adams, and Conte) and H.R. 5021 (introduced by Mr. Broyhill of North Carolina, for himself and Mr. McCollister).

In these hearings, the Subcommittee received testimony from the Chairman of the Federal Trade Commission, from representatives of consumers' groups, business, and trade associations and from interested individuals.

On May 17, 1973, H.R. 7917, the bill herein reported, was introduced by Mr. Moss, for himself and Messrs. Eckhardt, Helstoski, Breckinridge, Dingell, Adams, and Carney of Ohio. The bill reflected improvements developed during the Subcommittee's hearings.

The Subcommittee devoted six days to markup of H.R. 7917 and reported it to the full Interstate and Foreign Commerce Committee by voice vote.

The full committee reported the bill, as amended, to the House by voice vote after spending five days marking it up.

Background and Need—Consumer Product Warranties

With the introduction of the assembly line and the mass production of goods, the techniques of advertising and mass merchandising, there has been made available to American consumers a continually growing assortment of goods to bring convenience and pleasure to their lives.

In 1896 the year marking the beginning of the American motor vehicle industry, thirteen cars of the same design were produced by an organized company. In 1971, 75 years later over 8.5 million passenger cars were produced in the United States.

Comparable growth was occurring in the production of other consumer products. Some idea of this growth, the diversity of products involved, the pervasiveness of the use of consumer products, and the vast sums of money spent for such products by American consumers is shown in the following table: [1]

HOME APPLIANCES—MANUFACTURERS' SALES AND RETAIL VALUES, 1960 TO 1972

[Compiled from reports of associations and manufacturers, Sales include exports, except that data for consumer electronics cover domestic production only. Except as indicated, covers electric appliances only]

Product	Sales (1,000 units)					Retail value (millions dollars)				
	1960	1965	1970	1971	1972	1960	1965	1970	1971	1972
Home laundry	4,776	6,567	7,075	7,986	9,032	1,148	1,399	1,482	1,660	1,901
Dryers, clothes	1,260	2,098	2,981	3,377	3,925	261	367	525	583	689
Electric	818	1,388	2,129	2,527	2,989	159	236	360	417	505
Gas	442	710	852	850	936	102	131	165	166	184
Washing machines	3,364	4,430	4,094	4,600	5,107	817	1,014	957	1,077	1,212
Automatic and semiautomatic	2,601	3,771	3,869	4,270	4,824	697	916	925	1,025	1,617
Wringer and spinner	763	659	225	339	283	120	98	32	52	45
Washer-drier combinations	151	39	NA	NA	NA	70	18	NA	NA	NA
Other major appliances	12,525	16,873	19,931	22,171	25,190	2,666	3,103	3,781	4,086	4,640
Dishwashers	555	1,260	2,116	2,477	3,199	142	276	466	542	676
Food waste disposers	760	1,360	1,977	2,292	2,772	61	82	129	137	172

[1] Statistical abstract of the United States, 1973, pages 734-35.

Product	Sales (1,000 units)					Retail value (millions dollars)				
	1960	1965	1970	1971	1972	1960	1965	1970	1971	1972
Freezers	1,045	1,160	1,359	1,437	1,576	308	271	302	311	342
Ranges, electric	1,495	2,065	2,362	2,714	3,232	413	446	540	601	707
Free-standing	860	1,285	1,767	2,014	2,422	224	290	417	469	550
Built-in	635	780	595	700	810	189	156	123	132	157
Range, gas	1,814	2,266	2,362	2,549	2,660	271	435	510	517	564
Free-standing [1]	1,475	1,787	2,036	2,186	2,270	199	334	439	445	488
Built-in [2]	339	479	326	363	390	72	101	71	72	76
Refrigerators, electric	3,475	4,930	5,286	5,691	6,315	1,129	1,282	1,448	1,542	1,705
Water heaters, electric	715	1,095	1,684	1,922	2,276	75	92	152	173	205
Water heaters, gas	2,666	2,737	2,785	3,089	3,160	267	219	234	263	269
Electric housewares	34,497	66,398	74,078	75,121	79,245	884	1,979	1,747	1,745	1,896
Bed coverings	3,335	4,610	4,050	4,000	4,200	77	78	81	72	80
Blenders	455	1,800	5,100	4,100	4,300	16	45	128	86	99
Broilers	NA	1,890	2,605	2,650	2,724	NA	43	71	73	78
With rotisseries	NA	515	880	950	990	NA	18	40	43	43
Without rotisseries [3]	NA	1,375	1,725	1,700	1,734	NA	25	31	30	35
Can openers [4 5]	1,200	4,300	5,000	4,750	4,925	28	60	65	62	64
Coffee makers, automatic	4,695	6,600	8,100	8,700	9,000	94	104	130	139	171
Corn poppers	780	1,105	2,300	2,900	4,000	1	7	23	32	52
Floor polishers	1,024	1,181	1,156	1,158	994	44	47	46	46	40
Frypan skillets	2,455	2,650	3,200	3,300	3,500	44	56	93	99	112
Griddles, automatic	275	390	500	550	660	6	8	13	15	18
Hair dryers, with bonnets [6]	NA	4,325	4,100	4,350	4,800	NA	78	98	96	96
Heating pads	2,575	3,000	3,900	3,900	4,200	15	15	23	27	34
Hotplates and buffet ranges	565	705	810	825	890	5	6	10	10	13
Irons	6,410	9,860	9,275	9,350	9,510	91	140	159	161	179
Steam and steam/spray	4,440	7,950	7,985	8,150	8,400	73	123	144	147	168
Other	1,970	1,910	1,290	1,200	1,110	18	17	15	14	11
Mixers, food	3,245	3,925	4,675	4,875	5,150	73	59	90	93	109
Stand	815	950	875	850	950	29	29	33	32	38
Portable	2,430	2,975	3,800	4,025	4,200	44	30	57	61	71
Oral hygiene devices [5 7]	NA	3,300	2,850	2,250	2,280	NA	45	46	36	32
Slicing knives	NA	5,900	2,075	2,175	2,250	NA	97	42	46	50
Toasters, automatic	3,345	4,750	5,975	6,300	6,525	60	74	108	117	111
Vacuum cleaners	3,313	5,107	7,382	7,973	8,337	311	398	502	518	542
Waffle and sandwich grills	825	1,000	1,025	1,015	1,000	16	22	19	17	16
Air treatment	7,872	13,216	20,195	19,135	18,999	669	935	1,679	1,570	1,356
Air-conditioners, room	1,580	2,945	5,887	5,438	4,508	435	624	1,207	1,147	911
Dehumidifiers	375	210	598	397	566	40	16	47	33	47
Fans	4,687	7,703	9,875	9,450	9,850	167	236	283	245	244
Heaters	1,230	1,808	2,835	2,750	2,925	27	29	70	66	70
Humidifiers	NA	550	1,000	1,100	1,150	NA	30	72	79	84
Consumer electronics	21,151	34,800	30,063	32,730	38,809	2,168	3,916	3,660	4,680	5,442
Phonographs, production	4,333	6,245	3,860	4,562	5,184	585	796	505	544	509
Table and portable	2,958	4,436	2,856	3,500	4,256	NA	271	174	210	213
Console and radio-phono combinations	1,375	1,809	1,004	1,062	928	NA	525	331	334	296
Radios, production	10,695	14,082	8,261	8,224	9,849	314	302	173	176	209
Table and clock radios	6,160	8,051	3,676	4,276	4,824	155	187	95	105	128
Portable radios	4,535	6,031	4,585	3,948	5,025	159	115	78	71	81
Television, black and white, production	5,708	8,382	4,851	4,848	5,600	1,269	1,336	643	627	692
Table and portable	3,274	6,956	4,463	4,415	5,341	589	974	558	530	636
Console	2,211	1,318	388	433	259	579	330	85	97	56
Phono and/or radio combinations	223	108				101	32			
Television, color, production	[8] 120	2,646	4,632	6,349	7,908	NA	1,482	2,339	3,333	4,032
Table and portable	NA	316	2,495	3,570	4,721	NA	NA	973	1,517	1,978
Console	NA	2,089	2,018	2,673	3,106	NA	NA	1,251	1,711	1,969
Phono and/or radio combinations	NA	241	119	106	81	NA	NA	115	105	85
Tape recorders [5]	295	3,445	8,459	8,747	10,268	NA	NA	NA	NA	NA
Power lawn mowers	3,800	4,500	5,650	5,575	6,130	352	421	791	781	858

[1] Beginning 1965, includes high-oven models.
[2] Beginning 1965, includes set-in models.
[3] Includes toaster-broilers.
[4] Includes combination can openers/knife sharpeners/ice crushers.
[5] Includes imports.
[6] Includes salon-type dryers.
[7] For 1965, toothbrushes only; therafter includes water-pulsating units.
[8] Represents factory sales.

NA Not available.

Source: Billboard Publications, Inc., New York, N.Y., Merchandising Week, annual statistical issues. (Copyright.)

These articles, of course, represent only a small portion of the consumer products on which warranties can be and are given.

Paralleling the growth of acquisition of consumer products has been a growing concern of the American consumer with the quality and

durability of many of those products. Another growing source of resentment has been the inability to get many of those products properly repaired and the developing awareness that the paper with the filigree border bearing the bold caption "Warranty" or "Guarantee" was often of no greater worth than the paper it was printed on. Indeed, in many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead.

Warranties are currently governed by common law and the Uniform Commercial Code. The Uniform Commercial Code has been adopted in forty-nine States (all but Louisiana) and the District of Columbia. In the jurisdictions where it is in effect, it generally controls the rights of parties in commercial transactions and it is commonly accepted as today's law of sales.

A warranty is a statement or representation expressed or implied made by a seller of goods with reference to the character or quality of the goods being sold. It is not necessary to the creation of an express warranty for the formal words "warranty" or "guarantee" to be used or that the seller have a specific intention to make a warranty.

An implied warranty arises by operation of law rather than out of an agreement or action of the parties to the sale and purchase. Unless they are expressly modified or excluded these implied warranties arise in every sale. Two types of implied warranties under the Uniform Commercial Code which are pertinent here are the implied warranties of merchantability and of fitness. Under the implied warranty of merchantability, goods must be reasonably fit for the general purpose for which they are sold. The implied warranty of fitness arises where the seller at the time of sale has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. The implied warranty of fitness is that the goods will be fit for that purpose. Many of the so-called warranties and guarantees now given on consumer products disclaim or negate these implied warranties of merchantability and fitness.

Presidential Messages on Consumer Matters

On March 15, 1962, President Kennedy sent the first Presidential Message on consumer interests to the Congress. Since then six additional Presidential Messages on consumer matters have been submitted to the Congress.

In his message of February 6, 1968, President Johnson established a Task Force on Appliance Warranties and Service consisting of the Special Assistant to the President for Consumer Affairs, the Chairman of the Federal Trade Commission, the Secretary of Commerce, and the Secretary of Labor. They were directed to begin work immediately with industry to (1) encourage improvements in the quality of service and repairs (2) assure that warranties and guarantees say what they mean and mean what they say (3) let the consumer know how long he may expect a product to last if properly used and (4) determine whether Federal legislation was needed.

President Nixon, in his Consumer Message of November 3, 1969, activated a task force consisting of his Special Assistant for Consumer Affairs, and representatives from the Department of Commerce, the Department of Labor, the Federal Trade Commission, the Department of Justice, and the Council of Economic Advisors to comment on the need for guarantee and warranty legislation in the household appliance industries and in other fields.

On March 1, 1971, in a message to the Congress, President Nixon proposed a Fair Warranty Disclosure Act which would provide for clearer warranties and prohibit the use of deceptive warranties. In that message, he stated

> A constant source of misunderstanding between consumer and businessman is the question of warranties. Guarantees and warranties are often found to be unclear or deceptive. . . . This proposal would increase the authority of the Federal Trade Commission to require that guarantees and warranties on consumer goods convey adequate information in simple and readily understood terms.
>
> It would further seek to prevent deceptive warranties; and it would prohibit improper use of a written warranty or guarantee to avoid implied warranty obligations arising under state law.

FTC Reports on Warranties

Beginning in the late 1950's a rising tide of complaints was received by Members and committees of the Congress, the Federal Trade Commission, and other officials and agencies of the Federal Government from irate owners of motor vehicles complaining that automobile manufacturers and dealers were not performing in accordance with the warranties on their automobiles. During this period as many letters were received by the FTC on this subject as on any other since the Commission was established in 1914. In the main, these letters complained of the manufacturer or dealer not living up to the terms of the automobile warranty in one or more respects, of automobiles that were unsafe, poorly designed, noisy, or that attempts to get service or defects cured were unsuccessful even when the car had been returned repeatedly to the dealer.

In mid-1965 the FTC directed its staff to undertake a limited field investigation to determine whether there was sufficient evidence of the failure of American car manufacturers to perform in accordance with their new car warranties to justify additional steps being taken to protect the public interest. On the basis of its staff's preliminary report the Commission on July 6, 1966, directed an investigation of automobile warranties under section 6(b) of the Federal Trade Commission Act and ordered the four domestic auto manufacturers to file special reports with the Commission.

Initially automobile manufacturers offered a sixty-day guarantee on parts and workmanship. However, in order to obtain the benefits of the guarantee the automobile owners either had to take his car to the factory or send for the parts by mail. By 1930 with the dealer franchise system developed the warranty became a simple short-term

ninety days or 4,000 miles, whichever came first, warranty. It guaranteed against defects in materials and workmanship and ran from the manufacturer to the dealer. The entire car except tires and batteries was covered by the warranty. The dealer then passed the warranty on to the customer.

This system of warranties prevailed until the early fall of 1960 when for competitive reasons a warranty race began between the big four automobile manufacturers (American, Chrysler, Ford, and General Motors). However, by the time the 1967 models were introduced, each of the "big four" were again offering virtually the same warranty on their automobiles. It consisted of extension of the warranty coverage to subsequent owners, a basic warranty of 2 years or 24,000 miles on defects in materials and workmanship, and a five-year or 50,000 mile (whichever occurred first) warranty on the power train consisting of such items as the engine block, head and internal engine parts, water pump, transmission, drive shaft, universal, joints, rear axle and differential, steering and suspension components, and wheels and wheel bearings.

Because of costs a cutback in warranty coverage on new automobiles began with the 1968 model automobiles.

In the FTC's staff report on automobile warranties issued on November 18, 1968, the staff concluded among other things that:

> 1. Performance of manufacturers and dealers under the warranty has not achieved the levels implied by the warranty.
> 2. Failure to perform up to warranted standards has been encountered in the manufacture and preparation of cars under the warranty.
> 3. An excessive amount of service under the warranty does not meet the standards of consumer acceptability.
>
> * * * * *
>
> 11. An increase in private litigation while placing pressure on the industry for better made cars and improved service does not represent an efficient or generally satisfactory way to achieve proper performance under the warranty.

In its subsequent report on automobile warranties made on February 19, 1970, the Federal Trade Commission proposed enactment of "a new and comprehensive Automobile Quality Control Act, which would give statutory recognition to the public utility obligations of automobile manufacturers and provide for minimum standards of quality, durability, and performance of new automobiles, and all parts thereof and which would place a statutory obligation on manufacturers to provide consumers with defect-free automobiles in compliance with such standards and to repair defective automobiles and automobile parts which do not conform to such standards."

Task Force on Appliance Warranties and Service

On January 8, 1969, the Task Force on Appliance Warranties and Service consisting of the Chairman of the Federal Trade Commission, the Secretary of Commerce, the Secretary of Labor, and the Special Assistant to the President for Consumer Affairs which had been designated by President Johnson in his Consumer Message to the Congress

of February 6, 1968, issued its report. In carrying out the study leading to the report the Federal Trade Commission had concentrated on the warranty aspects of the project. In preparation for the report the Commission studied over 200 warranties used by 50 manufacturers of major appliances. Among the conclusions stated by the Federal Trade Commission in its portion of the report relating to appliance warranties and service are the following:

> 1. There are a number of problems associated with major appliance warranties. However, the underlying and basic problem which must be solved, is how to persuade or compel a manufacturer and the retailer to provide the purchaser of a major appliance with a meaningful guarantee which they will honor in both letter and spirit subsequent to the sale.
>
> * * * * *
>
> 3. Manufacturers, servicing dealers, and independent service companies are aware that consumer dissatisfaction with the manner of performance under warranties is quite prevalent. Despite the obviously harmful effects of this dissatisfaction at least to their goodwill, they have not undertaken to do much about it. Perhaps their reluctance is attributable to competitive pressures. It is difficult for a company to conform voluntarily to high standards and practices if it has competitors who continue to reap greater profits by pursuing less honorable tactics. One way these pressures can be overcome is by effective industry-wide efforts to eliminate abuses and raise standards on a uniform basis under the leadership of an impartial government agency.
>
> 4. In some instances manufacturers have not lived up to their unstated but no less real obligations under their guarantees. They have failed to maintain adequate and properly distributed stocks of spare parts, and have attempted to pass this obligation along to retailers who they know cannot afford the expense of assuming this burden. They have failed to discard a servicing dealer or independent servicing agency which does not provide acceptable warranty service. They have failed to give more than cavalier treatment to consumer appeals for assistance when the retailer has refused to honor the guarantee.
>
> * * * * *
>
> 6. The consumer does not have a readily available or practical means of compelling the manufacturer or the retailer from whom he purchased the appliance or the servicing agency responsible for its maintenance to perform their respective warranty obligations.
>
> * * * * *
>
> 10. There is substantial evidence that at the time of the sale the purchaser of a major appliance does not understand the nature and extent of the protection provided by the manufacturer's warranty or of the obligations under the

warranty of the manufacturer or of the retailer. This lack of understanding may be due to deceptive advertisements, a misleading or inaccurate explanation by the salesman who sold the appliance, or to the content and terminology of the warranty itself.

11. A number of the warranties in use, and particularly those which embody differing periods of coverage for various parts and components of a product, are deceptively captioned through the use of such terms as "Ten Year Guarantee" or "Lifetime Guarantee" because the period of coverage referred to in the caption does not apply to the entire product.

12. Virtually all major appliance warranties contain provisions which purport to disclaim any liability which might arise by virtue of the implied warranties or merchantability and fitness for particular purposes under the Uniform Commercial Code. . . .

13. The contention of manufacturers and retailers that limited warranties are justified in order that they may avoid damage claims which are frivolous or which amount to many times the value of the goods cannot be supported. . . .

14. The majority of the major appliance warranties currently in use contain exceptions and exclusions which are unfair to the purchaser and which are unnecessary from the standpoint of protecting the manufacturer from unjustified claims or excessive liability.

* * * * *

16. A number of the present methods and criteria used to determine the amount of compensation to be paid retailers for warranty service are unsatisfactory. . . .

17. The extended service contracts and extended term warranties that are in use today may have one or more of the following disadvantages: a. they may be overpriced and designed solely to increase the margin of profit on the sale; b. they may not provide sufficient compensation for the servicing agency and aggravate the warranty problems noted above; c. they may be devised simply as a means for increasing sales and contain illusory promises which will not provide the consumer with any real protection.

* * * * *

19. Measures must be taken to encourage both manufacturers and retailers to honor fully their warranties. One of the more promising means to this end is the intensification of efforts to persuade or to compel them to give guarantees which are explicit and which do not contain conditions or qualifications which are ambiguous or unfair to the purchaser. Avoidance of obligations which are stated in precise and exact terms is difficult even for the most callous. Moreover, opportunities for the concealment of one-sided provisions and and the making of self-serving interpretations by the guarantor are minimized if the guarantee is couched in clear and understandable language.

* * * * *

Committee Hearings

In addition to the hearings held in this Congress your Committee acting through its Subcommittee on Commerce and Finance also held three days of hearings in 1970 (September 29, 30, October 1) and six days of hearings in 1971 (September 28, 29, October 12, 13, 14, and 15) on consumer product warranties. Those hearings established the need for (1) requiring that the terms and conditions of written warranties on consumer products be clearly and conspicuously stated in simple and readily understood language, (2) prohibiting the proliferation of classes of warranties on consumer products and requiring that such warranties be either a full or limited warranty with the requirements of a full warranty clearly stated, (3) safeguards against the disclaimer or modification of the implied warranties of merchantability and fitness on consumer products where a written warranty is given with respect thereto, and (4) providing consumers with access to reasonable and effective remedies where there is a breach of a warranty on a consumer product. All of these requirements are met by title I of H.R. 7917 as herein reported.

Federal Trade Commission Act Amendments

The Federal Trade Commission was established in 1915 pursuant to the provisions of the Federal Trade Commission Act which had been enacted the preceding year. The Commission consists of five members appointed by the President by and with the advice and consent of the Senate for terms of seven years. Not more than three members of the Commission may be members of the same political party. A focal point of the Commission's jurisdiction is section 5 of the Federal Trade Commission Act. As originally enacted in 1914 section 5 proscribed unfair methods of competition in commerce. In 1938 section 5 was amended to extend the jurisdiction of the FTC to cover "unfair or deceptive acts or practices in commerce". The necessity for this amendment was explained as follows in the report from your Committee: "The words 'unfair methods of competition' in section 5 have been construed by the Supreme Court as leaving the Commission without jurisdiction to issue cease and desist orders where the Commission has failed to establish the existence of competition. In other words, the Act is construed as if its purpose were to protect competitors only and to afford no protection to the consumer without showing injury to a competitor." [2]

Notwithstanding the 1938 amendments, the Wheeler-Lea Act, the FTC continued to be hampered as an effective force in promoting fair and free competition and safeguarding the consuming public against unfair or deceptive acts or practices by the scope of its authority being limited to matters "in commerce" and by being made to rely solely on the cease and desist order procedure for enforcement.

In or affecting Commerce

Article I, Section 8 of the United States Constitution grants the Congress several specified powers, among them "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." The Federal Trade Commission Act was

[2] House Report No. 1613, 75th Congress, First Session, P. 3.

passed in 1914 as an exercise of that power. Since that time, the courts have interpreted the Congress' power to include authority over ostensibly intrastate transactions which significantly affect interstate commerce. Although the jurisdiction of most other federal agencies has been found to be co-extensive with the constitutional authority of Congress, a Supreme Court decision of the early 1940's has prevented a similar redefinition of the scope of the authority of the Federal Trade Commission.

At the time of the passage of the FTC Act, the Commerce Clause was thought to apply only to the actual interstate movement of products. In *Hammer v. Dagenhart*,[3] for instance, the Supreme Court declared that there was no federal authority over the intrastate manufacture of goods, even though the subsequent interstate sale and shipment of those goods by the same corporation could be subjected to federal regulation. Section 5 of the FTC Act as originally drafted and as amended in 1938 used the term "in commerce". "Commerce" is defined by section 4 of the Act to include only "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia . . ." The early decisions involving the Commission read this language in a restrictive manner.[4]

This century, however, has seen an enormous expansion of economic activity in the United States. The purely local commerce which originally characterized American business enterprise has been replaced by large scale multi-state industrial and commercial activity.

In *Bunte Bros.* v. *FTC*,[5] the Supreme Court faced the issue squarely and declared that only a Congressional amendment could expand the scope of the FTC Act. The opinion cited an unsuccessful attempt by the Commission to obtain such an amendment in 1935.

The *Bunte Bros.* decision has never been overruled. The courts have diminished its impact to a certain extent by broadly construing what is in interstate commerce. In *FTC* v. *Cement Institute* [6], for instance, the terms of an FTC cease and desist order were held binding on certain cement companies which operated wholly intrastate. However, they had participated in activities of a multi-state trade association which were designed to fix prices throughout the entire United States. Other cases have attempted to enlarge the concept of practices "in" commerce to compensate for the Commission's lack of jurisdiction over matters "affecting" interstate commerce.[7]

Despite this trend, the existence of the *Bunte Bros.* decision places considerable limitations on the ability of the Commission to protect adequately the interests of competitors and consumers in the modern American economy. The FTC is generally without authority to regulate the practices of businesses engaged in transactions which neither cross state lines nor constitute a part of a pattern of interstate commerce conducted by the business concern itself or its local agents. This is in sharp contrast to the scope of the Commerce Clause in the Constitution.

[3] 247 U.S. 251 (1918).
[4] *See, e.g., Ward Baking Co.* v. *FTC*, 264 F. 2d 330 (2d Cir. 1920) and *Winslow* v. *FTC*, 277 F. 206 (4th Cir. 1921).
[5] 312 U.S. 349 (1941).
[6] 333 U.S. 683 (1948), *rehearing denied* 334 U.S. 839 (1949).
[7] *See, e.g., Holland Furnace* v. *FTC*, 269 F.2d 203 (7th Cir. 1959), *cert. denied* 361 U.S. 932 (1960) and *Morton's Inc.* v. *FTC*, 286 F.2d 158, 161 (1st Cir. 1961).

As the court noted in *Cement Institute*, "The Commission would be rendered helpless . . . if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state." [8]

Yet this seems to be an accurate reflection of the current limitations on the authority of the FTC. In consumer protection activities as well as the areas of antitrust, many problems with obvious national repercussions are beyond the Commission's jurisdiction.

It is unrealistic to restrict the jurisdiction of the FTC under section 5 of the Act to only interstate transactions. Although almost all economic activity today has interstate effects, it is possible (as the Court noted in *Cement Institute*) [9] for a persistent, inventive and determined law violator to cast his business in the form of a series of intrastate steps, with only incidental interstate transactions. The Commission is at present prevented from taking the action necessary to achieve the public benefits envisioned by Congress when the agency was created. The simplest and most sensible solution to this problem is to amend the FTC Act to grant the Commission jurisdiction over matters "affecting" interstate commerce. This will reflect both the structure of the modern American economy and the current Constitutional concept of the proper scope of the Federal government's authority to regulate the economy.

Cease and Desist Order Procedure

Until 1973 the only procedure available for enforcement of section 5(a) of the Act was the cease and desist order. Under this procedure whenever the FTC has reason to believe that any person is violating section 5(a) and that action by the Commission would be in the public interest it may issue a complaint and notice of hearing. In most instances before a complaint is issued, however, the party involved is given an opportunity to consent to a formal "cease and desist" order or he may be permitted to agree informally to discontinue the practice. Consent to such an order refers to future practices. It does not admit of violations in the past. In the event the case is not settled by a consent order or an informal agreement a complaint is issued and a public hearing is held before an administrative law judge of the FTC. This is a trial type hearing with all of the attendant safeguards provided for in the administrative procedure provisions of sections 556 and 557 of Title 5 United States Code.

After taking testimony the administrative law judge drafts an initial decision for the Commission. If the Commission is of the opinion based on the record of the hearing that the act or practice in question is violative of section 5(a) it issues an order directing the party charged to "cease and desist" the act or practice. Unless the party subject to cease and desist order files a petition for review with an appropriate Court of Appeals of the United States the cease and desist order becomes final on the 60th day after it is served. In the event review of a cease and desist order is sought the order of the Commission does not become final until affirmance is obtained from the Court of Appeals or by the Supreme Court of the United States if

[8] 333 U.S. at 696.
[9] 333 U.S. 683 (1948), *rehearing denied* 334 U.S. 839 (1949).

taken to that Court for review. Violation of a final order to cease and desist subjects the offender to a civil penalty.

Some cases have taken years from the filing of the original complaint to a cease and desist order becoming final.

In this regard the report of a special commission of the American Bar Association established to study the FTC stated:

> Problems of delay have vexed the FTC ever since it was established, and some of the most notorious examples of protracted administrative proceedings have occurred in that agency. One consequence of such delay was illustrated recently in *Columbia Broadcasting System, Inc.* v. *FTC.*, in which a Court of Appeals, reviewing in 1969 an FTC cease and desist order entered in 1967 under Section 5, found that evidence of injury to competition had been based on a 1959 investigation. The Court concluded that market conditions had changed so substantially in the intervening years that the FTC's findings were no longer reliable, and it remanded the case for the taking of additional evidence on the question of injury.

The FTC was given no power to halt an unfair or deceptive act of practice even though it might be doing great damage to the consuming public. Even when a final cease and desist order was entered the sanction for violation until 1973 was at most $5,000.

Rule-Making

Substantial sentiment has developed over the years that in many instances the desirable manner of implementing the broad standards of Section 5(a) of the Federal Trade Commission Act should be by means of rule-making with the complaint-cease and desist order procedure used as a means of enforcing the rules. Rule-making offers the obvious advantages that (a) each person who could be affected by the proposed rule is afforded an opportunity to be heard on it in a well defined and well understood procedure, (b) the rules are developed in advance of their application to any person or practice and apply with uniformity, and (c) judicial review of any rule is available as well as of the procedures used in adopting it. The FTC has issued rules to define acts or practices it considers to be violations of Section 5(a) since the mid-1920's. Until 1962 these rules were known as Trade Practice Rules or Trade Practice Conference Rules. These rules were designed to describe in lay language acts or practices in a particular industry that the Commission considered to be a violation of Section 5(a). Rules were issued after a Trade Practice Conference attended by representatives of the industry and of the Commission.

In 1962 the Commission instituted the practice of issuing Trade Regulation Rules. Like the Trade Practice Conference Rules, these rules seek a voluntary abandonment of acts or practices thought to be unfair methods of competition or unfair or deceptive. Where such rules result in avoidance of such practices or voluntary abandonment of them, the Commission is spared the time-consuming and expensive process of proceeding against each particpant in an industry through adjudicatory cease and desist order proceedings.

[1] Report of the ABA Commission to study the Federal Trade Commission, September 15, 1969.

Notwithstanding the FTC's long history of rule-making, there have been continuing assertions that the agency did not possess substantive rule-making authority. In 1970 a challenge to the FTC's rule-making authority was dismissed on grounds that it was brought prematurely.[10] Two years later the United States District Court for the District of Columbia in the so-called *Octane Rating* case held that the Federal Trade Commission Act did not confer authority on the Commission to promulgate rules having the effect of substantive law.[11]

While the decision of the District Court in the *Octane Rating* case was in effect, hearings were held and markup begun on H.R. 7917 (herein reported) before your Committee's Subcommittee on Commerce and Finance.

On June 27, 1973, the Court of Appeals for the District of Columbia Circuit reversed the District Court's *Octane Rating* decision.[12] The effect of the Circuit Court's decision was to recognize the FTC's authority to prescribe rules having substantive effect which would constrain the conduct of legitimate businesses based on the very broad standards of unfair methods of competition and unfair or deceptive acts or practices. The only procedural requirements that the FTC is required to observe are to afford notice of the proposed rulemaking, including a statement of its legal basis and the substance of the proposed rule or a description of the subjects and issues involved, and opportunity for comment in accordance with Section 553 of Title 5, United States Code. On judicial review such rules may only be set aside if they are found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; contrary to Constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedures required by law.

Your committee believes these rulemaking procedures and the scope of judicial review are inadequate for proceedings in which the integrity of the proposed rule may rest on the resolution of issues of material fact. We believe that the rulemaking procedures and judicial review provisions of section 202 (described below) afford the safeguards which are needed.

Studies of the FTC

As consumer consciousness developed in the 1960's, more and more attention was focused on the FTC as the principal consumer protection agency of the Federal Government. In June, 1968, seven volunteers dubbed "Nader's Raiders" began an in-depth study of the Commission. Their report, which was extremely critical of the manner in which the Commission was staffed and administered and in which it carried out its legislative mandate, was published in January, 1969.

Less than four months later, President Nixon wrote to the President of the American Bar Association (ABA), requesting the Association to undertake a professional appraisal of the present efforts of the Federal Trade Commission in the field of consumer protection, in its enforcement of the antitrust laws, and of the allocation of its resources between these two areas. A 16-member special commission was

[10] *Bristol-Meyers Co.* v. *FTC* (424 F.2d 935 (1970); *cert. denied* 27 L.ed. 2d 52 (1970)).
[11] *National Petroleum Refiners Association* v. *Federal Trade Commission* (340 F.Supp. 1343 (1972)).
[12] 482 F.2d 672 (1973); *cert. denied* 94 Sup.Ct. 1475 (1974).

appointed to carry out this task. It was placed under the chairmanship of Miles W. Kirkpatrick, who at that time was Chairman of the ABA's Section of Antitrust Law.[13] Although couched in somewhat more subdued terms, the report of the ABA's Special Commission supported the findings of Nader's Raiders. Both reports noted the need for additional statutory authority to permit the FTC to carry out its consumer protection responsibilities.

The Alaska Pipeline Act (Public Law 93–153)

Both the Nader and ABA reports recommended that the FTC be empowered to obtain preliminary injunctions against unfair or deceptive acts or practices which are unfair or deceptive to consumers. This authority was granted by Section 408 of the Alaska Pipeline Act, which authorized the FTC to obtain temporary restraining orders and preliminary injunctions of violations or threatened violations of any provision of law administered by the Commission.

In addition, Section 408 amended the Federal Trade Commission Act in two other respects sought by the Commission. It increased the penalty for violation of cease and desist orders from $5,000 to $10,000 and gave the Commission the right to represent itself through its own attorneys in civil actions if, after notifying the Attorney General and giving him 10 days to take the action proposed by the Commission, the Attorney General failed to do so.

Section-by-Section Description of the Committee Amendments to the Bill

As reported by your Committee, H.R. 7917 (with the exception of section 201) is amended section by section. The following description is of the Committee's amendments and section 201.

SHORT TITLE

The first section of the bill provides that the legislation may be cited as the "Consumer Product Warranties—Federal Trade Commission Improvements Act".

TITLE I—CONSUMER PRODUCT WARRANTIES

SECTION 101—DEFINITIONS

Among the terms defined in section 101 which are important to understanding title I of the legislation are the following:

The term "consumer product" is defined to mean any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes. There are many products which fall within this definition which are also used for other than personal, family, or household purposes. For example, automobiles which are used for business purposes. Such items are consumer products for the purposes of this legislation.

The term is also defined so as to specifically include such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed. Under concepts of

[13] Mr. Kirkpatrick was later appointed and served as Chairman of the Federal Trade Commission.

property law fixtures such as hot water heaters and air conditioners when incorporated in a dwelling become a part of the real property. It is intended that the provisions of title I continue to apply to such products regardless of how they are classified.

The provisions of the legislation regarding disclosure of the terms and conditions of written warranties on consumer products (section 102) would apply only to consumer products actually costing more than $5. The provisions of the legislation requiring that most written warranties on consumer products be designated as "full" or "limited" warranties and specifying the duties of the warrantor under a full warranty (sections 103 and 104) would only apply to consumer products actually costing more than $10.

"Commission" is defined to mean the Federal Trade Commission.

The term "consumer" is defined to mean the first buyer at retail of any consumer product, any person to whom such product is transferred during the duration of a warranty or service contract applicable to such product and any other person who is entitled by the terms of such warranty or service contract or under applicable State law to enforce against the warrantor or contractor the obligations of the warranty or contract. Thus, where a warranty or service contract on a consumer product is given for a specified duration it would cover transferees who use the product.

As defined the term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers. This definition includes, among others, all persons in the chain of production and distribution of a consumer product including the producer or manufacturer, component supplier, wholesaler, distributor, and retailer. The term is intended to exclude those persons not regularly engaged in the business of making consumer products directly or indirectly available to consumers. Thus, the provisions of title I do not apply to sporadic private transactions involving consumer products.

The term "warrantor" is defined to mean any supplier who gives or offers to give a warranty. Thus, a person who is not a supplier cannot under the terms of the legislation be a warrantor.

A "warranty" is defined to mean (1) 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 (2) any undertaking in writing in connection with the sale of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking. In either case the written affirmation, promise, or undertaking must become a part of the basis of the bargain between a supplier and the first consumer purchaser. In addition, the term "warranty" also includes an implied warranty arising under state law.

The term "service contract" is defined to mean a contract in writing to perform, over a fixed period of time or for a fixed duration, services relating to the maintenance or repair of a consumer product.

Some terms which are defined in section 101 are omitted here because they are defined to have their usually understood meaning. Other terms which are omitted are used in particular sections of the legislation and will be dealt with in connection with the description of those sections.

SECTION 102—WARRANTY PROVISIONS

Section 102 only applies to consumer products actually costing the consumer $5 or more. The words "actually costing" are intended to exclude added imposts such as sales taxes. For example, if a consumer product is sold for $4.98 in a State with a 4-percent sales tax the provisions of section 102 would not be applicable to a warranty on such product even though the consumer must actually give the retailer $5.18 for the product ($4.98 for the product, $0.20 for State sales tax).

Subsection (a) provides that any supplier warranting a consumer product to a consumer in writing must fully and conspicuously disclose in simple and readily understood language the terms and conditions of the warranty pursuant to rules issued by the Commission in accordance with section 109. The purpose of this requirement is to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.

The subsection enumerates thirteen categories of information that the Commission may require to be set out in any written warranty on a consumer product. Of course, the FTC could by rule require the inclusion of additional information in any written warranty on a consumer product. On the other hand it could also omit from inclusion in any such written warranty any of the categories set out in the legislation.

Under subsection (b) the Commission must prescribe rules requiring that terms of any warranty on a consumer product be made available to the consumer or prospective consumer prior to the sale of the product to him. In addition the Commission is authorized to prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product must be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale materials or other representations in writing.

Subsection (b) also makes it clear that the Commission is not authorized by this legislation to require that any consumer product or any of its components be warranted nor to prescribe the duration of any warranty given on a consumer product.

However, the Commission is authorized to prescribe rules extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such product by reason of the failure of the product to conform with the warranty or by reason of the failure of the warrantor or service contractor to carry out his obligations within the periods specified in the warranty or contract.

Subsection (c) prohibits any warrantor of a consumer product from conditioning his warranty on the consumer using in connection with

such product, any article or service which is identified by brand, trade, or corporate name. This prohibition would not apply in the case of a service provided without charge under the terms of a warranty. Furthermore, this prohibition could be waived by the Commission if it found that the warranted product will function properly only if the product or service so identified is used in connection with the warranted product and that the waiver is in the public interest. If the FTC waived this prohibition it would be required to publish its decision in the *Federal Register* including its reasons therefore.

Under this prohibition, for example, no automobile manufacturer may condition his warranty of an automobile on the use of a named motor oil or on the use of its own automobile parts unless he shows that any other motor oil or automobile parts which are available will not function properly and will not give equivalent performance characteristics in the automobile.

SECTION 103—DESIGNATION OF WARRANTIES

Subsection (a) requires any supplier warranting a consumer product in writing to clearly and conspicuously designate the warranty either as a "full (statement of duration)" warranty or guaranty or as a "limited" warranty or guaranty unless exempted from doing so by the Commission pursuant to subsection (c). Only written warranties on consumer products incorporating the Federal minimum standards set forth in section 104 could be designated as "full (statement of duration)" warranties or guaranties. These requirements for designating warranties and the provisions of section 104 would only apply to written warranties on consumer products actually costing the consumer more than $10 (exclusive of taxes).

Subsection (b) provides that the provisions of sections 102, 103, and 104 do not apply to statements or representations similar to expressions of general policy concerning customer satisfaction which are not subject to any specific limitation. The reference here is to such statements as "satisfaction guaranteed or your money refunded" where there is no other statement and no limitation on the suppliers obligation. The subsection specifically provides, however, that such a statement would remain subject to provisions of the Federal Trade Commission Act and of section 110(c) of this legislation which refers to deceptive warranties.

The Commission may by rule define in detail the duties set forth in section 104(a) and their applicability to warrantors of different kinds of consumer products who offer "full (statement of duration)" warranties. The FTC could also by rule determine when a warranty in writing did not have to be designated as a "full" or "limited" warranty. This authority would be granted by subsection (c).

SECTION 104—FEDERAL MINIMUM STANDARDS FOR WARRANTY

Subsection (a) defines the duties that a supplier must assume if it issues a "full" written warranty on a consumer product. Such a supplier (1) must as a minimum undertake the repair or replacement within a reasonable time and without charge of such consumer product in the case of a defect, malfunction, or failure to conform with such

written warranty, (2) may not impose any limitation on the duration of any implied warranty on the product, and (3) if the product (or a component thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy such defect or malfunction, the supplier must permit the consumer to elect either a refund or replacement of such product or parts (as the case may be) with an identical or reasonably equivalent product or part. In any case in which replacement of a component part of a consumer product is involved, replacement includes installing the part in the product without charge.

The terms "remedy", "replacement", "refund", and "without charge" are defined in paragraphs (5), (6), (7), and (11), respectively, of section 101. "Remedy" as used in title I allows the warrantor to elect repair, replacement, or refund. However, he may not elect to make a refund, unless he is unable to provide a replacement and repair is not commercially practicable or cannot be timely made; or unless the consumer is willing to accept the refund.

As defined "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted product. "Refund" means refunding the actual purchase price less depreciation based on actual use.

The term "without charge" means the warrantor cannot assess the consumer for costs the warrantor or his representatives incur in connection with the required repair or replacement of a warranted consumer product. It does not mean that the warrantor must necessarily compensate the consumer 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 imposes an unreasonable duty upon the consumer as a condition of securing repair or replacement then the consumer would be entitled to recover such reasonable incidental expenses in an action against the warrantor.

Subsection (b) provides that a "full" warrantor may not impose any duty other than notification upon any consumer as a condition of securing repair or replacement of any consumer product which does not conform to the written warranty unless the warrantor can demonstrate that such duty is reasonable. Thus the burden of proof would be on the warrantor. However, the warrantor may require as a condition for the replacement of any consumer product under a "full" warranty that the replaced consumer product shall be made available to the supplier free and clear of liens and other encumbrances except as otherwise provided by rule or order of the Commission in instances in which such a requirement would not be practicable. Making the product which is to be replaced "available" to the warrantor might, if it were portable, include returning it to the place where it was purchased. One instance where it is expected that the Commission might excuse the consumer from returning the defective product to the warrantor free and clear of liens and encumbrances is where it has become a part of real property which is subject to a mortgage. It is to be presumed that the mortgagor would not object to a defect-free fixture replacing one which is defective.

Subsection (c) makes it clear that the warrantor under a "full" warranty may be excused from the duties under that warranty if unreasonable use including failure to provide reasonable and necessary maintenance caused the warranted consumer product to fail to conform to the written warranty. The term "reasonable and necessary maintenance" is defined in section 101(4) to mean operations (1) which the consumer reasonably can be expected to perform or have performed, and (2) which are necessary to keep any consumer product performing its intended function and operating in the manner (if any) specified in the warranty.

Subsection (d) provides that if a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty then the warranty on the product shall for the purposes of any legal action under this legislation or under State law be deemed to incorporate at least the minimum requirements of section 104.

SECTION 105—FULL AND LIMITED WARRANTING OF A CONSUMER PRODUCT

This section makes it clear that the legislation is not intended to prohibit the selling of a consumer product which has both full and limited warranties applicable to it. However, such warranties must be clearly and conspicuously differentiated. For example, the manufacturer of a television set might offer a full one-year warranty on the picture tube, but restrict the warranty to parts on all other parts of the television set. The parts warranty would, of course, have to be designated as "limited".

SECTION 106—SERVICE CONTRACTS

This section makes it clear that a supplier may sell a service contract on a consumer product in addition to or in lieu of a warranty in writing on such product if such contract fully and conspicuously discloses in simple and readily understood language its terms and conditions. Section 106 also authorizes the Commission to prescribe rules with respect to the manner and form in which terms and conditions of service contracts on consumer products shall be clearly and conspicuously disclosed. The authority given to the FTC under this section with respect to the disclosure of the terms and conditions of service contracts is coextensive with the authority given to the Commission under section 102 with respect to the disclosure of the terms and conditions of warranties and does not detract from the Commission's basic authority to prevent unfair or deceptive acts or practices under section 5(a) of the Federal Trade Commission Act.

SECTION 107—DESIGNATION OF REPRESENTATIVES

This section makes clear that the legislation does not prevent any warrantor from designating a representative to perform duties under the warranty if there are reasonable arrangements for compensation of the designated representative. However, no such designation would relieve the warrantor of his direct responsibilities to the consumer, nor would it make the designated representative a co-warrantor.

SECTION 108—LIMITATION OF DISCLAIMER OF IMPLIED WARRANTIES

Subsection (a) provides that no supplier may disclaim or modify any implied warranty to a consumer with respect to a consumer product if (1) the supplier makes any express warranty in writing to the consumer with respect to such consumer product, or (2) at the time of sale or within 90 days thereafter the supplier enters into a service contract with the consumer which applies to the consumer product. In other words, the implied warranties of merchantability and fitness would apply with respect to a consumer product whenever an express warranty in writing is given with respect to that product or at the time of sale or within 90 days thereafter the supplier enters into a service contract with the consumer applying to that consumer product. Any disclaimer, modification, or limitation made in violation of these provisions would be ineffective for purposes of any action under title I or State law. This subsection is designed to eliminate the practice of giving an express warranty while at the same time disclaiming implied warranties. This practice often has the effect of limiting the rights of the consumer rather than expanding them as he might otherwise be led to believe.

Subsection (b) however, makes it clear that if only a "limited warranty" is given an implied warranty on the consumer product may be limited to the duration of such limited warranty if such duration is conscionable and set forth in clear and unmistakeable language, and prominently displayed on the face of the warranty.

SECTION 109—COMMISSION RULES

This section provides that rules prescribed for title I are to be prescribed in accordance with, and are subject to judicial review under the provisions of the new section 18 of the Federal Trade Commission Act which would be added by section 202 of the legislation.

SECTION 110—REMEDIES

In subsection (a) the Congress declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. The Commission must prescribe rules setting forth requirements for any informal dispute settlement procedure which is incorporated in any written warranty on a consumer product. Such rules must provide for the participation in such procedure by independent or government entities. It is essential that such entities be completely impartial since they are to be involved in the decision-making process under such procedure.

The rules prescribed by the FTC with respect to such informal dispute settlement procedures must also prohibit saddling the consumer with any costs which would discourage use of the procedure.

One or more suppliers could establish an informal dispute settlement procedure which is in accord with the FTC's rules. This procedure could be incorporated in written warranty on a consumer product. The supplier could then require that the consumer must initially resort to such procedure before bringing any action under section 110(d).

A limited exception is made to this requirement in the case of class action. Before a class may be established for the purpose of pursuing an action under section 110(d), the action may be brought so that the court can determine whether it may be maintained as a class action and to determine the membership of the class. The legislation permits a class action to be brought without first resorting to any informal dispute settlement procedure, but the class action could only be pursued to the point necessary to establish the representative capacity of the named plaintiffs. At that point or at some time previous to reaching it the named plaintiffs, after informing the defendant that they are acting on behalf of the class, would have to resort to the informal dispute settlement procedure before the class action could be carried further.

An adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding, but the decision reached in any informal dispute settlement procedure relating to any matter considered in such procedure would be admissible in any civil action arising out of a warranty on a consumer product if the procedure complies with the FTC's rules and is incorporated as a part of a written warranty pertaining to consumer products.

The FTC is authorized to review the bona fide operation of any informal dispute settlement procedure which is made a prerequisite to pursuing a legal remedy under a warranty on a consumer product. Such a review could be made upon the Commission's own initiative or upon written complaint filed by any interested person. If the Commission finds that any such procedure or its implementation fails to comply with the Commission's rules it is authorized to take whatever remedial action it determines necessary under any authority it has under this legislation or any other provision of law.

Your committee expects the FTC's rules to establish reasonable time limits within which decisions must be reached. If a decision is not reached within the prescribed time limits the consumer could begin a civil action on the warranty involved.

Subsection (b) provides that it is a violation of section 5(a)(1) of the Federal Trade Commission Act for any person to fail to comply with any requirement imposed on such person by or pursuant to this legislation or to violate any prohibition contained in this legislation.

Under subsection (c) the district courts of the United States are given jurisdiction over any action brought by the Commission to restrain (1) any supplier from making a deceptive warranty with respect to a consumer product, or (2) any person from failing to comply with any requirement imposed on such person by or pursuant to this legislation or from violating any prohibition contained in this legislation. In the proper circumstances a temporary restraining order or a preliminary injunction could be granted by the court without bond. However, if a complaint under section 5 of the Federal Trade Commission Act were not filed within such period (not exceeding 10 days) as might be specified by the court after issuance of the temporary restraining order or preliminary injunction the order or injunction would be dissolved by the court and be of no futher force or effect. In the case of an enforcement action against a newspaper, magazine, or other periodical, the committee anticipates that the court would

follow the procedures set out in section 13(c) of the Federal Trade Commission Act.

Subsection (d) gives a right of action to any consumer who is damaged by the failure of a supplier to comply with any obligation under title I or under a warranty or service contract as those terms are defined in section 101. This would, of course, include implied warranties arising under State law. This right of action would permit the consumer to bring suit in (1) any court of competent jurisdiction in any state or the District of Columbia, or (2) in an appropriate district court of the United States. However, in order that such a suit be brought in a district court of the United States (1) each individual claim would have to exceed the sum or value of $25.00, (2) the matter in controversy would have to exceed the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in the suit, and (3) if brought as a class action, the number of named plaintiffs would have to equal or exceed 100.

The purpose of these jurisdictional provisions is to avoid trivial or insignificant actions being brought as class actions in the federal courts. However, if the conditions of this section are met by a class of consumers damaged by a failure to comply with a warranty as defined in Title I or a violation of Title I, Section 110(d) should be construed reasonably to authorize the maintenance of a class action. In this context, your Committee would emphasize that this section is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers. In particular, assuming that other requirements for a class action are met, your Committee does not believe that the requirement of individual notice to each potential class member should be invoked to preclude a class action where the identification and notification of the class members is not possible after reasonable effort by the plaintiff. In considering whether identification and notification of all members of the class is possible with reasonable effort, the particular circumstances of the plaintiff or plaintiffs should be carefully evaluated by the court, including the question of whether the financial burden of such identification and notification would be likely to deny them relief.

Under the provisions of section 1337 of title 28, United States Code, the district courts of the United States have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce. The legislation herein reported is, of course, an act of Congress regulating commerce. This orginal jurisdiction vested in the district courts by section 1337 pertains without regard to the amount in controversy in any civil action or proceeding. In the absence of these provisions a civil action on a warranty under the legislation could be brought in a district court of the United States without regard to the amount involved. Under the monetary and other limitation included in subsection (d), no action could be brought in a United States district court unless the overall matter in controversy exceeded $50,000 exclusive of interests and cost, and no individual claim could be aggregated in any such action by joinder or in a class action unless it exceeded $25.00. In addition to these requirements if the action is to be brought as a class action, there must be at least 100 named plaintiffs.

If a consumer finally prevails in any action brought in a State or Federal court under the provisions of this subsection, the court may allow him to recover as a part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff in connection with the institution and prosecution of the action.

Subsection (e) prohibits the bringing of any action under this legislation for breach of a warranty or service contract unless the person obligated under the warranty or service contract is first afforded a reasonable opportunity to cure the breach. A limited exception to this prohibition is made in the case of class actions. The class action may be brought but may only be carried to the point of establishing the representative capacity of the named plaintiffs until those named plaintiffs afford the defendant the opportunity to cure the breach while notifying him that they are acting on behalf of the class. The provisions of subsection (e) would be inapplicable in any case in which the consumer has initially resorted to an informal dispute settlement procedure prescribed in the warranty.

Subsection (f) provides that only the supplier actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a warranty for purposes of this section 110. Any rights arising thereunder may be enforced under section 110 by a civil action only against such supplier and no other person.

SECTION 111—EFFECT ON OTHER LAWS

Subsection (a) makes it clear that nothing in title I of the legislation shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act, any statute defined in the Federal Trade Commission Act as an antitrust act, or the Federal Seed Act. In addition the subsection also spells out that title I does not apply to seed for planting.

The Committee recognizes that the provisions of this title do not cover the totality of circumstances and articles of property for which warranties and service contracts are given. Thus, subsection (a) would, among other things, preserve the authority of the Commission to promulgate rules and issue orders articulating the requirements of Section 5(a) of the Federal Trade Commission Act with respect to warranties and service contracts falling outside of the scope of title I.

Subsection (b) provides that title I of the legislation will not invalidate or restrict any right or remedy of any consumer under State law or affect the liability of or impose liability on any person for personal injury.

Any requirement of a State whether made by law or regulation which relates to labeling, disclosure or other matters regarding written warranties or performance thereunder and which is within the scope of sections 102, 103, and 104 and rules implementing those sections

and which is not the same as requirements of those sections or those rules would not under subsection (c) be applicable to warranties on consumer products complying with such sections and rules.

However, if an appropriate State agency applied to the FTC and the Commission determined that any requirement of such State covering any transaction to which title I of this legislation applies (1) affords greater protection to consumers than the requirements of title I, and (2) does not unduly burden interstate commerce, then the State requirement would not be preempted by subsection (c). This exemption would apply to the extent specified in the determination of the FTC and only for so long as the State continued to administer and effectively enforce any such greater requirement.

Except for section 102(c) which prohibits the conditioning of a warranty on a consumer product on the use of any article or service identified by brand, trade or corporate name, the provisions of title I would be inapplicable to any warranty, the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion would be subject to the provisions of title I. Thus, except for section 102(c), to the extent section 207 of the Clean Air Act and the regulations of the Administrator of the Environmental Protection Agency apply to written warranties on motor vehicles and engines, the provisions of title I would be inapplicable.

SECTION 112—EFFECTIVE DATE

The provisions of the legislation will take effect six months after the date of enactment. Of course the legislation will not apply to any consumer product manufactured prior to such date. The requirements of title I which cannot reasonably be met without the promulgation of rules by the FTC would take effect six months after the final publication of the rules. The Commission could, for good cause shown, give designated classes of suppliers up to an additional six months to bring their written warranties into compliance with rules promulgated under title I.

Under subsection (c) the Commission is required to promulgate initial rules for the initial implementation of title I as soon as possible after the date of enactment of the legislation but in no event could such rules be promulgated later than one year after the date of the enactment of the legislation.

TITLE II—FEDERAL TRADE COMMISSION IMPROVEMENTS

SECTION 201—JURISDICTION OF THE COMMISSION

This section amends sections 5, 6, and 12 of the Federal Trade Commission Act so to expand the FTC's jurisdiction from acts and practices "in" interstate commerce to those "in or affecting" interstate commerce.

The existing jurisdiction of the FTC under sections 5, 6 and 12 of the Federal Trade Commission Act is much narrower than the scope of the "commerce clause" of the Constitution. Consequently many

unfair or deceptive acts or practices which affect commerce are now either beyond reach of the Commission or require an inordinate expenditure of time and effort to marshall evidence to satisfy purely jurisdictional technicalities. Many frauds occur in large cities where concentrations of the poor and of the poorly educated make them easy targets for dishonest operators. At the present time these are largely beyond the Commission's reach.

The amendments made by section 201 will permit more effective regulation of the marketplace by the FTC by placing within its reach unfair or deceptive acts or practices which, although local in character, affect interstate commerce. The expansion of the FTC's jurisdiction made by this section 201 is not intended to occupy the field or in any way to preempt State or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission.

Where cases of consumer fraud of a local nature which affect commerce are being effectively dealt with by State or local government agencies, it is the Committee's intent that the Federal Trade Commission should not intrude.

SECTION 202—RULEMAKING AUTHORITY

As previously noted in this report the courts have confirmed the FTC's authority to prescribe substantive rules detailing what activities will constitute unfair methods of competition for unfair or deceptive acts or practices. However, the only procedural requirements which now apply to the making of such rules are those of section 553 of Title 5 of United States Code. Under section 553 all that is required is that general notice of proposed rulemaking be published in the *Federal Register*. The notice must include (1) a statement of the time, place, of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved In addition to the giving of notice the FTC is required to give interested persons an opportunity to participate in the rulemaking. This requirement can be satisfied by permitting such persons to file written views with the Commission. Once the Commission has adopted a rule it could under section 706 of title 5 of the United States Code be set aside by a court on review only if it was found to be (1) arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law; (2) contrary to Constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitations or short of statutory right; or (4) without observance of procedure required by law.

Your committee believes these rulemaking procedures and this scope of judicial review may be inadequate in some cases where fundamental factual premises of a rule are at issue. Because of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices", the committee believes greater procedural safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions

described below which we believe to be more appropriate in this context than merely relying upon the provisions of sections 553 and 706 of title 5.

Revised rulemaking authority

Section 202 replaces the existing rulemaking authority of the FTC under section 6(g) of the Act with a new section 18 which authorizes the FTC to issue rules defining with specificity the acts or practices which are unfair or deceptive and which are within the scope of section 5(a)(1) of the Federal Trade Commission Act. Such specificity would require that any such rule reasonably and fairly inform those within its ambit of the obligation to be met and the activity to be avoided. This rulemaking authority would be the exclusive substantive rulemaking authority of the FTC under the Federal Trade Commission Act. Thus, the Commission would not have rulemaking authority with respect to unfair methods of competition to the extent they are not unfair for deceptive acts or practices. This authority would be subject to the procedural requirements which are described below.

When proceeding to issue rules, the Commission would observe the provisions of section 553 of title 5 of the United States Code and would also (1) issue an order of proposed rulemaking stating the reason for the proposed rule with particularity sufficient to allow informed comment; (2) allow interested persons to comment on the proposed rule in writing and make all such comments publicly available; (3) hold an informal hearing in which interested persons could comment orally on the proposed rule; and (4) promulgate, if appropriate, a final rule together with a statement of its basis and purpose based on the matters described in clauses (1)–(3). If any oral hearing were held as provided in clause (3) a verbatim transcript of the hearing would be taken and would be made publicly available.

In any informal hearing held to permit oral comment on a proposed rule, any party would be entitled to present his position by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as might be necessary for a full and true disclosure of all disputed issues of material fact.

The words "disputed issues of material fact" are intended to describe and limit the scope of cross-examination in a rulemaking proceeding. Thus, the right of participants in the proceeding to cross-examine Commission witnesses does not include cross-examination on issues as to which there is not *a bona fide* dispute. In this connection, the Committee considers the rules of summary judgment applied by the courts analogous. Where the weight of the evidence is such that there can be no *bona fide* dispute over the facts, summary judgment is proper. Similarly, in such a situation cross-examination would not be permitted; neither is a participant entitled to cross-examination where the disputed issues do not involve material facts. This language in the bill is used to distinguish facts which might be relevant to the proceeding but not of significant enough import to rise to the level of materiality. The word material is used here with the same meaning it is given under the common law rules of evidence. Also of importance is the word "fact." Cross-examination is not required regarding issues in rulemaking proceedings

which are not issues of fact. Examples of such issues are matters of law or policy or matters whose determination has been primarily vested by Congress in the Federal Trade Commission. Thus, unless the subject matter with regard as to which cross-examination is sought relates to disputed issues, which are material to the proposed rule and which are fact issues, there is no right to cross-examination on the part of any party to the proceeding.

The right of a party to present his position would also be subject to the Commission's power to take steps designed to avoid unnecessary costs or delay and to limit cross-examination. Where parties have the same or similar interests, representatives would present the oral case for those interests and conduct cross-examination of them. However, no party would be denied the opportunity to present those aspects of his case and to conduct any cross-examination if he showed to the satisfaction of the Commission that he had made a good faith effort to reach agreement upon group representation and there were substantial issues which were not presented by the group representative.

The FTC's statement to accompany the adoption of a rule would have to include, among other things, statements (1) as to the extent of the acts and practices treated by the rule; (2) as to the matter in which, and extent to which, such acts or practices are unfair or deceptive; and (3) as to the economic impact of the rule taking into account the impact on small business.

The Committee wishes to emphasize that the requirements for the FTC's statement which accompanies the adoption of a rule are incorporated for the purpose of permitting a better understanding of the terms of the rule and the reasons for the rule on the part of the public. The statement is not intended to be a summary of all the legal findings which might be necessary to support the rule. In particular, the requirement that the statement include statements as to the economic impact of the rule does not require the Commission to undertake a full scale economic investigation prior to promulgation of the rule. To do this would inordinately delay FTC proceedings and deny relief to the consuming public while indefinite questions of economic prediction were resolved by the Commission. This provision should be read to require that the Commission consider the economic impact of the rule to issues and summarize its best estimate of that impact in the statement. Obviously, a full evaluation of the economic impact of the rule would have to await its implementation. The Committee would suggest, however, that the Commission maintain a continuing evaluation of the economic impact of its rules and where necessary utilize its powers to modify or amend such rules.

After any rule issued under these provisions became final a violation of the rule would constitute an unfair or deceptive act or practice violative of section 5(a)(1) of the Federal Trade Commission Act unless the Commission otherwise expressly provided in the rule.

Judicial review

Any person adversely affected by such a rule (including a consumer or consumer organization) could obtain judicial review of the rule. This would be done by filing a petition for judicial review with the United States Court of Appeals for the District of Columbia or for

the circuit in which such person resides or has his principal place of business not later than 60 days after the Commission prescribed the rule. The rule would not be affirmed by the court unless the Commission's action was supported by substantial evidence in the record taken as a whole.

The judgment of the court affirming or setting aside in whole or in part any such rule would be final subject to review by the Supreme Court upon certiorari or certification as provided in section 1254 of title 28 United States Code.

Banks

Under the Federal Trade Commission Act the Commission does not have authority to regulate banks. This legislation does nothing to change this situation. However, your committee is mindful that some acts or practices of banks can be unfair or deceptive to consumers.

Accordingly the Board of Governors of the Federal Reserve System is required to issue regulations proscribing acts or practices of banks which are substantially similar to the unfair or deceptive acts or practices proscribed by rules issued by the Federal Trade Commission under section 18 of the Act. These regulations must be issued by the Board of Governors within 60 days of the effective date of the FTC's rules. However, the Board of Governors would not have to issue such similar regulations if it found that such acts or practices of banks are not unfair or deceptive to consumers or if it found that implementation of such regulations with respect to banks would seriously conflict with essential monetary and payment systems policies of the Board. Such finding and the reasons therefor would have to be published in the *Federal Register*.

The Board of the Governors of the Federal Reserve System, the Comptroller of the Currency, and the Board of Directors of the Federal Deposit Insurance Corporation would each be required to establish a separate division of consumer affairs within their agency. These divisions of consumer affairs would receive and take appropriate action upon complaints with respect to unfair or deceptive acts or practices in or effecting commerce, and would enforce the regulations of the Board of Governors of the Federal Reserve System, with respect to banks subject to their separate jurisdictions.

Not later than March 15 of each year the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Board of the Directors of the Federal Desposit Insurance Corporation would have to transmit to the Congress a detailed report on its activities under this legislation during the preceding calendar year.

Exemption authority

The legislation specifically provides that any person to whom a substantive rule issued under the legislation applies may petition the Commission for an exemption from the rule based on special circumstances. The applicability of such a rule would not be stayed pending an application for an exemption from the rule nor pending judicial review of the Commission's actions with respect to a petition for exemption.

Judicial review of the Commission's action or failure to act with regard to a petition for exemption from a substantive rule issued

under this legislation would be in accordance with Chapter 7 of title 5, United States Code. The Commission's action would not be affirmed unless it was supported by substantial evidence in the record taken as a whole.

Savings provision

The legislation specifically provides that the amendments made by section 202 of the bill to the Federal Trade Commission Act shall not affect the validity of any rule promulgated under that section prior to date of enactment of the legislation. Furthermore, any proposed rule under section 6(g) of the Act with respect to which presentation of data, views and arguments is substantially completed before the date of enactment may be promulgated in the same manner and with same validity as such rule would have been promulgated with had section 202 not been enacted. Of course, if any rule which was prescribed before the date of enactment of the legislation is amended after such date, such amendment shall be made in accord with the revised rule-making provisions of section 18 of the Federal Trade Commission Act as added by section 202.

SECTION 203—INVESTIGATIVE AUTHORITY

Under the existing provisions of sections 6, 9, and 10 of the Federal Trade Commission Act, the FTC's investigatory powers and authority to obtain reports and documentary evidence and enforcement and penalty provisions relating to those powers are limited to corporations engaged in commerce. Of course, section 201 described previously in this report would expand this jurisdiction to cover those whose business affects commerce. However, section 5 and other provisions of the Act are cast in terms of "persons, partnerships, and corporations". In order to achieve conformity with these provisions and to make clear that entities covered by sections 6, 9 and 10 are the same as are prohibited from using unfair methods of competition, or unfair or deceptive acts or practices in or affecting commerce, sections 6, 9, and 10 of the Act are amended by substituting "person, partnership, or corporation" wherever the term "corporation" is used.

SECTION 204—REPRESENTATION

As noted earlier in this report, Public Law 93–153 (the Alaska Pipeline Act) amended sections 5 and 16 of the Federal Trade Commission Act to authorize the Commission to be represented in its own name by any of its attorneys designated by it in any civil action after notifying and consulting with the Attorney General and giving him 10 days to take the action proposed by the Commission. Additionally, if the Commission believes that any person, partnership, or corporation is liable to a penalty under section 5(1) or section 14, it may certify the facts to the Attorney General whose duty it is to cause appropriate proceedings to be brought or after having formally notified and consulted with and given the Attorney General 10 days within which to take the action proposed by the Commission, the Commission could itself cause appropriate action to be brought by its own attorneys.

As reported to the full committee from the Subcommittee on Commerce and Finance, the legislation would have authorized the FTC to appear after notice to the Attorney General in any civil action in its own name and through its own legal representative for the purpose of enforcing laws subject to its jurisdiction.

The FTC in a letter to Chairman Staggers dated March 11, 1974, supported the subcommittee's proposal and stated its position with regard to the provisions relating to representation in the Alaska Pipeline Act as follows:

> Section 206 would add to Section 5 of the Act, 15 U.S.C. § 45, a new subsection (m) which clearly authorizes the Commission, after notification to the Attorney General, to appear in any of its civil litigation through its own legal representative. The Commission supports enactment of Section 206.
>
> The Commission's present authority is contained in Sections 5(m) and 15 of the Act, 15 U.S.C. §§ 45(m) and (56), as amended by Section 408(d) and (e) of Public Law 93–153, and in certain respects differs from Section 206. Section 5(m) is a general provision which allows the Commission to represent itself "after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission." Section 16 contains a separate procedure with respect to civil penalty actions. Specifically, Section 16 requires the Commission to "(a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought . . . ; or (b) after compliance [with the general provisions of section 5(m)], itself cause such appropriate proceedings to be brought."
>
> We believe that the recently enacted amendments to the Federal Trade Commission Act may give rise to some confusion as to the appropriate roles of the Commission and the Department of Justice. The Commission, as an independent law enforcement agency, favors Section 206 of H.R. 7917 because it would clarify our relationship to the Executive Branch by assuring that its litigation is conducted in the manner best calculated to achieve the agency's enforcement goals.
>
> In practice the Commission almost always has represented itself before the courts, and because the Commission's attorneys have the experience and expertise that attends familiarity with the agency's business, the Commission has achieved a commendable record. Because the independence of this expert agency is so important to enforcement of the nation's consumer protection and antitrust laws, the Commission fully endorses Section 206 of H.R. 7917.

In the course of its markup of H.R. 7917, Chairman Staggers received a letter from the Assistant Attorney General for Legislative Affairs which addressed this question. In pertinent part it states:

> We differ strongly with the Commission with respect to its support for section 206 of the proposed legislation, which would authorize the Commission to supervise, and in its discretion to conduct its own civil litigation. While the Commission is, in a sense an "independent law enforcement agency," as it describes itself, its law enforcement is based upon an administrative process rather than a judicial process. The kinds of orders which the Commission issues in enforcing the statutes for which it is responsible are not essentially different from the kinds of orders which other regulatory commissions and agencies issue in enforcing their statutes. When it becomes necessary to enforce agency orders in judicial proceedings, the Department of Justice has generally been responsible for management of the litigation on behalf of the Government. This is but part of the Department's overall responsibility for the supervision and conduct of government litigation in the federal courts. See 28 U.S.C. 516. Performing this function, Department attorneys are well equipped by training and experience to make law enforcement judgments. As litigator for other federal departments and agencies, this Department can insure that the government maintains consistent positions on matters of common interest to all government agencies. Moreover the Department, through the local United States Attorneys, is able to establish effective continuing relationships with the various federal courts which maximize the government's prospects for successful law enforcement.
>
> It is also somewhat misleading to suggest that "in practice the Commission almost always has represented itself before the courts." The Department has never hesitated to call upon Commission attorneys for assistance in presenting the government's position when it concluded that such presentation could best advance that position, but supervision and control of the litigation has remained the law enforcement responsibility of Department attorneys. This division of responsibility has worked well in the past, and should be maintained.
>
> The Department's role in conducting litigation on behalf of the Federal Trade Commission has been considerably clouded by enactment of sections 408(d) and (e) of Public Law 93–153, which appear to authorize the Commission to initiate and conduct civil litigation in its own behalf after giving the Attorney General ten days to take proposed action for the Commission. Apparently the Commission is

no more satisfied with the relationship thus created than is the Department. The proper solution to problems created by hasty and incomplete consideration of the Federal Trade Commission amendments to the Trans-Alaska Pipeline legislation, we believe, is repeal of sections 408(d) and (e) of Public Law 93–153. This was also the position stated by the President in reluctantly accepting these provisions only because of the Nation's pressing need for legislation authorizing construction of the pipeline.

The Department strongly opposes enactment of section 206 of H.R. 7917.

Your committee believes that litigation on behalf of the United States Government requires coordination through a single department or agency of the United States. To do otherwise would result in hopeless confusion and ofttimes lead to the undesirable result of various departments and agencies of the Federal Government taking conflicting positions on issues of public policy. Traditionally, the Attorney General has coordinated and controlled litigation on behalf of the United States.

Accordingly, section 204 of the legislation amends the Federal Trade Commission Act so as to permit the FTC to appear in any civil action in its own name through its own legal representative only with the concurrence of the Attorney General.

SECTION 205—AUTHORIZATIONS OF APPROPRIATIONS

This section would authorize appropriations for the overall operation of the Federal Trade Commission. It would authorize $41 million for fiscal year 1975, $45 million for fiscal year 1976 and $49 million for fiscal year 1977. It should be emphasized that these amounts are not appropriations but authorizations of appropriations and have the effect of placing a ceiling on the amount which can be appropriated for a fiscal year. To place these authorizations in perspective it may be helpful to know that $28,354,000 was appropriated for operations of the FTC for fiscal year 1973, $32,236,000 was appropriated for such purposes for fiscal year 1974 with an additional amount of $260,000 expected to be appropriated for fiscal year 1974 in a supplemental appropriation. For fiscal year 1975 the President's budget requests $38,104,000 for the operation of the Commission.

For fiscal years ending after June 30, 1977, the legislation provides that only such sums may be appropriated to carry out the FTC's operations as are authorized by law.

Your committee believes that more systematic and therefor more effective legislative oversight of the activities of the FTC will result from providing for authorization of appropriation for the Commission's operations.

COST

It is estimated that Title I (consumer product warranties) will result in an average additional cost per year following enactment as follows:

Staff attorneys	$417, 800
Clerical personnel	94, 500
Overhead cost	297, 700
Total	810, 000

Total annual additional cost of Title I: $810,000.

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

Staff attorneys	$200, 000
Clerical personnel	40, 000
Overhead cost	153, 000
Total	411, 000

Total annual additional average cost of Title II following enactment: $411,000.

Total annual additional cost of Titles I and II: $1,221,000.

Agency Comments

Federal Trade Commission,
Washington, D.C., March 11, 1974.

Hon. Harley O. Staggers,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Chairman: The Commission has been asked by the Committee staff to comment on the provisions of H.R. 7917 as reported out of the Subcommittee on Commerce and Finance on November 27, 1973. Our remarks on the entire legislative proposal will be sent to the House Interstate and Foreign Commerce Committee separately. However, at this time we would like to comment on several features of H.R. 7917 which are similar to provisions contained in Public Law 93–153, the Trans-Alaska Pipeline Authorization Act which was passed by the Congress on November 16, 1973.

Section 202 of H.R. 7917 would increase the civil penalty for each violation of a final commission order from $5,000 to $10,000. Section 408(c) of Public Law 93–153, which is now effective, authorizes a $10,000 civil penalty for violations of Commission orders. Consequently, the Commission suggests that Section 202 of H.R. 7917 be deleted.

Section 204 would amend Section 13 of the Federal Trade Commission Act (Act), 15 U.S.C. 53, by recodifying the authority of the Commission to seek injunctions in aid of the administrative process in instances where acts or practices which are unfair or deceptive have occurred or are threatened. This authority as well as authority to similarly enjoin unfair methods of competition was granted to the Commission when Congress amended Section 13 of the Act by passing Public Law 93–153.

The Commission strongly prefers the language of P.L. 93–153 to that of Section 204 of H.R. 7917. Section 204 would cut back on recently acquired authority to seek injunctions to halt anti-competitive practices. For these reasons, we urge that Section 204 be deleted from H.R. 7917.

Section 206 would add to Section 5 of the Act, 15 U.S.C. 45, a new subsection (m) which clearly authorizes the Commission, after notification to the Attorney General, to appear in any of its civil litigation through its own legal representative. The Commission supports enactment of Section 206.

The Commission's present authority is contained in Sections 5(m) and 15 of the Act, 15 U.S.C. 45(m) and (56), as amended by Sections 408 (d) and (e) of Public Law 93–153, and in certain respects differs from Section 206. Section 5(m) is a general provision which allows the Commission to represent itself "after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission." Section 16 contains a separate pro-

cedure with respect to civil penalty actions. Specifically, Section 16 requires the Commission to "(a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought . . .; or (b) after compliance [with the general provisions of section 5(m)], itself cause such appropriate proceedings to be brought."

We believe that the recently enacted amendments to the Federal Trade Commission Act may give rise to some confusion as to the appropriate roles of the Commission and the Department of Justice. The Commission, as an independent law enforcement agency, favors Section 206 of H.R. 7917 because it would clarify our relationship to the Executive Branch by assuring that its litigation is conducted in the manner best calculated to achieve the agency's enforcement goals.

In practice the Commission almost always has represented itself before the courts, and because the Commission's attorneys have the experience and expertise that attends familiarity with the agency's business, the Commission has achieved a commendable record. Because the independence of this expert agency is so important to enforcement of the nation's consumer protection and antitrust laws, the Commission fully endorses Section 206 of H.R. 7917.

By direction of the Commission.

CHARLES A. TOBIN, *Secretary.*

FEDERAL TRADE COMMISSION,
Washington, D.C., April 29, 1974.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Committee's staff has advised the Commission that the House Interstate and Foreign Commerce Committee is now considering H.R. 7917. In my letter of March 11, 1974, the Commission's views concerning Sections 202, 204, and 206 of the bill were communicated to you. The purpose of this letter is to express the Commission's views with respect to certain provisions in Title II upon which we have not previously commented.

As you know, the Commission has previously endorsed comprehensive warranty legislation, and it is pleased to repeat that endorsement now. There are so many salutory features of the bill which we support that specific comment as to each is not practicable. Therefore, our current comments shall be restricted to the rulemaking provisions of both Title I and Title II of H.R. 7917. In our view these provisions are critically important and should be amended.

Section 203 of H.R. 7917 would codify new procedural requirements for making trade regulation rules respecting acts or practices which are unfair and deceptive within the meaning of Section 5 of the Act, 15 U.S.C. § 45, and, in addition, vest in the United States Court of Appeals jurisdiction to review the administrative proceedings under what is commonly referred to as the "substantial evidence" test. After serious consideration of these provisions, the Commission must advise the Committee that it is strongly opposed to Section 203.

As the Committee knows, the decision by the District Court for the District of Columbia in *National Petroleum Refiner's Association* v. *Federal Trade Commission*, 340 F. Supp. 1343 D.D.C. (1972) cast some doubt on the Commission's authority to promulgate substantive rules. However, these doubts were laid to rest last year by the United States Court of Appeals which reversed the District Court's decision in a lengthy and scholarly opinion reported at 482 F.2d 672.

On February 25, 1974, the Supreme Court declined to review the decision of the Court of Appeals. 42 L.W. 3485 (No. 73–806). In view of the successful conclusion of this litigation, the Commission considers that there is no need for legislative reaffirmation of its rulemaking authority.

Quite apart from the lack of any necessity for legislation, our objections to the provisions of Section 203 are based upon the substantial differences between our present authority and the limitations on that authority embodied in the proposal.

First, the bill would appear to restrict the Commission's existing authority to promulgate rules to prohibit "unfair methods of competition." The Commission perceives no reason for curtailing its powers in this area. Admittedly, the Commission's consumer protection responsibilities are more conducive to the rulemaking process, and, for this reason, the Commission does not foresee a high level of rulemaking activity in the antitrust area. That is not to say, however, that rulemaking is not an appropriate or an effective regulatory device for antitrust enforcement. For instance, where the legality of identical, similar, or related practices of an anticompetitive nature may be addressed responsibly and more efficiently in a single proceeding than in a case-by-case adjudication, law enforcement by rulemaking would be considered more favorably. We may also wish to consider formalizing some guidelines which now trigger an adjudicatory proceeding when they are infringed. Finally, it should be noted that some practices, such as the failure to post octane ratings involved in the *National Petroleum Refiner's* case, constitute both an unfair trade practice and an unfair method of competition. These should be handled in a single proceeding in which the Commission's full authority over all activity in violation of the Act may be exercised.

Second, the bill imposes a trial-type procedure on the rulemaking process which is (except in rare cases not applicable to the Commission) inappropriate. At present, the Commission adheres to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. These existing procedures require that the Commission publish the proposed rule in the Federal Register, invite interested persons to submit written comments, views, and data bearing upon the propriety of the proposal, and publish a concise statement of basis and purpose when the rule is promulgated. In addition, the Commission allows oral presentation of views in virtually all proceedings and provides a comprehensive and detailed statement of basis and purpose in conjunction with publication of the rule.

Section 203 purports to grant an "informal" hearing. Yet by requiring in every instance a hearing at which participants are allowed to present evidence, to cross examine witnesses, and to adduce rebuttal testimony, Section 203 does no less than mandate formal, on-

the-record rulemaking functionally equivalent to that required by 5 U.S.C. §§ 556 and 557. This requirement will, in our judgment prevent the Commission from expeditiously fulfilling its responsibilities.

There may be particular proceedings, as contemplated by 5 U.S.C. 553, in which no oral presentation is justified on the basis of the written comments submitted in response to the proposed rule. A mandatory hearing in such instances would result in a needless expenditure of Commission resources. Most frequently, both because broad factual issues may be disputed and because the written comments may reflect a diversity of opinion, an opportunity for oral presentation will be justified. In such instances, the Commission has provided in the past and will continue to provide a forum for oral presentations.

Were Section 203 to be enacted, it is not difficult to foresee a battery of lawyers adducing sworn testimony, whether initially or in rebuttal, on a variety of policy, legal, and insignificant factual matters which are more properly addressed in argument or written comments. Rulemaking proceedings before other agencies, notable examples being the Food and Drug Administration and the Interstate Commerce Commission, have experienced such practices with adverse results.

The Commission is not unmindful of the procedural safeguards Section 203 is designed to extend to interested persons, but on balance strongly believes that with its present authority the Commission can achieve necessary safeguards and, at the same time, maintain the flexibility necessary to respond fairly and expeditiously to the realities presented in rulemaking proceedings. The Commission has a long history of conducting its business with due regard for the rights of participants before it. If the Commission is too niggardly in protection of these rights, the courts are empowered to review the proceedings and can be expected to correct any prejudicial error.

In the Commission's view, its rulemaking procedures compare (and favorably so) with the procedures employed by Congress in the legislative process. Indeed, the Commission's rulemaking process is directly analogous to the legislative process. Examination of the relationship between the rulemaking function and the lawmaking function performed by adjudicative tribunals (including the Commission and the courts) is also fruitful. Adjudicative tribunals make law in individual cases and the law they make, through the principle of *stare decisis*, affects persons who are not parties to the proceedings, who have no notice of the proceedings, and who are not allowed to submit comments or views (let alone evidence) on the isues. Even as to persons who are parties to the adjudication, evidence may not be submitted on questions of law. Thus, we believe that the rulemaking procedures of the Commission also compare favorably to the lawmaking functions of adjudicative tribunals.

Third, Section 203 would require an "economic impact statement." At present the Commission attempts to take into account the impact of its rules, but it does not always hold that such assessments are relevant. For example, if the extent of a fraudulent practice is difficult to measure (some defy estimation) and the public is prejudiced by the practice, the Commission believes the public interest does not require an inquiry into the precise scope or extent of the fraudulent practices or the effect their cessation would have on certain businesses. That

someone is forced to reduce or abandon business based on illegal activity proscribed by the rule is immaterial, for violations of the law are not metamorphized into legal behavior depending upon economic impact. For example, the business failure of itinerant home repairmen who survived solely on fraudulent practices would be salutory. At the same time the laborious efforts necessary to calculate the precise impact of any such rule would tie up Commission financial and manpower resources with little public benefit.

Fourth, Section 203 raises many questions of interpretation by departing from well-settled terms and administrative law concepts. Knowing the skill and inclinations of the FTC bar, we believe these questions will create fodder for the litigation mill and may well require extended and costly court battles for resolution. The right to cross examine witnesses by parties who could not in "good faith" agree to group representation (however unreasonable their *bona fides*), coupled with the inquiry into what issues "are not adequately presented" in the group representation; the determination of what are "similar interests" giving rise to group representation; the right to conduct "such cross examination as may be required" on an issue and how it differs, if at all, from the traditional right to conduct full cross examination; the question of who determines what issues concern a "material fact" and the determinative criteria to be employed; the definition of an a"advisory" rule *vis a vis* an "administrative" rule; the question of what is sufficient "particularly" when publishing a notice of proposed rule; and the fact that the "substantial evidence" standard of review may imply adjudicatory proceedings in an "informal" hearing are but a few of the issues which certainly will engender litigation, all of it, in our view, to the detriment of the public which must await judicial resolution. More important, however, is the impact Section 203 could have in upsetting the well established roles of the Commission and the courts. If parties are entitled to present "evidence" on the rule, presumably including evidence on the policy involved, it appears that the traditional deference courts have paid to the Commission's expertise and discretion in formulating remedies will be sacrificed to the "substantial evidence" standard.

Fifth, Title I contains numerous provisions which require formal rulemaking for implementation. While Section 110(a)(2) apparently authorizes less than formal rulemaking for promulgation of rules setting forth requirements for an informal dispute settlement procedure, Section 109 would require that every rule setting forth substantive requirements to be followed by industry be promulgated pursuant to the arduous, formal procedures prescribed in Section 203. Thus Sections 102 (a), (b)(1)(A), (b)(1)(B), (b)(3), and (d) as well as Sections 103(c), 106, and 111(c)(2) each specify that rules shall be made in "accordance with Section 109", i.e. Section 203. The only rules with substantive effect which the Commission is authorized to promulgate under the less formal requirements of 5 U.S.C. § 553 are those which *waive* prohibitions against certain conditional warranties.

The Commission firmly believes that its use of 5 U.S.C. 553 is adequate to protect the procedural rights of the industries which will be affected by its rulemaking endeavors. We must also assume that the Subcommittee on Commerce and Finance considered those procedures

adequate to protect consumers when waivers of warranty requirements are sought by the regulated industries. In any event, the Commission holds the firm conviction that the procedures contemplated by 5 U.S.C. 553 are no less applicable to the waiver of regulatory obligations than to the establishment of such obligations. Consequently, we urge that the present Section 109 be deleted and in its stead the following language be adopted:

> SEC. 109. The Commission is authorized to establish rules for the implementation of this title pursuant to section 553 of title 5, United States Code.

This language is consistent with that contained in Section 109 of S. 356 and would provide that all persons interested in a proposed rule have the opportunity for oral presentation while avoiding the extreme expense and delay attendant to formal rulemaking.

A final point should be made concerning the impact of Section 203 on the Commission's budget. Although their precise cost consequences cannot be estimated with any degree of certainty, the Commission is concerned that the provisions of Section 203 could result in substantial additional costs in the form of delay. As we have indicated, this section of the bill establishes a procedure for promulgating trade regulation rules that depart materially from the traditional and well-established procedures of the Administrative Procedure Act. Since it is reasonable to expect that these uncertainties will give rise to protected administrative hearings and court litigation, years of delay may be encountered in defining authoritatively the requirements of this section and promulgating rules thereunder.

The costly delays which invariably result from efforts to superimpose trial-type procedures such as cross-examination upon the traditional rulemaking process are extensively documented. The drafters of the Administrative Procedure Act thoroughly considered and then rejected the notion that rulemaking would be fairer or more efficient if conducted as an adversary proceeding. The Attorney General's Committee to study Administrative Procedure similarly rejected such procedures as a general proposition, and cited at page 10 of its Report three examples of adversary rulemaking which it found to be "cumbersome and expensive."

Commentators have almost universally reached the same conclusion. Typical are J. Landic, *Report on Regulatory Agencies to the President-Elect* (1960) at page 17; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harvard Law Review 921 (1965); Reich, *The Law of the Planned Society*, 75 Yale L.J. 1227 (1966); Robinson, *The Making of Administrative Policy; Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970).

Professor Davis' celebrated *Administrative Law Treatise* (1958), which is extremely critical of the use of trial-type hearings in rulemaking was cited by W. W. Goodrich, as General Counsel, FDA, in *The FDA's View on Procedural Rules*, 23 Food, Drugs and Cosm. L.J., 481, 485 (1968), wherein he stated "[The major problem with rulemaking at FDA] is the problem of protracted, trial-type proceedings almost to the breaking point by delay *and by great financial expense* (emphasis added)."

A final and most significant commentary is the criticism of formal rulemaking voiced by the Administrative Conference of the United States in Recommendation 72–5, contained in its *Procedures for Adoption of Rules of General Applicability* (Dec. 14, 1972), which strongly advocates the use of the informal rulemaking procedures established by Section 553 of the Administrative Procedure Act, and recommends that agencies currently required to use formal rulemaking procedures take action to amend their statutes.

In short, the central theme of all of these comments and recommendations is the cost and delay which characterize formal rulemaking, and the consequent ineffectiveness of such rulemaking. Accordingly the Commission reiterates its grave concern regarding the provisions of Section 203, and respectfully urges the Committee to reconsider the advisability of abandoning the proven rulemaking procedures set forth in Section 553 of the Administrative Procedure Act.

By direction of the Commission,

CHARLES A. TOBIN, *Secretary.*

FEDERAL TRADE COMMISSION,
Washington, D.C., May 16, 1974.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On April 29, 1974, we forwarded to you our comments on Section 203 of H.R. 7917. At that time we also had hoped to discuss Section 207; however, our comments on that Section were not fully prepared. Since we felt it urgent to apprise you and the members of the Committee about our objections to the rulemaking provisions of the bill as soon as possible, we decided in favor of sending a separate letter on Section 207.

Basically Section 207 represents an attempt to provide the Commission with new, limited authority to seek judicial redress for consumers injured by acts or practices that are found to be in violation of final Commission orders. However the provision is susceptible to two different constructions, one narrow, the other expansive. If construed narrowly, Section 207 would permit a consumer redress action against only those parties specifically covered by a Commission order. If construed expansively, Section 207 would permit institution of actions seeking consumer redress against anyone who engaged in activity identical or similar to that prescribed by the provisions of one or more Commission orders as long as such persons had actual or implied knowledge of the pertinent orders.

The Commission supports the basic principle of consumer redress reflected in this provision, but is constrained not to endorse the legislation in its present form. Our reasons are several. They involve the criteria for and extent of liability authorized by Section 207 and the forum in which these matters are to be adjudicated. In addition there are certain technical difficulties for which we shall suggest amendments.

Before addressing these points we believe the Committee should be aware of the impact Section 207 will have on the Commission's ability to obtain the cease and desist orders which are intended to serve as the basis for subsequent consumer redress actions. Between July 1, 1971 and January 31, 1974, four hundred and forty (440) complaints in the consumer protection area were approved by the Commission. Approximately two-thirds of these resulted in consent orders. Thus, it can be seen that the consent order process is very important to the swift disposition of Commission business. We anticipate that no matter how it is ultimately construed, Section 207 may have a chilling effect on the willingness of prospective litigants to forego a full adjudicatory hearing when they consider that a consent order may be a prelude to a damage suit against them or others potentially affected by an order.

This probable impact on the consent order process will carry over to the adjudicatory process in two respects. First, a decline in consent orders will result in additional full hearings on those complaints which otherwise would have been settled informally. Second, the interest of those similarly situated to a respondent before the Commission, and thus candidates for consumer redress actions, will likely be felt in the attempts of such potential defendants to intervene or participate in the adjudicatory proceedings. We mention these inevitable consequences because the Commission's workload in obtaining cease and desist orders will be substantially increased even before efforts to implement the consumer redress provisions of Section 207 are initiated.

CRITERIA FOR AND EXTENT OF LIABILITY

The Senate, in considering a parallel consumer redress provision in S. 356, expressed its concern over the provision's probable impact on the Commission's ability to secure consent orders. See S. Rep. No. 93–151, 93rd Cong., 1st Sess., p. 29 (1973). In our view, however, it did not resolve the dilemma by limiting the effect of the order to *prima facie* status in the subsequent suit.

Section 207 is uninformative on the question of specific effect to be accorded Commission orders in suits it brings to redress consumer injuries. If the question remains unresolved, prottracted litigation on this point is a real possibility.

If the section is to be construed narrowly, we recommend that it be amended to state explicitly that Commission orders are to be given conclusive effect, except that an order entered upon consent may by its terms provide otherwise. This amendment, in addition to clarifying Section 207, preserves the integrity of orders issued after adjudication and appellate review by giving them the *res judicata* effect to which they are entitled, thus preventing district courts from second-guessing the Commission and the circuit courts of appeals. In addition, flexibility to insist upon a similar conclusive effect, *prima facie* effect, or no effect at all is provided to the Commission in consent order procedures.

On the other hand, if Section 207 is to be construed broadly to impose liability on anyone violating any Commission order, the effect of such orders in district court litigation would post questions on at least two

issues: (1) whether the district courts would be required to follow or permitted to disregard the Commission's expert judgment, as reflected in its orders, that certain acts or practices constitute a violation of the Federal Trade Commission Act; and (2) having found a violation of the Act, whether the remedial measures ordered by the court may, if they are different in form and extent from relief required by the Commission in the basic cease and desist order, serve as a lever to reopen a Commission order and subject it to collateral attack.

On the first point, that is whether the courts may disregard the Commission's holding that certain practices violate the law, we suggest that the Commission's holding must prevail so long as it is a reasonable construction of the Act. Otherwise, the spectre of numerous different courts interpreting the Act in different ways among themselves and from the Commission could become a reality. Such a contrariety of precedential standards would be destructive of uniform national policy on trade regulations. Consistent national policy is necessary for both the fair administration of consumer protection laws and the guidance of the business community which requires a degree of certainty that its activities are consistent with legal standards.

Unfortunately, Section 207 will not foster necessary consistency in trade regulation law. Admittedly, it may be argued that parties bound by an order may not relitigate issues in a subsequent proceeding before a district court. It may be argued also that under the principle of *stare decisis* persons who are not parties to a Commission order should be bound by the law of the order when there has been an adjudication, particularly when followed by appellate review. However, these arguments reflect only possibilities in the face of ambiguous statutory language. The Committee may, as did the Senate, articulate in legislative history a precise effect to be accorded an order. While we believe the effect should be conclusive as to the law the district courts must follow in these two situations, other considerations may obtain when a consumer redress action is premised on a consent decree.

The consent order process differs from an adjudication in that the guarantee of a comprehensive consideration of facts publicly adduced, evaluated, and relied upon in fashioning relief may be lacking. For instance if a major corporation with a large, nationwide share of a market were sued for violation of the provisions of a consent order entered against a much smaller regional establishment, it might be argued that the respondent agreed to consent merely to avoid the time, money and effort involved in adjudication, and not because of legal culpability. Under these circumstances it could be effectively argued that the Commission had engaged in no less than rulemaking through the consent order process and, thus, circumvented the required public notice and participation.

The obvious dilemma inherent in consumer redress actions based on consent orders is not insoluble. District court referral of precedential issues to the Commission for initial determination utilizing the primary jurisdiction of the Commission would accomplish this purpose and is discussed in our comments on the proper forum for consumer redress.

Whether a district court's findings that a particular form and extent of relief is warranted in an action can operate to reopen a previ-

ous Commission order requiring a different form or extent of relief is a more remote, but still serious consideration. Accordingly, we suggest that the Committee's report make it clear that Section 207 is not intended to alter the principle that all final Commission orders are inviolate to collateral attack.

At least as disturbing as the potential problem of collateral attack on Commission remedies—indeed, more disturbing—is the recognition that the section limits redress to violations occurring after an order becomes final. Violative activity before an order becomes final is effectively immunized against redress in an action under Section 207. This result is highly incongruous since the Commission possesses authority pursuant to Section 5 of the Act to require redress for acts and practices which it has found to violate the Act. Considering, therefore, that adjudicatory proceedings must take place in either the Commission or the courts, there is no advantage in the first instance to a court proceeding when the Commission can extend more effective relief.

In instances where consumer redress may not be required in the first instance, but industry-wide practices prevail, we would probably prefer to promulgate rules defining violative conduct (all who would be affected would be given notice and could participate); enforce the rules in proceedings brought on complaints wherein the issue would be whether the rule was violated (consumer redress might be ordered in appropriate cases); and for subsequent violations of an order, seek consumer redress so that the Commission order may be given *res judicata* effect.

CHOICE OF FORUM

Under either version of Section 207, the broad or the narrow, the authority to seek redress for acts "substantially similar" to those covered by a Commission order suggests that the courts, rather than the Commission, may have primary jurisdiction to determine in a trial *de novo* what acts are "substantially similar" (there is also the necessity to determine the effect to be accorded the law of a consent order discussed above). Such a construction of Section 207 would upset the balance between the courts and the Commission by placing in the courts responsibility to interpret the scope and effect of Commission orders and to fashion policy under the Federal Trade Commission Act. The Supreme Court recently has reiterated that sound public policy militates against such a result. In *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 93 S. Ct. 2488, 2494 (1973), Justice Douglas, speaking for unanimous Court, stated:

> We conclude that the District Court's referral of the "new drug" and the "grandfather" issues to FDA was appropriate, as these are the kinds of issues peculiarly suited to initial determination by the FDA. As the District Court said: "Evaluation of conflicting reports as to the reputation of drugs among experts in the field is not a matter well left to a court without chemical or medical background." * * * Threshold question within the peculiar expertise of an agency are appropriately routed to the agency, while the court holds its hand. As we stated in *Far Eastern Conference* v. *United States*, 342 U.S. 570, 574–575, 72 S. Ct. 492, 494, 96 L. Ed. 576: " . . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matters should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." And see *Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68, 91, S. Ct. 203, 208, 27 L. Ed. 2d. 203; *Ricci* v. *Chicago Mercantile Exchange*, *supra*, 409 U.S. at 304–306, 93 S. Ct. at 581–593.

Thus, notwithstanding which version of Section 207 the Committee adopts, the Commission urges that the section be amended to make it clear that primary jurisdiction over determining the scope of Commission orders and whether acts are "substantially similar" to those expressly prohibited by an order, resides with the Commission. In view of the fact that it may not always be possible to make such determinations prior to instituting a district court action, we further urge that the Commission be given the opportunity to make these determinations either before or after institution of the litigation.

While the Commission believes that either version of Section 207 may be made workable with the amendments suggested, both would be far less than ideal. We would emphatically prefer to see the authority for consumer redress vested in the Commission. Accordingly, we suggest that the Federal Trade Commission Act be amended to authorize the Commission to order such consumer redress as may be necessary to remedy the effects of violations of Commission orders.

The advantages of empowering the Commission to exercise this consumer redress authority are evident. As we have indicated earlier, the Commission possesses acknowledged expertise in the consumer protection field. Given this expertise and familiarity with the record of proceedings upon which consumer redress will be based, there is an obvious economy to conducting all proceedings before the Commission. In addition to relieving already overburdened district courts of this litigation, the amendment would assure a uniform national approach to consumer redress by consolidating the judgmental expertise in one body. Finally, judicial review will be preserved since Commission orders may be tested in appropriate courts of appeals.

The Commission has taken steps within the past few years to incorporates elements of consumer redress into its orders. In addition to corrective advertising, Commission orders have required restitution of money, recission and specific performance of contracts, and other remedial measures. Thus, the Commission is already familiar with the various factors and mechanics of consumer redress. The amendment would logically extend the exercise of that function from one that is

collateral to the cease and desist order to one that effects administrative implementation of orders previously entered.

TECHNICAL AMENDMENTS

The limitation of two years between entry of a final order and institution of the litigation is too short a period. In view of the fact that the time within which an action may be taken is computed from the date the Commission's order becomes final, persons violating an order after two years are effectively immunized against a consumer redress suit. We suggest that a limitation of two years (as with most statutes of limitation) be computed from the date the order is violated.

If the narrow version of Section 207 is adopted, the Commission recommends that the notice provision be deleted, for in view of the requirement of Subparagraph A that the specific acts or practices against which the Commission can institute consumer redress actions are those which ". . . are the same as or substantially similar to the acts or practices to which the cease and desist order [1] applied; . . . ," we fail to see the public interest in imposing the additional requirement of Subparagraph B that the acts or practices ". . . were engaged in with actual knowledge or knowledge fairly implied that such acts or practices were unfair or deceptive to consumers within the meaning of Section 5(a)(1) of the Act."

Finally we point out that Section 207 does not specify that its provisions are applicable to only those persons, partnerships and corporations subject to Commission jurisdiction pursuant to Section 5(a)(6). To rectify any ambiguity we suggest that the section be specifically amended to state as follows (Committee print, p. 34, at line 11):

> . . . , the Commission may institute civil actions [against such persons, partnerships, or corporations] in the district courts of the United States . . . .

By direction of the Commission.
Respectfully submitted.

CHARLES A. TOBIN, *Secretary.*

DEPARTMENT OF JUSTICE,
Washington, D.C., May 10, 1974.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice with respect to H.R. 7917, the Consumer Product Warranties and Federal Trade Commission Improvements Act of 1973, which is pending before your Committee, and with respect to the report of the Federal Trade Commission concerning that bill. Because the Commission's comments are limited to Title II of the proposed legislation, our comments herein are similarly directed.

[1] *i.e.*, "an order of the Commission to cease and desist from acts or practices which are unfair or deceptive to consumers and proscribed by Section 5(a)(1). . . ."

Section 202 of H.R. 7917 would increase the maximum civil penalty for each violation of a final Commission order to $10,000. We agree with the Commission that, since such an increase has already been accomplished by section 408(c) of Public Law 93–153, the Trans-Alaska Pipeline Authorization Act, enactment of section 202 is unnecessary.

We would further agree with the Commission that section 13 of the Federal Trade Commission Act, 15 U.S.C. 53, as amended by Public Law 93–153 is both more comprehensive and more desirable than section 204 of the bill. Under present law the Commission can seek injunctive relief in federal courts, in aid of its administrative jurisdiction, in cases involving consumer fraud and trade restraints. Section 204 would limit this authority to consumer fraud situations. Although the Department would agree that these situations present the most compelling need for interlocutory relief, we have no objection to retaining Commission authority to obtain injunctions pending administrative action in appropriate cases of trade restraint.

We differ strongly with the Commission with respect to its support for section 206 of the proposed legislation, which would authorize the Commission to supervise, and in its discretion to conduct its own civil litigation. While the Commission is, in a sense an "independent law enforcement agency," as it describes itself, its law enforcement is based upon an administrative process rather than a judicial process. The kinds of orders which the Commission issues in enforcing the statutes for which it is responsible are not essentially different from the kinds of orders which other regulatory commissions and agencies issue in enforcing their statutes. When it becomes necessary to enforce agency orders in judicial proceedings, the Department of Justice has generally been responsible for management of the litigation on behalf of the Government. This is but part of the Department's overall responsibility for the supervision and conduct of government litigation in the federal courts. See 28 U.S.C. 516. Performing this function, Department attorneys are well equipped by training and experience to make law enforcement judgments. As litigator for other federal departments and agencies, this Department can insure that the government maintains consistent positions on matters of common interest to all government agencies. Moreover the Department, through the local United States Attorneys, is able to establish effective continuing relationships with the various federal courts which maximize the government's prospects for successful law enforcement.

It is also somewhat misleading to suggest that "in practice the Commission almost always has represented itself before the courts." The Department has never hesitated to call upon Commission attorneys for assistance in presenting the government's position when it concluded that such presentation could best advance that position, but supervision and control of the litigation has remained the law enforcement responsibility of Department attorneys. This division of responsibility has worked well in the past, and should be maintained.

The Department's role in conducting litigation on behalf of the Federal Trade Commission has been considerably clouded by enactment of sections 408 (d) and (e) of Public Law 93–153, which appear to authorize the Commission to initiate and conduct civil litigation in

its own behalf after giving the Attorney General ten days to take proposed action for the Commission. Apparently the Commission is no more satisfied with the relationship thus created than is the Department. The proper solution to problems created by hasty and incomplete consideration of the Federal Trade Commission amendments to the Trans-Alaska Pipeline legislation, we believe is repeal of sections 408 (d) and (e) of Public Law 93–153. This was also the position stated by the President in reluctantly accepting these provisions only because of the Nation's pressing need for legislation authorizing construction of the pipeline.

The Department strongly opposes enactment of section 206 of H.R. 7917.

Finally, because so many of the provisions embodied in Title II of H.R. 7917 have already been enacted, while others, such as section 206 discussed above and section 203, a detailed and complex rulemaking provision, are likely to generate controversy warranting separate consideration, we would respectfully suggest that the Committee give serious consideration to splitting Title II from the legislation as presently drafted. Such action might help insure that this Congress can complete favorable consideration of the consumer protection provisions embodied in Title I with respect to consumer product warranties.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program and that the Administration opposes eliminating the exemption for national banks contained in the Federal Trade Commission Act on the grounds that the financial regulatory agencies rather than the FTC should be vested with rulemaking authority to determine unfair or deceptive trade practices with reference to financial institutions.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, 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) :

FEDERAL TRADE COMMISSION ACT

* * * * * * *

SEC. 5. (a) (1) Unfair methods of competition in *or affecting* commerce, and unfair or deceptive acts or practices in *or affecting* commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between

manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(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 406(b) of said Act, from using unfair methods of competition in *or affecting* commerce and unfair or deceptive acts or practices in *or affecting* commerce.

(b) 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 *or 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 issues 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. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided,*

however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 38, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, part-

nership, or corporation from any liability under the Antitrust Acts.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will

accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the circuit court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) 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. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey 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, after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commossion.]

(m) For the purpose of enforcing the laws subject to its jurisdiction, the Commission shall have the power, with the concurrence of the Attorney General, to appear in any civil action in its own name and through its own legal representative.

SEC. 6. 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 *person, partnership, or* 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] *persons, partnerships, and corporations.*

(b) To require, by general or special orders, [corporations] *persons, partnerships, and 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 *persons, partnerships, and* corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations [and to make rules and regulations for the purpose of carrying out the provisions of this Act].

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable. *Provided*, That the exception of "banks and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers from, any such [corporation to the extent that such action is necessary to the investigation of any corporation, group of] *persons, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnership, or* corporations, or industry which is not engaged or is engaged only incidentally in banking or in business as a common carrier subject to the Act to regulate commerce.

* * * * * * *

SEC. 9. 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 *person, partnership, or* corporation 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. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

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 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.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any [corporation or other person] *person, partnership, or corporation*, issue an order requiring such [corporation or other person] *person, partnership, or corporation* to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, 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] *person, partnership, or* corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any *person, partnership, or* corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such *person, partnership, or* corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such *person, partnership, or* corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such *person, partnership, or* corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any *person, partnership, or* 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 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 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 *in the case of a corporation or partnership* in the district where the corporation *or partnership* has its principal office or in any district in which it shall do business, *and in the case of any person in the district where such person resides or has his principal place of business.* It shall be the duty of the various district 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.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

* * * * * * *

SEC. 12. (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 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 affecting* commerce within the meaning of section 5.

* * * * * * *

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 (l) 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) [after compliance with the requirements with section 5(m)] *with the concurrence of the Attorney General,* itself cause such appropriate proceedings to be brought.

SEC. 17. If any provision of this Act, or the application thereof to any person, partnership, corporation, or circumstance, is held invalid, the remainder of the Act and the application of such provision to any other person, partnership, corporation, or circumstances, shall not be affected thereby.

RULEMAKING

Sec. 18. (a)(1) The Commission shall have the power to issue (A) procedural, administrative, and advisory rules, and (B) rules defining with specificity acts or practices which are unfair or deceptive and which are within the scope of section 5(a)(1) of this Act. The Commission shall have no authority under this Act, other than its authority under this section, to prescribe rules.

(2)(A) When issuing rules under paragraph (1)(B) of this subsection, the Commission shall proceed in accordance with section 553 of title 5, United States Code (not including any reference to section 556 and 557) and shall also: (i) issue an order of proposed rulemaking stating with particularity the reason for the proposed rule; (ii) allow interested persons to comment on the proposed rule in writing and make all such comments publicly available; (iii) provide an opportunity for an informal hearing at which interested persons may comment orally on the proposed rule; and (iv) promulgate, if appropriate, a final rule together with a statement of basis and purpose based on the information and comments compiled in accordance with clauses (i),

(ii), and (iii). A verbatim transcript of any oral hearing under clause (iii) shall be taken and such transcript shall be publicly available.

(B) The Commission shall afford the following process for its hearings pursuant to subparagraph (A) (iii) of this paragraph:

(i) Subject to clauses (ii) and (iii) of this subparagraph, a party is entitled to present his position by oral or documentary evidence and to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of all disputed issues of material fact.

(ii) The Commission may make such rules and rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay.

(iii) When parties with the same or similar interests cannot agree upon a single representative, the Commission may make rules and rulings governing the manner in which such cross examination is limited; but when any party has the same or similar interests with other parties but is unable to agree upon group representation with these parties, such party shall not be denied the opportunity to conduct cross examination as to issues affecting his particular interests if he shows to the satisfaction of the Commission that he has made a good-faith effort to reach agreement upon group representation with the other parties having some or similar interests and that there are substantial issues which are not adequately presented by the group representative.

(C) The agency statement to accompany the adoption of a rule shall include, among other things, statements (i) as to extent of the acts and practices treated by the rule; (ii) as to the manner in which and extent to which such acts or practices are unfair or deceptive; and (iii) as to the economic impact of the rule, taking into account the impact on small business.

(D) When any rule under this paragraph (2) is promulgated and becomes final a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of this Act, unless the Commission otherwise expressly provides in the rule.

(E) The term "Commission" as used in this paragraph (2) includes anyone authorized to act in behalf of the Commission in any part of the conduct of the rulemaking process.

(3)(A) Not later than sixty days after a rule to which paragraph (2) of this subsection applies is prescribed by the Commission, any person adversely affected by such rule (including a consumer or consumer organization) may file a petition with the United States Court of Appeals for the District of Columbia or for the circuit in which such person resides or has his principal place of business for a judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The Commission shall file in the court the record of the proceedings on which the Commission based its rule as provided in section 2112 of title 28, United States Code. For purposes of this section, the term "record" means such rule, the transcript required by paragraph (2)(A) of any oral presentation, any written submission of interested parties, and any other information which the Commission considers relevant to such rule.

(B) If the petitioner applies to the court for leave to adduce additional data, views, or arguments and shows to the satisfaction of the court that such data, views, or arguments are material and that there were reasonable grounds for the petitioner's failure to adduce such data, views, or arguments in the proceeding before the Commission, the court may order the Commission to provide additional opportunity for the oral presentation of data, views, or arguments and for written submissions. The Commission may modify its statement or make a new statement by reason of the additional data, views, or arguments so taken and shall file such modified or new statement, and its recommendations, if any, for the modification or setting aside of its original rule, with the return of such additional data, views, or arguments.

(C) Upon the filing of the petition under subparagraph (A) of this paragraph, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The rule shall not be affirmed unless the Commission's action is supported by substantial evidence in the record taken as a whole.

(D) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

(E) Remedies under this paragraph (3) are in addition to and not in lieu of any other remedies provided by law.

(b)(1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to a consumer) by banks, each agency specified in paragraph (2) of this subsection shall establish a sepaarte division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks subject to its jurisdiction. The Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices. In carrying out its responsibilities under this subsection, the Board shall issue substantially similar regulations proscribing acts or practices of banks which are substantially similar to those proscribed by rules of the Commission within sixty days of the effective date of such Commision rules unless the Board finds that such acts or practices of banks are not unfair or deceptive to consumers or it finds that implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

(2) Compliance with the requirements imposed under this subsection shall be enforced under section 8 of the Federal Deposit Insurance Act, in the case of—

(A) national banks and banks operating under the code of law for the District of Columbia, by the division of consumer affairs established by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than banks referred to in subparagraph (A)) by the division of con-

sumer affairs established by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)), by the division of consumer affairs established by the Board of Directors of the Federal Deposit Insurance Corporation.

(3) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any requirement imposed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any requirement imposed under this subsection, any other authority conferred on it by law.

(4) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subsection.

(5) Each agency exercising authority under this subsection shall transmit to the Congress not later than March 15 of each year a detailed report on its activities under this paragraph during the preceding calendar year.

(c)(1) Any person to whom a rule under subsection (a)(1)(B) of this section applies may petition the Commission for an exemption from the rule based on special circumstances. If the petitioner satisfies the Commission that special circumstances are applicable to him, the Commission shall grant the petitioner an exemption from such rule. Paragraphs (2)(A), (2)(B), and (2)(E) of subsection (a) of this section shall apply to petitions for exemptions under this subsection to the same extent as such paragraphs apply to rules under paragraphs (1)(B) of subsection (a).

(2) For purposes of this subsection, the term "special circumstances" means factors which are applicable to a particular petitioner (as distinguished from others subject to the rule) and which are so different or unique that applying the rule to the petitioner would result in significant hardship which would outweigh any public benefit resulting from application of the rule to the petitioner.

(3) Neither the pendency of an application under this subsection for an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action under this subsection, shall stay the applicability of such rule.

(4) Judicial review of the Commission's action or failure to act under paragraph (1) of this subsection shall be in accordance with chapter 7 of title 5, United States Code. The Commission's action shall not be affirmed unless it is supported by substantial evidence in the record taken as a whole (including any material evidence in the record of the rulemaking proceeding for the rule from which the exemption is sought).

SEC. [18] *19.* This Act may be cited as the "Federal Trade Commission Act".

SEPARATE VIEWS ON H.R. 7917—CONSUMER PRODUCT WARRANTIES—FEDERAL TRADE COMMISSION IMPROVEMENTS ACT

The bill H.R. 7917, The Consumer Product Warranties—Federal Trade Commission Improvements Act, was ordered reported by the House Committee on Interstate and Foreign Commerce on May 22, 1974 after five days of detailed consideration. The bill, as reported by the Committee, contains two titles, and inasmuch as the titles deal with separate matters, we feel it appropriate to address them separately in these views.

The subject matter contained in Title I of H.R. 7917, consumer product warranties, has been before the House in various forms in every Congress since and including the 91st Congress. During this period, the Subcommittee on Commerce and Finance held many days of hearings in regard to consumer product warranties and the problems which consumers have encountered with the type of warranties frequently being offered today. The information received in these hearings has revealed that warranties in recent years have become quite complicated legal documents which often confuse and mislead consumers who are not clearly informed as to their complex legal implications. Recognizing a need for appropriate legislation in this area, we have endorsed and supported most of the provisions contained in Title I of H.R. 7917.

Summarized briefly, the provisions of Title I would do the following:

First, authorize the Federal Trade Commission to issue rules requiring that the terms and conditions of written warranties be fully and conspicuously disclosed in simple and readily understood language.

Second, require that all written warranties be clearly designated as "full" or "limited" warranties. In order for a warranty to be designated as a "full" warranty, it must incorporate the Federal minimum standards for warranty. If the Federal minimum standards are not incorporated in a warranty, it must be designated as a "limited" warranty.

Third, establish Federal minimum standards for "full" warranties. These standards would—

(*a*) require replacement or repair of the product within a reasonable time without charge,

(*b*) prohibit any limitation on the duration of implied warranties, and

(*c*) require that if a warranted product is not repaired after a reasonable number of attempts (as determined by the FTC by rule) the consumer be given the choice of a refund or replacement of such product.

Fourth, encourage warrantors to establish procedures for setting consumer disputes through informal dispute settlement mechanisms and require that the consumer must first resort to the procedures established before commencing a civil action in a court of law.

Fifth, allow class actions in Federal courts under certain circumstances for actions for breach of warranty.

With the exception of the provision authorizing class actions for breach of warranty, we firmly believe that the provisions contained in Title I will promote greater consumer understanding of product warranties, assist the consumer in the enforcement of his warranty, and encourage suppliers of consumer products to produce more reliable products. Perhaps equally important, we feel that most of these provisions will compliment one another and operating as a whole assist in alleviating the inequities resulting from the imbalance which often exists in the relative bargaining power between consumers and suppliers of consumer products.

However, in regard to the provision authorizing class actions, we take a different view. We are aware that several consumer organizations have endorsed this provision and while we have no cause to challange their motives, we do question the wisdom of their judgment on this issue. Our view regarding this question can be stated briefly. We do not believe that class actions constitute a viable consumer remedy for breach of warranty. We have formulated our judgment on this issue after a review of the history of class actions in Federal courts and base our judgment on what that history reveals.

The basic justification for endorsing an expansion of consumer class actions is the promise of actual consumer redress that they can offer. However, the experience under Rule 23 demonstrates that such a promise would be illusory and misleading. It has become increasingly apparent that the amendments to Rule 23 in 1966, which facilitated class actions under a number of federal statutes, have not met their stated purpose: The achievement of economies of time, effort and expense. On the contrary, the result has been just the opposite—enormous wastes of time, effort and expense.

One of the most important elements of a viable consumer remedy for breach of warranty is promptness. This was recognized in the formulation of the Federal minimum standards which are contained in the legislation and which require repair or replacement within a reasonable time. It is our belief that a claim that class actions will provide actual recoveries or relief within reasonable periods of time generates false hope to consumers. Our position is supported by eight years of experience under Rule 23. Since 1966, several thousand class actions have been filed in federal courts, and as far as we have been able to ascertain, not one of these has been tried through to a final determination on its merits. The United States Court of Appeals for the Second Circuit recently made the same observation in the celebrated case of *Eisen* v. *Carlisle & Jacquelin* when it stated:

> So far as we know not a single one of these class actions including millions of indiscriminate and unidentifiable members, has ever been brought to trial and decided on the merits. *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005, at 1018 (1973)

The *Eisen* case provides a good example of the time problems involved in class actions. That case was filed in the Southern District of New York in 1966 and has not yet been brought to trial.

Another example, out of many which could be cited, is *Dolgow* v. *Anderson*, 438 F. 2d 825 (2d Cir. 1971), a securities fraud consumer class action. The complaint in that case was filed in the Eastern District of New York in 1966. In 1968, after 12 sets of interrogatories, 7600 pages of documents, 1500 pages of depositions and a 10 volume record, summary judgment dismissal of the class action was granted. This was reversed on the grounds that the class representatives should have been granted *more discovery*. After more discovery and hearings, the class action was again dismissed in a 76 page opinion. (*Dolgow* v. *Anderson*, 53 F.R.D. 664 (E.D.N.Y. 1971).) Thus, six years and a staggering amount of time of the courts and the parties involved elapsed before the case was dismissed as not even meriting a trial.

A remedy which involves a time frame that class actions have experienced is simply not workable or appropriate in regard to breach of warranties. Typical consumer complaints in the area of warranties involve one consumer and one supplier and relate to such matters as poor product performance, defective merchandise, service inadequacies, and the like. These matters can be more promptly and effectively resolved through such techniques as more efficient small claims courts, neighborhood courts, binding consumer arbitration, voluntary settlement mechanisms, and improved enforcement agencies. Experience has shown that class actions have not been effective in dealing with such matters. As Chief Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit commented in his recent book in regard to Rule 23:

> * * * Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated. But the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multi-million dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrongdoing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or what is more likely, produce blackmail settlements. This is a matter that needs urgent attention. (Friendly, Federal Jurisdiction: A General View, 120 (1972))

Title II of H.R. 7917 amends the Federal Trade Commission Act in several important aspects. After the Subcommittee on Commerce and Finance held hearings and during the period that they were engaging in extended and detailed deliberations on the provisions of this legislation, the House received from the Senate its version of the

Alaska Pipeline bill. This bill also contained amendments to the Federal Trade Commission Act which were added by floor amendment. The House did not adopt these amendments and the bill went to House-Senate conference. At that time, we expressed deep concern to the House conferees over the inclusion of Federal Trade Commission Act amendments in that legislation since both the House and Senate Committees having jurisdiction over this matter had the issue under active consideration. Our view was that such an action would constitute a highly improper and imprudent manner of legislating. Our expression of concern however, served little or no purpose. The House conferees receded to the Senate on that issue and the conference report was passed by the House with no opportunity for the members of the House to express their will on the matter either by amendment or by separate vote on that issue.

Since that unfortunate occurrence, and undoubtedly in response to it, Rule XXVIII of the Rules of the House of Representatives has been amended to deal with such situations. We hope that these amendments are adequate to serve that purpose and will decrease the incidence of this type of mischief.

Summarized briefly, the provisions of Title II of H.R. 7917 would do the following:

(1) Expand the Federal Trade Commission's jurisdiction from acts and practices "in" interstate commerce to those "in or affecting" interstate commerce.

(2) Amend the Federal Trade Commission Act to limit the Federal Trade Commission's rulemaking authority to defining acts or practices which are unfair or deceptive. In addition, existing procedural requirements are altered so as to give those affected by the rule a greater opportunity to be heard on any proposed rule, and the scope of review has been broadened so as to provide that a rule would not be affirmed by the court unless the Commission's action was supported by substantial evidence in the record taken as a whole.

(3) Allow the Federal Trade Commission to represent itself in civil actions only with the concurrence of the Attorney General.

(4) Expand the Federal Trade Commission's investigatory authority to cover "persons, partnerships, and corporations" rather than just "corporations", as provided by present law.

The Federal Trade Commission has for a number of years issued rules defining acts and practices which it considered to be unfair or deceptive to consumers and, therefore, in the view of the Commission, a violation of Section 5(a) of the Federal Trade Commission Act. However, there were during this period continuing assertions that the Commission did not possess substantive rule-making authority and that any rules it issued had only the effect of being a guideline to industries. In 1972, the courts were finally called upon to rule on the Commission's authority to issue substantive rules. In the now well-known *Octane Rating* case, the United States District Court for the District of Columbia held that the Federal Trade Commission Act did not confer authority on the Commission to issue rules having the effect of substantive law. This decision was reversed by the Court of Appeals for the District of Columbia in June of 1973 and the Court

held that Section 6(g) of the Federal Trade Commission Act did confer authority to the Commission to promulgate substantive rules defining both unfair methods of competition and unfair or deceptive acts or practices to consumers. (*National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F. 2d (1973); *cert. denied* 94 Sup. Ct. 1475 (1974)) Thus, it first became clear in June of 1973 that the Commission did have the authority to issue rules having the substantive force and effect of law.

When a statute provides authority to a Federal administrative agency to issue rules of general applicability but is silent on the procedures which the agency is required to follow in issuing such rules, only the procedural requirements of Section 553 of Title 5, United States Code apply to any rulemaking proceeding undertaken pursuant to that authority. This means that the agency is required to do no more than to provide notice of the proposed rulemaking in the *Federal Register* and allow interested persons the opportunity to submit written comments on the proposal. There is no right to appear in person before the agency, to cross-examine, to submit rebuttal evidence or to insist that the agency decide solely on the basis of information available at the public hearing. Also, the scope of judicial review under such procedures is very narrow. On judicial review, such rules could be set aside if they were found to be arbitrary, capricious or an abuse or discretion, unconstitutional, in excess of statutory authority or without observance of procedures required by law.

While such procedures may technically meet the due process requirements of the Constitution, we question both their wisdom and their fundamental fairness. Numerous cases could be cited in which these limited procedures have been used to promulgate rules that very dramatically affected the lives of individuals and the economic futures of businesses. For example, the Federal Aviation Administration has employed these procedures to promulgate a rule that pilots for commercial airlines must be less than 60 years old. Pilots who were over 60, in effect, lost their livelihood without any opportunity for an evidentiary hearing on the wisdom of the rule or on the question of whether it was safe for them to continue piloting a commercial aircraft. (*Air Lines Pilot Association, International* v. *Quesada*, 276 F. 2d 892, (1960)) Similarly, the Civil Aeronautics Board has utilized these procedures to issue a rule providing that only all-cargo carriers may offer space at wholesale rates pursuant to advance contract. Thus, carriers which offer both passenger and cargo service are prevented from competing for that business. The competing carriers were not entitled to a hearing on these regulations. (*American Air Lines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624, (1966))

It is this situation that gives us concern with regard to the Federal Trade Commission Act. Under the recent Court of Appeals interpretation of Section 6(g) of that Act, the Commission has the authority to issue substantive rules which may affect an entire industry and in some cases a great number of industries. However, inasmuch as the Act is silent in regard to the procedural requirements to be followed in issuing these rules, those persons immediately and seriously affected by such rules have no procedural rights before the agency except to submit a writtten statement.

We strongly support the Committee's determination that the Federal Trade Commission Act should be amended to provide adequate procedural safeguards for those affected by the Commission's rules. In our judgment, more effective, workable and meaningful rules will be promulgated if persons affected by such rules have an opportunity, by cross-examination and rebuttal evidence, to challenge the factual assumptions on which the agency is proceeding and to show in what respect such assumptions are erroneous.

Those opposed to the procedural requirements adopted by the Committee point to the FDA's experience in the "Foods for Special Dietary Uses" proceeding and assert that the Committee has created a similar vehicle for delay in this legislation which will diminish the effectiveness of the Commission's rulemaking authority. At the time Section 202 of H.R. 7917 was being formulated, we were well aware of the FDA's experience with Section 701(e) of the Food, Drug and Cosmetic Act and sought, by statutory provision, to avoid a duplication of this experience by granting the Commission broad authority to closely control the proceeding. For example, Section 202 specifically provides that the "Commission may make such orders concerning proceedings in such hearings as may tend to avoid unnecessary costs or delays". This authority is stated in rather broad and general terms and it was intentionally so fashioned in an effort to give the Commission latitude to stop the introduction and pursuit of redundant, repetitious, immaterial and irrelevant matters. Similarly, the Commission is granted the authority to require representative testimony and cross-examination where appropriate, and in those cases in which parties cannot agree upon a single representative the Commission is given the authority to make rulings governing the manner in which cross-examination is to be limited.

Our mission was to develop a provision which would allow interested persons an opportunity to be heard in a meaningful and constructive way on proposed rules while granting to the Commission the latitude to avoid unnecessary costs or delay in its proceedings. We firmly believe that the provisions of Section 202 are adequate to accomplish these objectives. We are, of course, aware that government at all levels is a continuing experiment and, should experience show that Section 202 is not adequate to accomplish the objectives which we have pursued, we would support such amendments as that experience shows to be necessary and appropriate.

The Alaska Pipeline Act (Public Law 93–153) amended Sections 5 and 16 of the Federal Trade Commission Act and by those amendments authorized the Commission to represent itself by its own attorneys in any civil proceeding after notifying and consulting with the Attorney General and giving him 10 days to take such action as proposed by the Commission. At the time that the Alaska Pipeline bill was in House-Senate conference, we voiced our strong opposition to the inclusion of this provision in the bill and since the passage of that Act we have actively sought to have it amended. The House Commerce Committee in its wisdom agreed that this provision should be amended; we strongly endorse and support the action which the Committee took.

The Department of Justice for many years has been charged with the responsibility for the supervision and conduct of all Federal litigation. We strongly support this concept. Considering the vast number and diversity of cases involving the Federal government, the wisdom of having one central agency to coordinate all Federal litigation is apparent. The same or closely related issues may arise in cases involving a number of government agencies and, without central coordination, it would be difficult, if not impossible, to avoid inconsistencies or incompatibilities in the positions the government takes before the courts. Also, a lack of central coordination would almost certainly result in a situation that would jeopardize the likelihood of favorable judgments on appeals regarding critical Federal issues.

The Alaska Pipeline Act amendments would not only diminish the Justice Department's ability to supervise and coordinate Federal litigation, but would also set an undesirable precedent which would encourage all other agencies to push for a similar authority. We believe that it is vitally important that the positions to be taken by a single agency on a question of general concern to the Federal government and all of its agencies reflect the overall best interests of the entire Federal government, and not just the interest of a particular agency in winning a particular case.

For these reasons, we support Section 204 of H.R. 7917 which amends the Federal Trade Commission Act so as to permit the Federal Trade Commission to appear in any civil action in its own name through its own legal representative only with the concurrence of the Attorney General.

H.R. 7917 as reported by the Subcommittee on Commerce and Finance contained a Section 207 which was entitled "Consumer Redress". This section represented an attempt to provide the Commission with new authority to seek judicial redress for consumers injured by acts or practices that were found to be in violation of final Commission orders. This authority was not, however, limited in its application to those against whom a cease and desist order was directed. This section also granted authority to the Federal Trade Commission to institute actions against those persons who engaged in acts or practices similar to those prohibited by a cease and desist order, even if they had no actual notice of the outstanding order and even though there had been no hearing to determine whether their acts or practices were in fact illegal under Section 5 of the Federal Trade Commission Act or any other Act.

Consequently, that section, if adopted, would have had the effect of making a cease and desist order tantamount to a substantive rule without providing to those affected the procedural safeguards required in rulemaking proceedings. The Federal Trade Commission also was troubled by this provision and by letter to the Committee Chairman stated that it felt "constrained not to endorse the legislation in its present form".

While we do not oppose the basic concept of consumer redress contained in this provision, we thought it wise to have additonal hearings and study on the matter so that the deficiencies and inequities of the

provision as drafted could be corrected. It was for these reasons that we supported a motion to strike this provision from the bill.

We have previously discussed in these views our opposition to the use of class actions as a remedy for breach of warranty. This bill addresses only the jurisdictional questions involving the use of class actions in breach of warranty cases. The Committee did not address the questions involved with the requirements of Rule 23 and, inasmuch as the United States Supreme Court in the recent *Eisen* case made it clear that "the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort", we feel that those whose rights are potentially affected by a class action are now protected by that notice. Thus, while we continue to question the effectiveness of class actions as a viable remedy for breach of warranty, we feel that we have, in this legislation, done little to encourage them and we intend to support the bill in its present form.

JAMES T. BROYHILL,
ANCHER NELSEN,
DAN KUYKENDALL
JAMES F. HASTINGS,
JAMES M. COLLINS,
JOHN WARE,
JOHN Y. MCCOLLISTER,
NORMAN F. LENT,
WILLIAM H. HUDNUT, III,
SAMUEL H. YOUNG,
DAVID E. SATTERFIELD, III,
BARRY M. GOLDWATER Jr.

INDIVIDUAL VIEWS OF RICHARD PREYER AND JOHN Y. MCCOLLISTER

While we support this bill, we believe that it is essential that we clarify its scope. As currently drafted, the definitions are so vague that it is not possible to determine those who will be included as warrantors under Title I. The definition of "warranty" in Section 101(10) is so broad as to include the Kosher Seal, the Good Housekeeping Seal, possibly the union bug, and other seals which have never been warranties in the history of American law.

In addition, the bill fails to recognize the historic distinction between waranties and guarantees. The Courts have correctly maintained this distinction because third party guarantors, such as Good Housekeeping, have no opportunity to examine the condition of the products as they pass through the distribution chain. Such guarantors must necessarily make their recommendations or criticisms on the basis of a few samples. In addition, third party guarantors do not receive as large a profit on each sale ss do warrantors who manufacture or sell. For this reason, the Courts have not extended strict liability to third party guarantors. But this legal and economic distinction was never considered in the hearings on this bill.

As an example, if Good Housekeeping were to put its seal on the blanket and promise the consumer his money back if the blanket were defective, and if the blanket were to catch fire, Good Housekeeping should be liable for the price of the blanket, but not for the value of a house burned down in the fire.

Without any hearings on this issue, the Committee would overturn several hundred years of Anglo-American law.

The effect of this overly broad definition would be to eliminate a program which has provided thousands of dollars to America's consumers who may not otherwise have been able to get their money back from the retailers and manufacturers.

Third party guarantors provide an important service to America's consumers. If a coffee pot explodes, a guarantor can be liberal in acknowledging the defect and returning the consumer's money. But the manufacturer will be very reluctant to acknowledge a defect because he could incur substantial products liability exposure if he admitted that his product was defectively designed.

Third party guarantors at the present time can be sued for negligent misrepresentation and must conform to the FTC Guides—the sufficiency of which was never considered by the Committee.

The Committee's action is a radical departure from the definition of "warrantor" contained in the Uniform Commercial Code—a measure adopted by 49 states.

Calendar No. 143

93D CONGRESS
1st Session

SENATE

REPORT
No. 93–151

MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE

ON

S. 356

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.

MAY 14, 1973.—Ordered to be printed

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Calendar No. 143

93D CONGRESS
1st Session

SENATE

REPORT
No. 93-151

MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT

MAY 14, 1973.—Ordered to be printed

Mr. MAGNUSON, from the Committee on Commerce, submitted the following

REPORT

[To accompany S. 356]

The Committee on Commerce to which was referred the bill (S. 356) to provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve consumer protection activities; and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

Summary and Purpose

S. 356, the "Magnuson-Moss Warranty Federal Trade Commission Improvement Act," is designed to help the American consumer to find and enforce greater reliability in the tangible personal property he buys for "personal, family, or household purposes." Title I of the bill sets forth disclosure and designation standards for written warranties on each consumer product that costs the consumer more than $5; defines Federal contents standards for full warranties; and provides meaningful consumer remedies for the breach of written warranty and written service contract obligations. Title II of the bill improves the Federal Trade Commissions ability to deal with unfair consumer acts and practices "affecting" interstate commerce by granting the Commission the power to: (1) seek preliminary or permanent injunctions, (2) initiate actions in district courts seeking specific redress for consumers injured by unfair or deceptive acts or practices, and (3) secure civil penalties for knowing violations of the Federal Trade Commission Act. In addition, title II authorizes the Commission to represent itself in court and makes more uniform the operation of the F.T.C. Act as it applies to financial institutions.

It is the purpose of this bill to improve the position of the consumer in the marketplace by making the Federal agency responsible for his economic well being (the F.T.C.) more effective and by delineating with specificity the duties which suppliers of consumer products assume when offering warranties or service contracts in writing on consumer products. In addition, this bill aims to increase the ability of the consumer to make more informed product choices and to enable him to economically pursue his own remedies when a supplier of a consumer product breaches a voluntarily assumed warranty or service contract obligation.

Brief Description

Title I of S. 356 requires the supplier of a consumer product costing more than $5 who chooses to warrant in that product writing to clearly and conspicuously disclose the contents of that warranty and to designate the warranty as either a "full" warranty in compliance with Federal standards, or to describe the warranty with easily understood language indicating the specific limitations. Title I would prohibit a supplier offering a warranty in writing from disclaiming his implied warranties. Thus, the present misleading practice of using very limited express waranties to reduce consumer rights which would have been available but for the disclaimer of implied warranties is prohibited by title I.

If a supplier fails to honor his warranty or service contract promises, the consumer can avail himself of certain specified remedies. If that supplier has provided a bona fide informal dispute settlement mechanism by which disputes between suppliers and consumers are to be resolved, then the consumer would utilize the informal dispute settlement mechanism before pursuing other avenues of redress. If a supplier does not have an informal dispute settlement mechanism for resolving consumer complaints, or if the consumer is not satisfied with the results obtained in any informal dispute settlement proceeding, the consumer can pursue his legal remedies in a court of competent jurisdiction, provided that he has afforded the supplier a reasonable opportunity to cure the breach. Such pursuit is made economically feasible by the provision in the bill which awards reasonable attorneys fees (based on actual time expended) and court costs to any successful consumer litigant. In addition to authorizing private consumer remedies, the bill provides that any violation of title I is a violation of the Federal Trade Commission Act. The Federal Trade Commission or the Attorney General can seek preliminary injunctions against persons violating such provisions.

Title II would authorize the Federal Trade Commission to seek either a preliminary or permanent injunction against parties committing acts or practices which are unfair or deceptive to consumers. Title II would also authorize the Commission to assess civil penalties (up to $10,000 per violation) against those suppliers of consumer products who knowingly commit unfair or deceptive acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act. Such penalties could be compromised, mitigated, or settled if the Commission provides a public statement of its reasons for such action and the court approved the compromise, mitigation, or settlement.

In order to redress consumer injury resulting from violations of the Federal Trade Commission Act, the Commission is authorized to initiate civil actions in United States district court seeking reasonable and appropriate consumer redress. While redress under this provision could not include exemplary or punitive damages, relief could include recission, reformation, refunding of money, return of property, or other appropriate relief for those injured by an unfair or deceptive act or practice.

Title II of S. 356 expands the Federal Trade Commission's jurisdiction beyond activities "in" interstate commerce to those acts or practices "affecting" interstate commerce. The Commission is authorized to act through its own attorneys in situations in which it is now represented by the Attorney General of the United States.

Finally, title II of S. 356 removes the present exemption for banks from the Federal Trade Commission Act. In order to make the prohibitions against unfair or deceptive acts or practices in the consumer credit field uniform, all financial institutions are made subject to those provisions of the Federal Trade Commission Act relating to unfair or deceptive acts or practices to consumers. Enforcement powers under this section, however, are mandatorily delegated to the various Federal financial regulatory institutions, with the proviso that the Commission, pursuant to section 553 of Title 5 of the United States Code, may request and shall receive redelegation of those enforcement powers if it is shown that they are not being effectively carried out by the relevant Federal financial regulatory agency.

Background and Need

CONSUMER PRODUCT WARRANTIES

Background

In response to a growing tide of complaints regarding automobile warranties, the Federal Trade Commission instituted a field investigation in 1965 to see if in fact there was a significant failure of performance on the part of automobile manufacturers to live up to their warranty promises.

While the Federal Trade Commission investigation was being conducted. Senator Magnuson and Senator Hayden introduced warranty legislation late in 1967 which covered automobiles and appliances. These bills required suppliers to disclose clearly and conspicuously the terms of their warranties. The Magnuson bill would have established an advisory council on guarantees, warranties, and servicing to conduct a comprehensive study and investigation of the adequacy of performance of guarantees and the extent of difficulty in securing competent servicing of consumer products. No action was taken on these bills in the 90th Congress.

In response to the proposed warranty legislation, and as an extension of its initial investigative effort, the Federal Trade Commission asked its staff to prepare a comprehensive report on automobile warranty practices. That report was published in October of 1968 and concluded among other things that, "performance of manufacturers and dealers under the warranty has not achieved the levels implied by the warranty, and failure to perform up to warranted standards has been encountered in the manufacture and the preparation of cars for delivery to consumers." The report went on to conclude that, "in servicing under the warranty an excessive amount of service does not meet the standards of consumer acceptability, and replacement of cars which have revealed serious malfunctions and which cannot be repaired by the dealer is infrequent."

While the Federal Trade Commission was attempting to shed some light on the automobile warranty problem, a task force on appliance warranties and services designed to accomplish the purposes of Senator Magnuson's proposed advisory council was created. The task force consisted of the Secretaries of Commerce and Labor, the Chairman of the Federal Trade Commission, and the Special Assistant to the President for Consumer Affairs. Not only was this task force supposed to study the warranty problem, but it was also supposed to encourage voluntary action on the part of industry and determine the need for Federal legislation. In January 1969, the task force published a report which included comprehensive recommendations of the various participants. The report concluded that—

> There are a number of problems associated with major appliance warranties. However, the underlying and basic problem which must be solved, is how to persuade or compel a manufacturer or retailer to provide the purchaser of a major appliance with a meaningful guarantee which they will honor in both letter and spirit subsequent to the sale.

The task force then recommended that:

> At the end of one year, if it appears that substantial progress is not being made toward the solution of these problems, the mentioned officials should consider the nature and scope of legislation necessary to achieve the desired results.

In anticipation of the possible need for legislation, Senator Magnuson began to discuss possible legislative proposals in early 1969. On October 27, 1969, Senator Magnuson and Senator Moss introduced the Consumer Products Guarantee Act (S. 3074). On October 30, 1969, President Nixon, in his consumer message, reconstituted the Task Force on Appliance Warranties and Services and asked it to report on the problem.

Initial hearings on S. 3074 were held in late January 1970. At that time the Federal Trade Commission promised to submit its report on the Automobile warranty soon; the Task Force on Appliance Warranties and Services said it would report to the Committee in March.

On February 19, 1970, the Federal Trade Commission issued its automobile warranties report which advocated Federal legislation to solve automobile warranty and service problems. The Commission proposed enactment of "a new and comprehensive Automobile Quality Control Act, which would give statutory recognition to the public utility obligations of automobile manufacturers and provide for minimum standards of quality, durability, and performance of new automobiles and all parts thereof, and which would place a statutory obligation on manufacturers to provide consumers with defect-free automobiles in compliance with such standards and to repair defective automobiles and automobile parts which do not conform to such standards." In short, the Commission advocated the creation of a mandatory statutory warranty through the direct regulation of product quality.

In March of 1970 the Administration gave testimony before the Congress which emphasized the need for Federal warranty legislation covering a wide range of consumer products. After careful study, the Senate Commerce Committee amended the Magnuson-Moss bill to incorporate certain constructive suggestions of the Administration, industry, and consumer witnesses and ordered S. 3074 reported. The reported bill was passed by the Senate unanimously on July 1, 1970. Although the House held hearings on S. 3074 and related bills, no action was taken by the House prior to the adjournment of the 91st Congress.

The warranty provisions of S. 3074 were reintroduced in the 92d Congress in a refined form along with the Federal Trade Commission Reform Proposals discussed below as the "Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971" (S. 986). The Committee again held extensive hearings on the warranty and the Federal Trade Commission reform proposals, and following intensive executive consideration of S. 986, the Committee ordered the bill reported to the floor of the Senate.

The Administration was also active in the warranty field. The President indicated in his consumer message of February 24, 1971, that he would propose a "Fair Warranty Disclosure Act" to provide for clearer warranties and prohibit the use of deceptive warranties. This

proposal was transmitted by the Attorney General on March 8, 1971, and introduced by Senator Magnuson on March 12, 1971, by request, as S. 1221.

After consideration on the floor, S. 986 passed the Senate by a vote of 72 to 2; this marked the second time that the Senate had overwhelmingly approved comprehensive warranty legislation. Unfortunately, the House was not able to move rapidly enough to report and pass a companion piece of legislation before the end of the 92d Congress.

A refined version of this same bill was introduced by Chairman Magnuson and Senator Moss in the 93d Congress on January 12, 1973, as S. 356. In lieu of holding further hearings on this proposal, the committee solicited comments from all those interested in the legislation. After further refinements, the Committee unanimously ordered the legislation reported to the floor of the Senate.

Needs

For many years warranties have confused and misled the American consumers. A warranty is a complicated legal document whose full essence lies buried in myriads of reported legal decisions and in complicated State codes of commercial law. The consumers' understanding of what a warranty on a particular product means to him frequently does not coincide with the legal meaning.

This was not always the case. When the use of a warranty in conjunction with the sale of a product first become commonplace, it was typically a concept that the contracting parties understood and bargained for, usually at arms length. One could decide whether or not to purchase a product with a warranty, and bargain for that warranty accordingly. Since then, the relative bargaining power of those contracting for the purchase of consumer products has changed radically. Today, most consumers have little understanding of the frequently complex legal implications of warranties on consumer products. Typically, a consumer today cannot bargain with consumer product manufacturers or suppliers to obtain a warranty or to adjust the terms of a warranty voluntarily offered. Since almost all consumer products sold today are typically done so with a contract of adhesion, there is no bargaining over contractural terms. S. 356 attempts to remedy some of the defects resulting from this gross inequality in bargaining power, and return the sense of fair play to the warranty field that has been lost through the years as the organizational structure of our society has evolved. The warranty provisions of S. 356 are not only designed to make warranties understandable to consumers, but to redress the ill effects resulting from the imbalance which presently exists in the relative bargaining power of consumers and suppliers of consumer products.

The warranty provisions of S. 356 are designed to meet four basic needs:

(1) The need for consumer understanding.
(2) The need for minimum warranty protection for consumers,
(3) The need for assurance of warranty performance, and
(4) The need for better product reliability.

First, the bill is designed to promote consumer understanding. Far too frequently, suppliers of consumer products fail to communicate to

the consumer what, in fact, they are offering him in that small piece of paper proudly labeled "warranty". The consumer really does not know what to expect from the warranty offered. Whom should he notify if his product stops working during the warranty period? What are his responsibilities after notification? How soon can he expect a fair replacement? Will repair or replacement cost him anything? There is a great need to generate consumer understanding by clearly and conspicuously disclosing the terms and conditions of the warranty and by telling the consumer what to do if his guaranteed product becomes defective or malfunctions.

Second, the bill is designed to insure consumers certain basic protections when they purchase consumer products which have written warranties. Normally when goods are sold, the law provides that certain warranties by implication accompany the sale of these goods. For example, the law usually implies a warranty of fitness for ordinary use or, when the seller knows that the goods are to be used by the buyer for a particular purpose, the law implies a warranty of fitness for a particular purpose. The law allows the seller to disclaim his implied warranties only by using such words as "as is" or "without fault" or by disclaiming the implied warranties when issuing an express warranty. These rules do no injustice to commercial buyers who are sophisticated in the ways of the marketplace and can judge the import of the express warranty and the meaning of the disclaimer of the implied warranty. Unfortunately, the ordinary purchaser of consumer products does not know the meaning of words in an express warranty which state, for example, "this warranty is in lieu of any other express warranties or the implied warranties of merchantability or fitness." In this situation a consumer's rights may, without his knowledge, be limited rather than expanded when a supplier of consumer products gives him a piece of paper with a bold claim of warranty written across the top. The issuance of a limited express warranty while simultaneously disclaiming implied warranties has become an increasingly common practice which results in many cases in a document which could be more accurately described as a limitation on liability rather than a warranty. Therefore, there is a need to prohibit the disclaimer of implied warranties when a supplier of consumer products guarantees his products in writing.

The third major problem concerning warranties confronting consumers today relates to warranty enforcement. Even in the relatively rare situation where the consumer fully understands the meaning of a warranty, and there has been no disclaimer of the implied warranties, he frequently is in no better position because the warrantor does not live up to the promises he has made. Because enforcement of the warranty through the courts is prohibitively expensive, there exists no currently available remedy for consumers to enforce warranty obligations. If warrantors who did not perform as promised suffered direct economic detriment, they would have strong incentives to perform. Therefore there is a need to insure warrantor performance by monitarily penalizing the warrantor for non-performance—and awarding that penalty to the consumer as compensation for his loss. One way to effectively meet this need is by providing for reasonable attorneys fees and court costs to successful consumer litigants, thus making con-

sumer resort to the courts feasible. It is hoped that by making court actions feasible, suppliers will be encouraged to develop workable informal dispute settlement procedures for the expeditious settlement of consumer complaints.

In the final analysis, many warranty problems could be cured if products were made sufficiently reliable to last the length of the warranty period and beyond. Thus, there is a basic need to stimulate better product design and quality control for the production of more reliable products. One way of accomplishing this is by making it economically rewarding for producers of consumer products to build reliability into their products.

Under present marketing conditions, the consumer has available to him little or no information about the product reliability potential of any consumer product he buys. He cannot look to the length of the warranty period as a possible indicator of product reliability, because variance in warranty terms and performance permits producers of less reliable products to compete on ostensibly the same terms of duration as producers of more reliable products. Both producers may use the rubrick "warranty" and offer identical duration periods, but one producer might warrant parts only and require the consumer to mail the product to the plant while the other producer might provide for repair without charge and fix the product in the home. Only when the rules of the warranty game are clarified so that the consumer can look to the warranty duration of the guaranteed product as an indicator of product reliability (because all costs of breakdown have been internalized) will consumers be able to differentiate on the basis of price between more reliable and less reliable products. This ability to differentiate should produce economic rewards from increased sales and reduced service costs for the producer of more reliable products.

Before the duration of the warranty can become a useful comparative gauge of product reliability, it is necessary to clearly designate for the consumer whether the warrantor of the product is willing to assume all costs connected with the repair or replacement of the warranted product and whether he is willing to absorb all consumer costs incidental to any failure to live up to the promises of free and timely repair or replacement. Only a warrantor giving this type of "full" warranty is in a position to increase his profit, by making product reliability or service capability improvements. Furthermore, to the extent that consumer choice in the marketplace is guided by the desire for product reliability measured by the duration of the warranty, there will be an incentive for suppliers of consumer products to offer full warranties of relatively long duration. Therefore, there is a need to identify for the consumer which products are fully warranted and to create standards for "full" warranties.

FEDERAL TRADE COMMISSION IMPROVEMENTS

In 1938 the Wheeler-Lea Trade Commission Act expanded the powers of the Federal Trade Commission to cover "unfair or deceptive acts or practices in commerce." The purpose of this expanded authority, in the words of the House Committee report, was to make "the consumer, who may be injured by an unfair trade practice, of

equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." Congress, however, did not accompany this broad grant of authority with a concomitant expansion of the Commission's powers of enforcement, except partially in the limited area of food, drug and cosmetic advertising.

Thus the sole enforcement weapon available to the FTC to police the vast majority of consumer frauds, deception, and cheating has been the cease and desist order. Even in 1938, a minority of the House Committee reporting the Wheeler-Lea Act recognized and decried the inadequacy of such a limited enforcement power:

> * * * Unless the disseminator of a false advertisement knows at the time of the dissemination that he may at some time in the future be held accountable by a criminal or civil penalty action for the unlawful dissemination, he will not be deterred from such dissemination. It is just this deterring effect that is lacking when dependence is placed upon cease and desist orders for enforcement.

Their fears proved well founded. Each subsequent decade has brought forth indictments of the FTC's incapacity to enforce section 5(a)(1) of the Federal Trade Commission Act.

In the 90th Congress, Chairman Magnuson introduced and the Senate passed S. 3065, the "Deceptive Sales Act", which would have given the FTC authority to seek preliminary injunctions to bring unfair or deceptive practices to a halt immediately in appropriate circumstances. The House did not act. This legislation was reintroduced in substantially identical form in the 91st Congress, on May 26, 1969, by Consumers Subcommittee Chairman Moss and Chairman Magnuson, as S. 2246.

On October 31, 1969, President Nixon, in his consumer message to Congress, called for "expanded powers for a revitalized Federal Trade Commission, to enable it to protect consumers promptly and effectively." The Administration's "Consumer Protection Act of 1969" was introduced by Chairman Magnuson, together with Senators Baker, Griffin, Prouty, and Scott as S. 3201, on December 3, 1969.

The Consumer Subcommittee of the Commerce Committee commenced hearings on these proposals shortly after the introduction of S. 3201, receiving the testimony of Mrs. Knauer, Consumer Advisor to the President, and Assistant Attorney General McLaren on behalf of the Administration. The Subcommittee also sought the benefit of the experience of each Commissioner of the FTC individually.

Commissioner Philip Elman, in testimony before the Committee, explained how the FTC's regulatory anemia was related to its dependence upon cease and desist orders:

> * * * [A]s to most products and services offered the public, the principle protection for the consumer is left to the Federal Trade Commission and its limited power to prohibit unfair and deceptive practices solely through issuance of orders to cease and desist having only prospective effect. Unless and until an order based on past violations is issued, no penalties, criminal or civil, can be imposed for practices that

> violate the law, no matter how flagrant and harmful to the public. And even as to respondents under order, they are subject to civil penalties only if violations of the order are proved in a new, separate proceeding brought by the attorney general in a federal court. Finally, while injured consumers are given a private right of action under a few statutes (e.g., the Consumer Credit Protection Act), no recovery of damages may be had under the FTC act even when they result from unfair and deceptive practices which violate an outstanding order to cease and desist.

And Commissioner Mary Gardner Jones strongly concurred:

> * * * [W]hat we need are stronger sanctions. A cease and desist order is not enough to create the kind of deterrent that one needs so that in fact business will police itself, because no agency, state or federal, can police violations of law. What you depend on is for the community to police itself. But in order for a community to police itself, you have to have effective sanctions.* * *

Burgeoning public impatience with the Commission in the consumer conscious 1960's—fueled by revelations of bureaucratic ineptitude and consumer neglect—led President Nixon in April, 1969, to seek from the American Bar Association a "professional appraisal of the present efforts of the FTC in the field of consumer protection." The ABA responded with a landmark study performed by a special commission under the Chairmanship of Miles W. Kirkpatrick. Among other things, the Kirkpatrick Commission concluded:

> * * * We believe that effective law enforcement in this area requires the creation of new procedural devices, including a right in the FTC, in appropriate situations, to seek preliminary injunctions against deceptive practices, and some form of private relief for or on behalf of consumers injured by such practices.

FTC Chairman Casper Weinberger, who had taken the reigns of the Commission at the moment in its 50 year history when it had reached its nadir in public esteem and confidence, on behalf of a unanimous Commission, sought new powers from Congress. In addition to authority to obtain preliminary injunctions, Chairman Weinberger asked for (1) authority to assess civil penalties for existing violations of law, (2) authority to assess civil penalties for violations of existing commission orders, and (3) authority to award damages to consumers injured by acts or practices found by the commission to violate the law.

Chairman Weinberger told the Committee that these provisions "represent extremely important proposals, the enactment of which will enable the Commission to give the country's consumers the protection from unfair and deceptive practices to which they are entitled." Support for these statements has been restated by both succeeding Chairmen, Miles W. Kirkpatrick, and Louis A. Engman.

Although S. 3201 was reported to the floor too late in the second session of the 91st Congress to receive floor action, Chairman Magnuson and Senator Moss renewed their efforts to improve the Federal Trade Commission Act in the 92d Congress through the introduction of the "Consumer Products Warranties and Federal Trade Commission Improvements Act of 1971," which combined the warranty provisions discussed above with the FTC reforms.

After extensive consideration of this legislation, the Committee reported it favorably to the floor of the Senate, where it passed by a vote of 72 to 2. In the rush of business surrounding the end of the 92nd session, the House was unable to act.

On January 12, 1973, Chairman Magnuson and Senator Moss introduced S. 356, a refined version of the same legislation. Comments on the bill were solicited, and after further refinements, the legislation was ordered reported to the floor of the Senate.

Section-by-Section Analysis

TITLE I

Definitions (section 101)

(1) As used in title I, "Commission" means the Federal Trade Commission.

(2) The term "consumer product" is limited to tangible personal property, not realty. Furthermore, to qualify as a consumer product, the tangible personal property must normally be used for either personal, family, or household purposes.

There are many products which are used for both personal and business purposes. For example, a typewriter is clearly a consumer product when used in the home by members of the family. It is not uncommon, however, for typewriters to be purchased by businessmen for exclusively business purposes. This may create an ambiguous situation in many instances. To the extent that there is any necessary ambiguity in the term "consumer product," the ambiguity should be resolved in favor of coverage. Personal or family use of a typewriter is not uncommon; therefore, for the purposes of this title, a typewriter would be considered a "consumer product" if any question arose. Of course, the Federal Trade Commission could exempt a warrantor from the disclosure and labeling provisions of the bill to the extent that he sells consumer products to persons for use in their businesses.

The term "consumer product" is also defined to include property which is intended to be attached to, or installed in, real property—without regard to whether it is so attached or installed. An appliance which has been attached to or installed in real property might no longer be considered "tangible personal property" for purposes other than this bill because the appliance may become a fixture, and thus be characterized as realty rather than personalty. The definition of "consumer product" insures that fixtures which are normally used for personal, family or household purposes will be covered by the act without regard to whether the object in question would be considered realty or personalty for some other purpose.

The term "consumer product" is limited in subsection (2) of section 101 by the sentence, "not withstanding the foregoing, the provisions of 102 and 103 of this title affecting consumer products apply only to consumer products each of which actually costs the purchaser more than $5." This language has the effect of excluding products costing $5 or less from the disclosure and designation requirements of title I.

However, any such excluded consumer product remains subject to the provisions of the Federal Trade Commission Act, and, if it is warranted in writing, to the other sections of this title, particularly section 110. A written warranty on a consumer product costing $5 or less which meets Federal standards for warranties under section 104 of this title may be designated a "full" warranty, although there is no requirement that it be so labeled. Of course, if such a warranty did not meet Federal standards, the prohibitions of the Federal Trade Commission Act against unfair or deceptive acts would prohibit it from being labeled as a "full" warranty.

(3) The term "consumer" is defined in subsection (3) of section 101 as the first retail buyer 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 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. The use of the term person is meant in its most all-inclusive sense; for example, a corporation purchasing a color television set may be deemed to be a "consumer" within the meaning of this act.

The intent of the definition is to make clear that the supplier is not entitled to specify which classes of people may enforce the obligations of the warranty or service contract so long as the product is transferred for use for personal, family, or household purposes during the term of the warranty or service contract. Voluntarily assumed warranty or service contract obligations extend at least to the first purchaser and any subsequent transferee during the obligation period who uses the product for personal, family, or household purposes. Because the term "consumer" designates the scope of the warranty obligation, it also includes any other person who may enforce the obligations of the warranty or service contract either by operation of law or by the terms of the warranty or service contract.

The definition of consumer is not intended to include persons who utilize consumer products for commercial purposes. For instance, a clothes washer might be purchased by a consumer and subsequently transferred within the warranty period to a person who installs the machine in a commercial laundromat. The subsequent transferee would not be a consumer, since the product is not being used for personal, family, or household purposes.

(4) The concept of "reasonable and necessary maintenance" is defined in subsection (4) of Section 101, and is used in Section 104(d). If a supplier can show that a consumer has failed to provide reasonable and necessary maintenance, he is entitled to avoid his duties to repair or replace a malfunctioning or defective warranted consumer product if the lack of reasonable and necessary maintenance caused the malfunction or defect. "Reasonable" maintenance means that maintenance which the consumer could be expected to perform or have performed, given the skills he or she may be expected to possess and the tools normally available to a consumer, or the availability of maintenance facilities. "Necessary" maintenance includes the concept of reasonable maintenance but goes further to require that the reasonable

maintenance be necessary in order to keep the consumer product operating in a predetermined manner and performing its intended function.

(5) The term "repair" is defined in subsection (5) of Section 101 to include not only repair in the normal sense of correcting a malfunctioning consumer product, but also replacement of that malfunctioning product with a new consumer product or a component thereof which is identical or equivalent to the malfunctioning consumer product or component. The term is used in Section 104 in defining the duties of suppliers meeting Federal standards for warranties. To that extent, the concept of repairs set forth in subsection (5) of section 101 has direct applicability only to a "full" warranty. However, it is possible that in the context of a warranty other than a "full" warranty, the definition of repair in this bill might serve as a guide to the meaning of the word "repair".

(6) The term "replacement" is defined in subsection (6) of section 101. This term has direct applicability only to "full" warranties but might also serve as a guide in other warranty situations. The term includes the normal concept of replacement and requires that such replacement be with a new consumer product. The term also includes the refunding of the actual purchase price of the consumer product if repair or replacement is not commercially practicable or if the purchaser is willing to accept such refund in lieu of repair or replacement. In other words, the purchaser is required to accept a refund in lieu of repair or replacement if such repair and replacement it not commercially practicable; on the other hand, if repair and replacement is commercially practicable the consumer may, if he desires, accept such refund in lieu of repair or replacement if it is offered. This would allow the supplier, when he decides that neither repair nor replacement is commercially practicable, to refund the purchase price. A supplier could decide that repair or replacement is not commercially practicable, for example, in a situation of supplier-consumer disagreement over such things as whether reasonable and necessary maintenance has been performed, or whether misuse has occurred. This allows the supplier to make a business decision as to when neither replacement in kind nor repair is commercially practicable and to instead refund the purchase price.

Of course, when a product is to be replaced, the consumer is obliged to make the defective product "available" to the supplier. If the product is portable, the consumer might have to return the product to the point of purchase. In making a product "available" the consumer is required to free that product of any liens or incumbrances, but in those situations where fixtures are to be replaced, the consumer should be under no obligation to make the malfunctioning consumer product available free and clear of any liens or incumbrances attached to it because it is part of the real property. It would be impracticable to require the consumer to pay off the mortgage on his house in order to be eligible for replacement. The substitution of one such fixture for another should result in the transfer of the security interest on the defective product to the new consumer product so that the interest of the secured party would not be prejudiced.

(7) The term "supplier" is defined in subsection (7) of Section 101 as 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. This definition would include all persons in the distribution chain including the component supplier, the manufacturer, the distributor, and the retailer.

Because the definition of "supplier" excludes those persons not regularly engaged in the business of making consumer products available to consumers, the warranty provisions of S. 356 do not apply to periodic private transactions.

(8) The term "warrantor" is defined in subsection (8) of section 101 as any supplier or any other party who gives a warranty in writing. Thus, a party not selling a product but offering a warranty on the product for the benefit of a consumer would be a warrantor.

(9) The term "warranty" is defined in subsection (9) of section 101 as including guarantee, and to warrant is to guarantee.

(10) The term "warranty in writing" or "written warranty" is defined in subsection (10) of section 101. Depending upon whether or not the warranty incorporates at a minimum the uniform Federal standards for warranty set forth in section 104, it may be either a "full warranty" or a "limited warranty".

(11) The words "warranty in writing against defect or malfunction of a consumer product" are defined in subsection (11) of section 101. A warranty in writing against defect or malfunction is one in which there is a written affirmation of fact or promise made "at the time of sale". Therefore, as applied to advertising, only point of sale advertising could be found to create a warranty in writing under the terms of this definition. Of course, this is not the case with respect to the broader category of express warranty as used in section 110(d). In order to create a warranty in writing against defect or malfunction of a consumer product under this section, the written affirmation or promise must relate to the nature of the material or workmanship and promise or affirm that such material or workmanship is defect free or will meet a specified level of performance for a particular period of time.

For example, a written statement given at the time of sale that a particular clothes washer would "effectively wash clothes" would create a "warranty in writing against defect or malfunction of the consumer product" if that statement became part of the basis of the bargain between the supplier and the purchaser. This statement would represent a "promise" that the "material or workmanship" of the product are such that it will "meet a specified level of performance", namely washing clothes effectively. Alternatively, a warranty in writing against defect or malfunction of the consumer product could arise if the supplier undertakes in writing to refund, repair, replace, or take other remedial action with respect to the sale of a consumer product in the event that the product fails to meet specifications set forth in the undertaking. For example, the supplier might state: "if this washer doesn't wash clothes effectively, I will refund its purchase price." Since this represents an undertaking in writing to refund the purchase price of the product if the product fails to wash clothes effectively, a warranty in writing against defect or malfunction of a consumer product would have been created. In any event, any written affirmation, promise or undertaking discussed above would have to become part of the basis of the bargain between the supplier and the purchaser to qualify as a "warranty in writing against defect or malfunction of a consumer product".

(12) The term "without charge" is defined in subsection (12) of section 101. In section 104 a supplier making a "full" warranty and thus necessarily meeting or exceeding Federal standards must repair or replace any malfunctioning or defective consumer product within a reasonable time and "without charge". Normally a warrantor who assumes the obligation to remedy a defect or malfunction within a reasonable time and "without charge" would not assess a consumer with any cost attendant to the discharge of the warranty obligations. For example, the warrantor could not require the purchaser to return a consumer product by mail if the consumer had to pay for the postage or it was very difficult to mail. Likewise, if a repair facility was located at an unreasonable distance, it would normally be expected that the supplier would bear the cost of transporting the product to that facility. (See discussion of section 104, infra.)

The term does not necessarily mean that the warrantor must necessarily compensate the purchaser for incidental expenses, however, if the supplier can affirmatively demonstrate that such expenses should be borne by the purchaser. (See section 104, infra.)

Subsection 12 of section 101, however, does affirmatively require the warrantor to compensate the purchaser for any reasonable, incidental expenses resulting from the warrantor's failure to repair or replace within a reasonable time the malfunctioning or defective consumer product. Such incidental expenses may also be compensated if the warrantor imposes any unreasonable duties upon the purchaser as a condition of servicing, repair or replacement. (The use of the term incidental expenses here is not to be confused with the concept of incidental or consequential damages, which are to be governed by state law. See section 113(c).)

Disclosure Requirements (section 102)

Section 102 of title I outlines disclosure requirements for suppliers of consumer products who offer warranties in writing or service contracts in writing. Suppliers are required to disclose fully and conspicuously in simply and readily understood language the terms and conditions of their warranties. The Federal Trade Commission is authorized to detail these disclosure requirements in accordance with procedures set forth in section 109 of title I.

Enumerated in section 102 are certain informational areas which the Federal Trade Commission is to consider when promulgating disclosure regulations. These guidelines exemplify information that would promote consumer understanding of warranties both at the time of the sale and when the product breaks down. For example, subparagraph (h) of paragraph (2) of subsection (a) of section 102 suggests that the warrantor tell the consumer on what days and during what hours he will perform his obligations in case of defect or malfunction. For instance, if a refrigerator breaks down, a consumer could consult his warranty to ascertain whether the warrantor had emergency service on Saturdays or Sundays. This information, coupled

with that in subparagraph i) relating to the period of time it would take the warrantor to effect repair or replacement, would enable the consumer to know what to expect and to take necessary precaution against the spoilage of food in the interim before the necessary repairs could be completed. Such information would also be useful to the consumer in making a product selection at the time of sale. One may be more prone to purchase products from a supplier who provides emergency service for such items as refrigerators.

The Committee is of the belief that the informal dispute resolving mechanisms encouraged in section 110 will be useful for the redress of grievances only when their existence is known. Subparagraphs (j) and (k) suggests that the consumer should be notified of his ability to seek redress through both any informal dispute settlement mechanisms that the warrantor may offer or through legal remedies made economically feasible because of provision for recovery of reasonable costs, including attorney's fees based on actual time expended. Furthermore, if the warrantor is required to inform the consumer of his rights in the event the warrantor fails to perform, the Committee believes that the warrantor will have greater incentive to perform as promised.

Of course, the items of information suggested for disclosure in Section 102(a)(2)(A) through (K) are not intended to be either mandatory or exclusive. The Commission may well determine, in accordance with section 109, that disclosure of additional items of information may be appropriate. For instance, it may well be that for some products, disclosure of what constitutes "reasonable and necessary maintenance" would be appropriate.

Section 102(a)(1) authorizes the Federal Trade Commission to determine the manner and form in which information pertaining to any written warranty should be presented and displayed in advertising, labeling, point-of-sale material, or other representations in writing. Subsection (b) makes explicit the fact that the Commission is not authorized by this title to prescribe the duration of warranties given or to require that a product or its components be warranted. While it is the intent of the Committee that the Commission under authority of title I of this bill may not prescribe the substance of written warranties, except to the extent provided in section 104, this limitation is to be read in conjunction with the savings provision in section 112 which says that, "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 Anti-Trust Act." Furthermore, the Commission is expressly granted the authority to prescribe rules requiring warranty or service contract periods to be extended to compensate the consumer for the time during which the warranted use of his product was lost as a result of a defect or malfunction. As stated in section 102(b), such an extension should not occur unless the consumer is denied the use of his product at least ten days. The ten-day figure should be cumulative over the duration of the warranty period, since otherwise the purpose of any such rule could be circumvented.

Designation of Warranties (section 103)

Section 103 of title I requires suppliers who warrant in writing their consumer products to clearly and conspicuously designate such warranties in a manner that will enable consumers to readily discern the type of warranty being given. If a warranty meets the Federal standards set forth in Section 104, and does not limit the liability of the warrantor for consequential damages, then it is to be conspicuously designated as a "full (statement of duration)" warranty. For example, an appliance guaranteed for a full year in accordance with Section 103(a)(1) would have a warranty headed with the designation: "full one year warranty." If a warranty in writing limits the liability of the warrantor for consequential damages, but in all other respects meets the requirements set forth in Section 104, then it shall be labeled as a "full (statement of duration) warranty (remedy limited to free repair or replacement within a reasonable time, without charge)". If a warranty in writing does not meet Federal standards, it would be designated in such a way as to clearly indicate to the consumer the fact that it is a "limited" as opposed to a "full" warranty. The designation should indicate the limited scope of the coverage afforded. For example, a warranty on an appliance might be designated as a "parts only warranty", or a warranty on an article of clothing might be headed "colorfastness only". The Federal Trade Commission, in Section 109, is empowered to define in detail the designation requirements for limited warranties.

There are several exceptions to the designation requirements set forth in section 103. First, if a product costs the purchaser $5 or less, a warranty on that product does not need to be designated in accordance with section 103. Second, the Federal Trade Commission may, pursuant to section 109, exempt a supplier from complying with the designation requirements in section 103. Finally, section 103(b) excludes from the designation requirements of Section 103 "expressions of general policy concerning customer satisfaction which are not subject to any specific limitations." For example, a statement such as "satisfaction guaranteed or your money back" does not have to be designated as a full or partial warranty. Section 103(b) also exempts such general policy statements from the provisions of sections 102 and 104 of title I. In order to be eligible for exemption, a general policy statement must not be subject to any "specific" limtiations. The word "specific" is included in order to protect a supplier from a consumer who uses a product for 10 years and then complains of dissatisfaction with the product. A refusal of a supplier to honor such an expression of dissatisfaction from a consumer who has used a product without expressing his objections for 10 years would not amount to a "specific" limitation on the general policy concerning consumer satisfaction.

In those situations where the purchaser may obtain both written statements or representations not subject to any specific limitations as well as specific warranties in writing from the same supplier of a consumer product, the written statement or representation not subject to any specific limitations should control unless the warranty in writing clearly and conspicuously excludes the guarantee of consumer satisfaction. (See also section 110(d)(2)). In any event, any statement or representation falling within the exclusion contained in section 103(b) would remain subject to the provisions of the Federal Trade Commission Act and to section 110 of title I.

Federal Standards for Warranty (section 104)

The minimum duties which a supplier must assume when giving a "full" warranty are described in section 104 of title I. At a mini-

mum, the supplier must promise to repair or replace any malfunctioning or defective consumer product covered by the warranty, within a reasonable time, and without charge. In addition, the warrantor is prohibited from imposing any duties other than notification upon the purchaser as a condition of securing repair or replacement of a consumer product covered by a warranty meeting Federal standards, unless the warrantor can affirmatively demonstrate that additional duties would be reasonable.

The words "repair," and "replace," are defined with specificity in section 101 of title I. The concept of "reasonable time" cannot be precisely defined. The amount of time which is reasonable will vary according to the customary time for repair of similar consumer products, the location of the defective consumer product in relation to the repair facility, the consumer's day to day need for the product, and other factors. The term "without charge" is defined in paragraph 12 of section 101 of title I. In order to add certainty and specificity to the relationship between the supplier and the purchaser, the Federal Trade Commission is empowered under Section 109(e) to define, to the extent possible, the duties imposed upon the supplier who decides to fully warrant his products. Such rules and regulations would be promulgated in accordance with the procedures set forth in section 109 of title I.

In determining whether a supplier can impose duties other than notification upon the purchaser, a court or the Commission would compare the magnitude of the economic burdens "necessarily" imposed upon a warrantor against the magnitude of the burdens of inconvenience and expense "necessarily" imposed upon the purchaser. The word "necessarily" requires a court or the Commission to explore the alternatives available to the supplier and the purchaser before weighing the supplier's burden against the purchaser's burden. As an illustration, suppose the manufacturer of a small, portable consumer product offers a "full" warranty but requires the consumer to personally deliver the product to a service center in case of malfunction or defect. The supplier might argue that this is a reasonable burden because it would be cheaper for the purchaser to bring the product to the service center than it would be for the supplier to maintain a pick-up system. Before evaluating the reasonableness of the duty imposed by the supplier, a court or the Commission should explore alternative methods of returning the product to the service center for repair.

For example, it may be less costly to all parties concerned to use the mails or a private delivery service to transport the malfunctioning or defective product. If this were so, then placing the burden of personal delivery to the service center upon the consumer would be unreasonable. Further analysis may be necessary, however, in order to determine what type of mailing duty or delivery to the private carrier would be reasonable. For example, the warrantor in the above example might change his warranty to require the purchaser to mail the defective or malfunctioning consumer product to a service center for repair. If the average rate of return for repair or replacement of the product is one for every hundred sold and if the average cost for mailing that product to the service center is $1.00, the supplier's economic burden would be $1.00 per hundred sold, assuming he already absorbs the cost of mailing the product back to the consumer. In all likelihood, this

cost would be passed on to purchasers of these products by charging 1¢ more per product. If the supplier pays the cost of the return mailing, then the cost to the one purchaser out of one hundred who has to send his product for repair would be his time in having to package and mail the product plus the 1¢ increase in purchase price. The remaining 99¢ would be paid by other purchasers, and the price of the product involved would reflect both its acquisition and complete warranty cost. If the consumer was required to pay the mailing charge, then his expense would be his time required to package and mail the product plus the $1.00 mailing charge; this would impose a burden on him which would be one hundred times greater. The burden on the supplier, however, would remain relatively constant in either situation. A requirement for the consumer to pay the mailing cost would, therefore, be unreasonable because the magnitude of the burden imposed upon the consumer in relation to the magnitude of the burden imposed upon the supplier is so much greater.

Subsection (b) of section 104 gives the purchaser or consumer the right to demand and receive replacement of a consumer product which has needed repair an unreasonable number of times during the warranty period. The provision is designed to rectify the situation where a consumer has received a product which turns out to be a "lemon", or where the supplier's repair system is so ineffectual that defects are not corrected even though the product is repeatedly returned for repair. In the face of continual malfunctions of the consumer product, the ability to continue to return the product for repair is insufficient recourse for the consumer. In order to give specificity to the language "unreasonable number of times during the warranty period," the Federal Trade Commission, in section 109(e), has been directed to "define in detail" the provisions of subsection (d) of section 104. This would allow the FTC by rule to establish what in fact is "an unreasonable number of times" for different categories of consumer products. A full refund of the purchase price in lieu of replacement with a new product would satisfy the requirements of this section if the supplier determined that repair or replacement was not commercially practicable in the circumstances. In either case, the burden of depreciation is to fall upon the supplier. (See discussion of section 101(6), supra.)

Subsection (c) of section 104 states that the full warranty duties assumed by a supplier extend to the consumer. "Consumer" is defined in section 101(3).

Subsection (d) of section 104 states that a supplier does not have to repair or replace a consumer product which malfunctions or becomes defective during the warranty period if he can sustain the burden of proof and show that damage, while in the possession of the purchaser, (opposed to damage in transit prior to the possession, for example), or unreasonable use caused the product to malfunction or become defective. (See discussion of "reasonable and necessary maintenance" supra, at section 102.)

Full and Limited Warranties of a Consumer Product (section 105)

Section 105 states that the warranty provisions in S. 356 would not prohibit the selling of both full, full (with limitation of liability for consequential damages), and limited warranties if such warranties are clearly and conspicuously differentiated. For example, a consumer

product might be sold with a "full one year warranty—remedy limited to free repair or replacement within a reasonable time, without charge". The supplier might also offer free parts replacement for an additional year. That limited warranty might be labeled a "two year free parts replacement guarantee." In other words, the measures of time for the limited warranty would run from the time of purchase to the end of the warranty period. In the example given the limited warranty during the first year would actually be subsumed under the full warranty.

Service Contracts (section 106)

Section 106 provides that a supplier may sell a service contract to the purchaser in lieu of, or in addition to, the warranty. Section 106 requires that a service contract fully and conspicuously disclose in simple and readily understood language its terms and conditions. The Federal Trade Commission is authorized to prescribe the manner and form in which the terms of service contracts should be clearly and conspicuously disclosed. The effect of this section is to require the same sort of disclosure requirements on both service contracts and warranties so that both will be fully understandable to the consumer.

Designation of Representatives (section 107)

In hearings before the Committee in the 92d Congress, concern was expressed that warrantors might be prevented from delegating to representatives the performance obligations assumed under a written warranty. Section 107 states that nothing in title I shall be construed to prevent any warrantor from making any "reasonable and equitable arrangements" for representatives to perform warranty duties.

The Committee did not intend to allow warrantors to make unjust or inequitable arrangements under which representatives would be bound to perform warranty duties. The phrase "reasonable and equitable arrangements" is intended to make clear that, to the extent a supplier asks or requires another party to assume responsibilities under the warranty, that party is not to be victimized by unreasonable or inequitable arrangements. Hence one of the purposes of this section is to insure that the manufacturer does not escape his liability under this title by shifting responsibility to dealers, wholesalers, retailers, or others in the chain of distribution. Since manufacturers have primary control over the quality of products, the intent of this section is to place full responsibility on them, while at the same time allowing others, such as dealers, to perform services related to warranties if they are equitably compensated. Therefore, this section also states that "no such arrangements shall relieve the warrantor of his direct responsibility to the purchaser or necessarily make the representative a cowarrantor." For example, the Federal Trade Commission has reported that some of the problems associated with automobile warranties in the past may have resulted from the failure of auto manufacturers to reasonably and equitably compensate their dealers for warranty work.

Nothing in section 107 is intended to dictate the method of compensation for warranty or service contract work, so long as whatever method used insures that such compensation is equitable. For instance, the supplier could build into the wholesale price the cost of warranty service and then compensate dealers who perform the warranty obligations by direct payment for services performed; or the manufacturer could establish a low wholesale price that excludes the cost of warranty service and a dealer who performs the warranty obligation could receive his compensation out of the dollar margin between the wholesale and retail price. While both methods could be examples of compensation which would satisfy the requirements of section 107 so long as the particular arrangements are "reasonable and equitable," direct payments would be the more likely method to meet the test.

While a manufacturer can issue a warranty that says certain authorized service representatives will repair or replace the defective product, the consumer has recourse directly against the manufacturer as warrantor, if these representatives fail to perform. The manufacturer could not defend against an action for failure to perform by arguing that the designated representative, not the manufacturer, was responsible for the failure of performance.

Limitation on Disclaimer of Implied Warranties (section 108)

Subsection (a) of section 108 prohibits a supplier (defined in paragraph 7 of Section 101) from disclaiming implied warranties such as the warranties of merchantibility or fitness, thereby building a base of protection for consumers whose products are warranted in writing. This subsection is designed to eliminate the practice of giving an express warranty while simultaneously disclaiming implied warranties. This practice has often had the effect of limiting the rights of the consumer rather than expanding them, as he might be led to believe.

Subsection (b) of section 108 has been included in the bill to clarify the relationship between implied warranties and express warranties. The subsection states that implied warranties may not be limited as to duration either expressly or impliedly through a designated warranty in writing or other express warranty. This provision clarifies the relationship between express and implied warranties on consumer products, by maintaining the independence of one from the other. This will mean that the implied warranties, created by operation of law, can only be limited by operation of law and not "expressly or impliedly" by an express warranty. As a result, suppliers and consumers are placed on equal footing when determining how long a particular implied warranty lasts. Through negotiation between consumer and supplier (and ultimately through determination by courts if that becomes necessary) the duration of an implied warranty such as the warranty of fitness for ordinary use would be established. Thus, a consumer whose warranty in writing for one year is unenforceable because the warranted product malfunctioned one year and six days after the time of purchase might still have recourse against the supplier for warranty of fitness for ordinary use.

It is not the intent of the Committee to alter in any way the manner in which implied warranties are created under the Uniform Commercial Code. For instance, an implied warranty of fitness for particular purpose which might be created by an installing supplier is not, in many instances, enforceable by the consumer against the manufacturing supplier. The Committee does not intend to alter currently existing state law on these subjects.

Federal Trade Commission (section 109)

The Federal Trade Commision is required to promulgate rules and regulations to facilitate the implementation of certain aspects of title

I. The Commission is to define in detail the disclosure requirements for warranties set out in 102, and to define the disclosure requirements for service contracts as provided in section 106; it is to determine when a warranty in writing does not have to be designated in accordance with section 103, and to define in detail the disclosure requirements of section 103 (2) (a); and it is to define in detail the duties set forth in section 104 (a), (b), and (c), and to define their applicability to warrantors of different categories of consumer products with "full" warranties.

Section 109 also sets forth in the procedure which the Federal Trade Commission is required to follow in establishing these rules. The language describing the type of procedure which the Commission is to follow in promulgating rules represents a compromise between simple informal rulemaking procedures and the more complex, complicated, and time consuming formal hearing procedures contained in sections 556 and 557 of title 5 of the United States Code. But for the qualifying words "structured so as to proceed as expeditiously as practicable," the Commission would be bound to follow at all times the formal hearing procedure when carrying out its rulemaking responsibilities. The qualifying words, however, have been added to indicate the Committee's desire not to require a formal oral hearing with cross examination as a part of all proceedings. It is the intent of the Committee to afford interested parties, both consumers and industry representatives, greater procedural rights than accorded under section 553. Therefore, the Committee provides for a public record and an opportunity for an agency hearing which assures judicial review on the basis of "substantial evidence." (See section 706 of title 5 of the United States Code.)

As to the type of public record developed and the form of agency hearing provided, the Committee is of the opinion that the Federal Trade Commission can best determine the type of proceeding it should hold so as to promulgate rules as expeditiously as practicable. The Committee desires to avoid the abuse of cross examination by interested parties which delays unduly the rulemaking process. Therefore, it is anticipated that expeditious rulemaking would not normally include formal hearings. But an opportunity for all interested persons to participate in the rulemaking should be afforded. In many situations, in the Committee's view, interested persons could submit all or part of the evidence in written form. The Committee also expects the Federal Trade Commission to exercise vigorously its discretion which permits it "as a matter of policy . . . to provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence." (See subsection (b) of section 556 of title 5 of the United States Code.) Such Commission action would avoid unwarranted delays caused by repetitious testimony offered by parties with essentially common interests.

Private Remedies (section 110)

Section 110 spells out the remedies available to the purchaser of consumer products. A purchaser can utilize informal dispute settlement procedures established by suppliers or, having afforded a supplier a reasonable opportunity to cure, may resort to formal adversary

proceedings with reasonable attorney's fees available if successful in the litigation (including settlement).

Subsection (a) of section 110 declares that it is the policy of Congress to encourage the development of informal dispute settlement mechanisms. If a supplier develops such a mechanism, then the "consumer" as defined in title I is required to utilize such mechanism as part of the opportunity given the supplier to cure a breach prior to resorting to formal legal action. The Federal Trade Commission is empowered to promulgate guidelines for the establishment of these informal dispute settlement mechanisms and is required to supervise them on its own initiative or when petitioned by an interested party to insure their bona fide operation. This provision is not intended to require the Commission to review individual disputes but only to require them to oversee generally dispute settlement mechanisms.

Subsection (b) authorizes any "consumer" (defined in section 101 (3)) to sue for breach of warranty or service contract in an appropriate district court, but any such suit shall be subject to the jurisdictional requirements of section 1331 of title 28 of the United States Code. In effect, this means a person or at this time a class of persons must show individual damages of ten thousand dollars or more in order to bring suit in a Federal court.

But any "consumer" 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—i.e. a warranty in writing, a service contract in writing, an express warranty (defined in section 110(d)(1)), or implied warranties—may sue in any State or District of Columbia court of competent jurisdiction. Thus, for the most part, the Federal rights created by title I of this bill will be enforced in State rather than Federal courts.

As previously mentioned, prior to commencing any proceeding authorized by title I a purchaser must afford the supplier a reasonable opportunity to cure any breach, including the utilization of any bona fide informal dispute settlement mechanism. Any purchaser who utilizes an informal dispute settlement mechanism would not be prevented from seeking formal judicial relief following such utilization. Of course in a class action suit only representatives of the class would have to avail themselves of any bona fide informal dispute settlement mechanism on behalf of the class before the class action suit could be instituted.

In order to preserve the status quo as to the eligibility under State law for participation in class actions, subsection (b) of section 110 provides that "nothing in this subsection shall be construed to change in any way the jurisdictional or venue requirements of any State." Because Federal rights would be enforced in State courts, some might argue that limitations that certain States impose on participation in class action litigation, would not be valid. The abovementioned language preserves such limitations but does not affect the requirement that suits authorized by title I may not be maintained until a purchaser or his representative first utilizes any bona fide informal dispute settlement mechanism which the supplier has provided.

Subsection (c) of section 110 provides for the recovery of court costs and reasonable attorney's fees in the event a "consumer", as de-

fined in title I, is successful in a suit for breach of an express or implied warranty or service contract obligation. This provision would make economically feasible the pursuit of remedies by consumers in State and Federal courts. It should be noted that an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery. This requirement is designed to make the pursuit of consumer rights involving inexpensive consumer products economically feasible. Of course, where small claims courts are available and function adequately in resolving consumer disputes, the Committee encourages their use; and to the extent legal representation is not necessary in such courts, attorney's fees would probably not be available.

Subsection (d) of section 110 defines an "express warranty" in a manner paralleling the Uniform Commercial Code's definition. If a consumer product accompanied by a warranty in writing or service contract in writing has been expressly warranted outside the writing, then the purchaser can enforce the terms of that warranty against the supplier actually making it and recover court costs and reasonable attorney's fees. For example, a salesman selling a consumer product warranted in writing for one year who said: "I guarantee that this product will perform perfectly for 5 years" would be deemed to have created an express warranty. If he was not acting as an agent for the retailer or manufacturer in making that statement, only the salesman himself would be the warrantor, and the purchaser would have recourse only against the salesman in enforcing the terms of the express warranty. Of course 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 would not create an express warranty.

Government Enforcement (section 111)

Subsection (a) of section 111 states that any failure to comply with the requirements imposed by or pursuant to title I shall be considered a violation of section 5 of the Federal Trade Commission Act.

Paragraph (1) of subsection (b) of section 111 gives the district courts of the United States jurisdiction to restrain violations of title I in an action brought by the Attorney General or the Commission. Any temporary restraining order or preliminary injunction would be issued by a District Court without bond. Such restraining order or preliminary injunction may be dissolved if a complaint is not filed within a reasonable time after issuance as specified by the court. Provision is made for joining other parties as the court deems appropriate, and to that end nationwide service of process is provided for.

Paragraph (2) of subsection (b) of section 111 authorizes the Attorney General to serve a civil investigative demand upon any person "under investigation" who may be in the possession, custody or control of documentary material relative to any violation of title I. The procedures to be followed in serving civil investigative demands are set out in detail in section 111. It is important to note that such demand may be served only on persons who are under investigation. This burden, however, should not be great because the Attorney General, believing anyone to be in possession of documentary material relevant to any violation of this title, could put that person under investigation

prior to the serving of a demand in order to comply with the "under investigation" requirement.

Savings Provision (section 112)

This section states the authority of the Federal Trade Commission under the Federal Trade Commission Act is in no way superseded by this title. This provision also assures that those products not specifically covered under this bill because of the $5 exemption applicable to section 102 and 103 are, nevertheless, subject to the Federal Trade Commission's power to proscribe unfair and deceptive acts or practices. (*See also* section 113(c)).

Scope (section 113)

Subsection (a) of this section states that the provisions of the bill and the powers granted to both the Federal Trade Commission and to the Attorney General extend to the sale of consumer products and services "affecting" interstate commerce as well as those "in" interstate commerce. This subsection would make the rights and remedies in title I available to low income consumers within our cities who are often victimized by acts only "affecting" interstate commerce. A proviso was included in subsection (a) to make clear that the operation of this Act is not to interfere with the operation of other Federal laws, such as the Clean Air Act.

Subsection (b) of section 113 specifies the way in which title I would interact with State laws regulating warranty practices. States would be preempted from requiring labeling or disclosure requirements that differed from those prescribed pursuant to title I of this bill. This was designed to insure that suppliers of consumer products would not have to print warranties in conformance with the many possible State and Territorial disclosure formulas or labeling procedures. Rules of the Federal Trade Commission detailing disclosure and designation requirements pursuant to sections 102 and 109 would preempt any different State requirements. Any rules defining "full" warranty duties (section 104) would constitute preemptive national standards for warranties unless the Commission permitted a State to deviate from those rules in a manner prescribed in the rule.

Because title I of this bill allows a supplier to give a warranty or not as he chooses and because it allows him to define the contents of any warranty given (as long as it is not unfair or deceptive or does not contain a disclaimer or limitation on the duration of implied warranties), the Committee has not been willing to follow the suggestion of those affected persons who asked that federal legislation totally preempt State action. The Committee was of the opinion that States should be free to determine that, for the protection of their citizens, a higher level of warranty protection would be required. Of course, the way in which any mandatory warranty protection would be required to be presented would have to be consistent with federal disclosure and designation standards. Furthermore, to the extent a supplier offers a "full" warranty in compliance with Federal standards, he is protected against the imposition of additional burdens by a State unless the Federal Trade Commission, in exercising its rulemaking authority, permits such imposition in accordance with the considerations set out in section 113(b).

For the purposes of illustration, it would probably be consistent with the provisions of subsection (b) of section 113 for a State to determine that all widgets sold in that State must contain a "Parts Only Warranty" for one year or a "Full One Year Warranty". In other words, a State can work within the provisions of this bill, and the rules and regulations implementing it, to advance the interests of consumers within its borders by mandating coverages which the Federal bill describes but does not mandate.

Subsection (c) of section 113 states that nothing in title I changes State law which allows a person to recover consequential damages for injury to the person resulting from a breach of warranty, or any State law which restricts the ability of a warrantor to limit his liability for consequential damages. For instance, since section 2–719 of the Uniform Commercial Code permits the limitation of remedies only when such a provision is included in the warranty, any limitation on incidental or consequential damages would have to be clearly disclosed in accordance with section 103.

Effective date (section 114)

Section 114 sets forth the timing for implementation of title I. The effective date is six months after the date of enactment, except that any of those portions of title I which can not reasonably be met without the promulgation of rules, shall take effect six months after the promulgation of such rules by the Federal Trade Commission (with an additional six month extention possible). The Commission is to promulgate such rules as soon as possible, but no event later than one year after the date of enactment of this Act. The time limitations contained in section 114 regarding the promulgation of rules by the Commission apply only to the promulgation of initial rules and do not restrict the Commission's rule-making activity in the warranty area *in futuro*.

Comments received by the Committee on this section expressed fears that a rule or regulation might be applied to merchandise manufactured prior to its effective date. The intent of the Committee is clear that, "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." Furthermore, any rules promulgated by the Commission would not take effect until six months after their final promulgation, except that the Commission may provide an additional six months so that suppliers can bring their written warranties into compliance. Thus any product manufactured prior to these effective dates would not have to comply with either the provisions of the Act or rules promulgated by the Commission.

TITLE II

Expanded Federal Trade Commission Jurisdiction (section 201)

Section 201 of this title expands the Federal Trade Commission's jurisdiction from acts and practices "in" interstate commerce to those "affecting" interstate commerce. This expansion of the Commission's jurisdiction is intended to permit more effective policing of the marketplace by bringing within reach practices which are unfair or deceptive and which, while local in character, nevertheless have an adverse impact upon interstate commerce.

In considering certain arguments against expansion of the Commission's jurisdiction, the Committee was mindful of the danger of making the Commission alone responsible for eradicating fraud and deceit in every corner of the marketplace. This is not the Committee's intent in expanding the jurisdiction of the Commission. State and local consumer protection efforts are not to be supplanted by this expansion of jurisdiction. In many situations the Commission, through its Consumer Advisory Boards and expanded field office operations would work concurrently with State and local governments to attack in their incipiency flagrant consumer abuses. However, this expansion of jurisdiction, in conjunction with the authority to seek injunctive relief, will enable the Commission to move against local consumer abuses where State or local consumer protection programs are nonexistent or where fly-by-night operators hit one local area and then quickly move on to another before local officials can take action. (For similar expansion of authority see section 206 and 209 of title II of this bill.)

Civil Penalties (section 202)

This section of the bill authorizes the Federal Trade Commission, through its own attorneys, to initiate civil actions to recover penalties against any person (including partnerships, corporations, or other entities) who commits an act or engages in a practice which he knows is unfair or deceptive to consumers and prohibited by section 5(a)(1). The maximum penalty recoverable would be $10,000 per violation, but this penalty could be settled if the Commission publicly stated its reasons and the court approved the settlement.

It should be noted that the word "consumer" as used in title II is not related to the definition of that term in title I. The use of the word "consumer" in title II is to be read in its broadest sense and is not limited to those persons defined in section 101(3) of title I of S. 356.

In any civil action initiated under authority of the amendment to the Federal Trade Commission Act set forth in this section, the Commission would have to show "actual knowledge or knowledge fairly implied from objective circumstances." A violation of a Commission rule would in most cases constitute a violation with "knowledge fairly implied from objective circumstances" unless the person against whom the action was brought could show why he should not have been expected to have knowledge of the Commission rule or that the rule itself is invalid.

The civil penalty which can be imposed is $10,000 "for each such violation." The Commission would have to judge what constituted "each such violation" in the particular case, but "each such violation" would not necessarily be each product unfairly or deceptively sold. The focus, in the opinion of the Committee, should be on the decision-making process of the person against whom the penalty is sought, the number of different decisions he made and the harm generated by those decisions.

Consumer Redress (section 203)

After a cease-and-desist order is made final, the Commission may seek remedial relief on behalf of consumers injured by the specific

unfair or deceptive act or practice which was the subject of the cease-and-desist proceeding in an action initiated in Federal district court. This provision would enable the Commission to more adequately protect consumers by affording them specific redress for their injuries. At the present time, cease-and-desist orders have prospective application only and afford no specific consumer redress to consumers who have been injured. A proceeding for consumer redress under section 203 could seek relief only for injury sustained as a result of the particular unfair or deceptive act or practice which was the subject of the cease and desist order.

In granting new powers to the Commission, section 203 does not in any way purport to supplant private actions by consumers. The Committee's intent in giving these remedial powers was (1) to reinforce the Commission's credibility in policing the marketplace by authorizing sanctions which could realistically be expected to inhibit unlawful business practices, and (2) to enable the Commission, where its investigation of an act or practice revealed damage to consumers, to utilize the results of that investigation for the benefit of the damaged parties.

The nature of the relief the Commission could obtain from the court on behalf of consumers would be limited only by the nature of the injury done and the remedial powers of the court. The enumeration in section 203 of the types of relief available are advisory only and would not limit the Commission in pleading or the court in acting to fashion other appropriate remedial relief. It is clear, however, that no punitive or exemplary damages are authorized under this section.

This section would not affect whatever power the Commission may have under section 5 of the FTC Act to fashion relief in its initial cease-and-desist order, such as corrective advertising or any other remedy, which may be appropriate to terminate effectively unfair or deceptive acts or practices. Likewise, there is no intent on the part of the Committee to disturb the Commission's power to compel restitution by its own order when such restitution is necessary to terminate a continuing violation of section 5 of the Federal Trade Commission Act. Section 203 is applicable to those situations where the Commission acts to make specific consumers whole and is not intended to supplant general actions by the Commission which are designed to dissipate the prior effects of unfair or deceptive acts or practices.

The court is expressly authorized to give notice reasonably calculated, under all the circumstances, to appraise all consumers allegedly injured by the defendant's acts, of the pendency of the action for redress under section 203. While an action under section 203 is not a class action, it may be useful for the court to be guided by some of the provisions of Federal Rule of Civil Procedure 23. It is anticipated that those consumers actually receiving notice under this provision would be considered parties by representation in a section 203 action and bound by any judgment therein as if they were actual parties. Therefore, in any subsequent suit brought by such consumers under State law, they would be bound under the doctrine of collateral estoppel, as to issues actually litigated and necessarily determined in the section 203 action.

It is anticipated that a final cease-and-desist order will be given the same effect in a subsequent action for redress under section 203 that a government obtained antitrust decree is given in a subsequent private treble damage action. In that situation, the government obtained decree (including an FTC order) is given only prima facie effect and is thus at least rebuttable. It is not the intent of the Committee to encourage respondents to resist the finalization of cease-and-desist orders because of fear of the effects of an FTC order in a possible consumer redress action under section 203. This effect would be both unfortunate for the Federal Trade Commission, resulting in further delays in FTC proceedings, and unfair to the respondents, who would have to conduct themselves before the FTC with too strong an eye on the possible effect of the FTC cease and desist order in a subsequent consumer redress action under section 203. Thus, it is anticipated that a final cease-and-desist order would be given prima facie effect in a subsequent action under section 203, as is already the case under section 5(a) of the Clayton Act (see 15 U.S.C. 16(a)).

Finally, section 203 makes clear that the court has the power to consolidate an action under section 203 with any other action requesting the same or substantially the same relief upon motion of any party.

Penalty for Violation of Cease and Desist Order (section 204)

This section increases the potential penalty for violation of an order of the Commission from $5,000 to $10,000. The FTC may seek such penalty through its own attorneys rather than relying upon the Justice Department. In addition to increasing the penalty, this section authorizes the Commission to seek mandatory injunctions against persons in violation of a Commission order for whom the threat of economic penalty is more apparent than real because they have no available resources with which to pay the penalty.

Commission Self-Representation (section 205)

This section insures that the Commission will be able to represent itself in any civil proceeding involving the Federal Trade Commission Act. At the present time, the Commission must, in many situations, rely on the Department of Justice, which has been sluggish in the past in enforcing regulatory agency decisions in Federal courts. Similar authority to litigate to enforce independent agency determinations is already enjoyed by the National Labor Relations Board (see 29 U.S.C. 154(a)).

In addition to the representational authority specifically provided the Commission by sections 202, 203, 204, 207, 208, and 210 in actions to redress consumer grievances, and to enforce Commission orders, penalties, and subpoenas, the Committee intends to permit the Commission to conduct and control all other litigation involving Commission action under the FTC Act, whether the Commission be acting as plaintiff or defendant. Without intending any limitation, the Committee has in mind, for instance, actions seeking injunctions, declaratory judgments or other relief.

Expansion of Jurisdiction (section 206)

See discussion in section 201 supra.

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 53(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 redelegation 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 Rulemaking

During the 92d Congress, the Magnuson-Moss Warranty-FTC bill (S. 986) as passed by the Senate contained a provision reaffirming the legislative rulemaking authority of the Commission. A similar provision was included in S. 356 as introduced in the 93d Congress, but in a letter to Chairman Magnuson dated March 26, 1973, Chairman Engman 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. 356 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 perform 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 553 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 conspicuously disclosed.

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 cowarrantor.

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 553 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 designated 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. Wherever 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 subpena 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 subpena 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).

SAVING 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 requirement) covering any transaction to which this title applies—

(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.

(c) 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 comprise, 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(l) of the Federal Trade Commission Act (15 U.S.C. 45(l)) is amended by striking subsection (l) and inserting in lieu thereof the following new paragraph:

"(l) 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 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 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. 212. (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 (m), added by section 205 of this title, the following two new subsections—

"(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(o)(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.

"(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 553 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:	
Staff attorneys	$375,000
Clerical personnel	84,000
Equipment, etc.	92,000
Total	551,000

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	30,000
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	84,000
Equipment, etc.	92,000
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	30,000
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.

Sincerely,

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. 45)

(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 406(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 unfair 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, recission 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 pendancy 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.

(b) 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] *$10,000* 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(o)(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.

(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 553 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.

* * * * * * *

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 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 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)] (*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. 986, 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. 20, 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 tie 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 reconsidered. 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 incipiency relief to many more cases where public harm is unduly aggravated by the continuance of a consumer abuse.

Accordingly, the Commission endorses the standard already contained in section 13(a) 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. *Rhodes 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]henever 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 jurisdicton. 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 provisons of section 204 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. 203).

(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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S. 356

Ninety-third Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To provide minimum disclosure standards for written consumer product warranties; to define minimum 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. For the purposes of this title:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer 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 in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that 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 a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 108 and 104(a)) in connection with the sale by a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration,

services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term "remedy" means whichever of the following actions the warrantor elects:

(A) repair,
(B) replacement, or
(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product.

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term "Federal law" excludes any State law.

WARRANTY PROVISIONS

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, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b)(1)(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this title (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(c) No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $5.

DESIGNATION OF WARRANTIES

SEC. 103. (a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "limited warranty".

(b) Sections 102, 103, and 104 shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) In addition to exercising the authority pertaining to disclosure granted in section 102 of this Act, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than $10 and which are not designated "full (statement of duration) warranties".

FEDERAL MINIMUM STANDARDS FOR WARRANTY

SEC. 104. (a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 108(b), such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

(b)(1) In fulfilling the duties under subsection (a) respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a), that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in section 104(a) of this Act and the applicability of such duties to warrantors of different categories of consumer products with "full (statement of duration)" warranties.

(4) The duties under subsection (a) extend from the warrantor to each person who is a consumer with respect to the consumer product.

(c) The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) For purposes of this section and of section 102(c), the term "without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

(e) If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such product shall, for purposes of any action under section 110(d) or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

FULL AND LIMITED WARRANTING OF A CONSUMER PRODUCT

SEC. 105. Nothing in this title shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

SERVICE CONTRACTS

SEC. 106. (a) The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.

(b) Nothing in this title shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer

in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.

DESIGNATION OF REPRESENTATIVES

SEC. 107. Nothing in this title shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided*, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

LIMITATION ON DISCLAIMER OF IMPLIED WARRANTIES

SEC. 108. (a) No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this title (other than section 104(a)(2)), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law.

COMMISSION RULES

SEC. 109. (a) Any rule prescribed under this title shall be prescribed in accordance with section 553 of title 5, United States Code; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions. A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 18(e) of the Federal Trade Commission Act (as amended by section 202 of this Act) in the same manner as rules prescribed under section 18(a)(1)(B) of such Act, except that section 18(e)(3)(B) of such Act shall not apply.

(b) The Commission shall initiate within one year after the date of enactment of this Act a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this title, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this title, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

REMEDIES

SEC. 110. (a)(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this title or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d), the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) for any person to fail to comply with any requirement imposed on such person by this title (or a rule thereunder) or to violate any prohibition contained in this title (or a rule thereunder).

(c)(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this title or from violating any prohibition contained in this title. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an

action brought by the Commission, if a complaint under section 5 of the Federal Trade Commission Act is not filed within such period (not exceeding 10 days) 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. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends 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) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d)(1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may 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 the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) No action (other than a class action or an action respecting a warranty to which subsection (a)(3) applies) may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) applies) brought

under subsection (d) for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

EFFECT ON OTHER LAWS

SEC. 111. (a)(1) 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 therein as an Antitrust Act.

(2) Nothing in this title shall be construed to repeal, invalidate, or supersede the Federal Seed Act (7 U.S.C. 1551–1611) and nothing in this title shall apply to seed for planting.

(b)(1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this title (other than sections 108 and 104(a) (2) and (4)) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

(c)(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections), and

(C) which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

(d) This title (other than section 102(c)) shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this title.

EFFECTIVE DATE

SEC. 112. (a) Except as provided in subsection (b) of this section, this title shall take effect 6 months after the date of its enactment but shall not apply to consumer products manufactured prior to such date.

(b) Section 102(a) shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this title.

(c) The Commission shall promulgate rules for initial implementation of this title as soon as possible after the date of enactment of this Act but in no event later than one year after such date.

TITLE II—FEDERAL TRADE COMMISSION IMPROVEMENTS

JURISDICTION OF COMMISSION

SEC. 201. (a) Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by striking out "in commerce" wherever it appears and inserting in lieu thereof "in or affecting commerce".

(b) Subsections (a) and (b) of section 6 of the Federal Trade Commission Act (15 U.S.C. 46(a), (b)) are each amended by striking out "in commerce" and inserting in lieu thereof "in or whose business affects commerce".

(c) Section 12 of the Federal Trade Commission Act (15 U.S.C. 52) is amended by striking out "in commerce" wherever it appears and inserting in lieu thereof in subsection (a) "in or having an effect upon commerce," and in lieu thereof in subsection (b) "in or affecting commerce".

RULEMAKING

SEC. 202. (a) The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by redesignating section 18 as section 21, and inserting after section 17 the following new section:

"SEC. 18. (a)(1) The Commission may prescribe—

"(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act), and

"(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

"(2) The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

"(b) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (3) provide an opportunity for an informal hearing in accordance with subsection (c); and (4) promul-

gate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

"(c) The Commission shall conduct any informal hearings required by subsection (b)(3) of this section in accordance with the following procedure:

"(1) Subject to paragraph (2) of this subsection, an interested person is entitled—

"(A) to present his position orally or by documentary submissions (or both), and

"(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (2)(B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

"(2) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (1) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact.

"(3)(A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (1) and (2) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes, and (ii) governing the manner in which such cross-examination shall be limited.

"(B) When any person who is a member of a group with respect to which the Commission has made a determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

"(4) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

"(d)(1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a)(1)(B) shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

"(2) (A) The term 'Commission' as used in this subsection and subsections (b) and (c) includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

"(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection. An exemption under subsection (g) shall not be treated as an amendment or repeal of a rule.

"(3) When any rule under subsection (a)(1)(B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of this Act, unless the Commission otherwise expressly provides in such rule.

"(e)(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of title 28, United States Code, shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

"(B) For purposes of this section, the term 'rulemaking record' means the rule, its statement of basis and purpose, the transcript required by subsection (c)(4), any written submissions, and any other information which the Commission considers relevant to such rule.

"(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule, and the rule's statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

"(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5, United States Code (taking due account of the rule of prejudicial error), or if—

"(A) the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or

"(B) the court finds that—

"(i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

"(ii) a Commission rule or ruling under subsection (c) limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

The term 'evidence', as used in this paragraph, means any matter in the rulemaking record.

"(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

"(5)(A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

"(B) The United States Courts of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a)(1)(B), if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

"(C) A determination, rule, or ruling of the Commission described in paragraph (3)(B)(i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3)(B). Section 706(2)(E) of title 5, United States Code, shall not apply to any rule promulgated under subsection (a)(1)(B). The contents and adequacy of any statement required by subsection (b)(4) shall not be subject to judicial review in any respect.

"(f)(1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks, each agency specified in paragraph (2) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks subject to its jurisdiction. The Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a)(1)(B) of this section, then within 60 days after such rule takes effect such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless such Board finds that (A) such acts or practices of banks are not unfair or deceptive, or (B) that implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

"(2) Compliance with regulations prescribed under this subsection shall be enforced under section 8 of the Federal Deposit Insurance Act, in the case of—

"(A) national banks and banks operating under the code of law for the District of Columbia, by the division of consumer affairs established by the Comptroller of the Currency;

"(B) member banks of the Federal Reserve System (other than banks referred to in subparagraph (A)) by the division of consumer affairs established by the Board of Governors of the Federal Reserve System; and

"(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)), by the division of consumer affairs established by the Board of Directors of the Federal Deposit Insurance Corporation.

"(3) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

"(4) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

"(5) Each agency exercising authority under this subsection shall transmit to the Congress not later than March 15 of each year a detailed report on its activities under this paragraph during the preceding calendar year.

"(g)(1) Any person to whom a rule under subsection (a)(1)(B) of this section applies may petition the Commission for an exemption from such rule.

"(2) If, on its own motion or on the basis of a petition under paragraph (1), the Commission finds that the application of a rule prescribed under subsection (a)(1)(B) to any person or class or persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates, the Commission may exempt such person or class from all or part of such rule. Section 553 of title 5, United States Code, shall apply to action under this paragraph.

"(3) Neither the pendency of a proceeding under this subsection respecting an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action or failure to act under this subsection, shall stay the applicability of such rule under subsection (a)(1)(B).

"(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

"(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would

be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000."

(b) Section 6(g) of the Federal Trade Commission Act (15 U.S.C. 46(g)) is amended by inserting "(except as provided in section 18 (a)(2) of this Act)" before "to make rules and regulations".

(c)(1) The amendments made by subsections (a) and (b) of this section shall not affect the validity of any rule which was promulgated under section 6(g) of the Federal Trade Commission Act prior to the date of enactment of this section. Any proposed rule under section 6(g) of such Act with respect to which presentation of data, views, and arguments was substantially completed before such date may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.

(2) If a rule described in paragraph (1) of this subsection is valid and if section 18 of the Federal Trade Commission Act would have applied to such rule had such rule been promulgated after the date of enactment of this Act, any substantive change in the rule after it has been promulgated shall be made in accordance with such section 18.

(d) The Federal Trade Commission and the Administrative Conference of the United States shall each conduct a study and evaluation of the rulemaking procedures under section 18 of the Federal Trade Commission Act and each shall submit a report of its study (including any legislative recommendations) to the Congress not later than 18 months after the date of enactment of this Act.

INVESTIGATIVE AUTHORITY

SEC. 203. (a)(1) Section 6(a) of the Federal Trade Commission Act (15 U.S.C. 46(a)) is amended by striking out "corporation" and inserting "person, partnership, or corporation"; and by striking out "corporations and to individuals, associations, and partnerships", and inserting in lieu thereof "persons, partnerships, and corporations".

(2) Section 6(b) of such Act is amended by striking out "corporations" where it first appears and inserting in lieu thereof "persons, partnerships, and corporations,"; and by striking out "respective corporations" and inserting in lieu thereof "respective persons, partnerships, and corporations".

(3) The proviso at the end of section 6 of such Act is amended by striking out "any such corporation to the extent that such action is necessary to the investigation of any corporation, group of corporations," and inserting in lieu thereof "any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations,".

(b)(1) The first paragraph of section 9 of such Act (15 U.S.C. 49) is amended by striking out "corporation" where it first appears and inserting in lieu thereof "person, partnership, or corporation".

(2) The third paragraph of section 9 of such Act is amended by striking out "corporation or other person" both places where it appears and inserting in each such place "person, partnership, or corporation".

(3) The fourth paragraph of section 9 of such Act is amended by striking out "person or corporation" and inserting in lieu thereof "person, partnership, or corporation".

(c)(1) The second paragraph of section 10 (15 U.S.C. 50) of such Act is amended by striking out "corporation" each place where it appears and inserting in lieu thereof in each such place "person, partnership, or corporation".

(2) The third paragraph of section 10 of such Act is amended by striking out "corporation" where it first appears and inserting in lieu thereof "persons, partnership, or corporation"; and by striking out "in the district where the corporation has its principal office or in any district in which it shall do business" and inserting in lieu thereof "in the case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business".

REPRESENTATION

SEC. 204. (a) Section 16 of the Federal Trade Commission Act is amended to read as follows:

"SEC. 16. (a)(1) Except as otherwise provided in paragraph (2) or (3), if—

"(A) before commencing, defending, or intervening in, any civil action involving this Act (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

"(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

"(2) Except as otherwise provided in paragraph (3), in any civil action—

"(A) under section 13 of this Act (relating to injunctive relief);

"(B) under section 19 of this Act (relating to consumer redress);

"(C) to obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under section 5 of this Act; or

"(D) under the second paragraph of section 9 of this Act (relating to enforcement of a subpena) and under the fourth paragraph of such section (relating to compliance with section 6 of this Act);

the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so. The Commission shall inform the Attorney General of the exercise of such authority and such exercise shall not preclude the Attorney General from intervening on behalf of the United States in such action and any appeal of such action as may be otherwise provided by law.

"(3)(A) If the Commission makes a written request to the Attorney General, within the 10-day period which begins on the date of the entry of the judgment in any civil action in which the Commission

represented itself pursuant to paragraph (1) or (2), to represent itself through any of its attorneys designated by it for such purpose before the Supreme Court in such action, it may do so, if—

"(i) the Attorney General concurs with such request; or

"(ii) the Attorney General, within the 60-day period which begins on the date of the entry of such judgment—

"(a) refuses to appeal or file a petition for writ of certiorari with respect to such civil action, in which case he shall give written notification to the Commission of the reasons for such refusal within such 60-day period; or

"(b) the Attorney General fails to take any action with respect to the Commission's request.

"(B) In any case where the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), the Attorney General may not agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

"(C) For purposes of this paragraph (with respect to representation before the Supreme Court), the term 'Attorney General' includes the Solicitor General.

"(4) If, prior to the expiration of the 45-day period specified in paragraph (1) of this section or a 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to any procedural requirement of any court with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or appeal may be taken, the Attorney General shall have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of commencing, defending, or intervening in the civil action pursuant to paragraph (1) or for the purpose of refusing to appeal or file a petition for writ of certiorari and the written notification or failing to take any action pursuant to paragraph 3(A)(ii).

"(5) The provisions of this subsection shall apply notwithstanding chapter 31 of title 28, United States Code, or any other provision of law.

"(b) Whenever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under this Act, the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought."

(b) Section 5(m) of such Act is repealed.

(c) The amendment and repeal made by this section shall not apply to any civil action commenced before the date of enactment of this Act.

CIVIL PENALTIES FOR KNOWING VIOLATIONS

SEC. 205. (a) Section 5 of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by inserting after subsection (l) the following new subsection:

"(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of

subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

"(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

"(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

"(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

"(C) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

"(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

"(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court."

(b) The amendment made by subsection (a) of this section shall not apply to any violation, act, or practice to the extent that such violation, act, or practice occurred before the date of enactment of this Act.

CONSUMER REDRESS

SEC. 206. (a) The Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by inserting after section 18 the following new section:

"SEC. 19. (a)(1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

"(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would

have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

"(b) The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

"(c)(1) If (A) a cease and desist order issued under section 5(b) has become final under section 5(g) with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5(b) with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 5(g)(1), in which case such finding shall be conclusive if supported by evidence.

"(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

"(d) No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5(b) which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

"(e) Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."

(b) The amendment made by subsection (a) of this section shall not apply to—

(1) any violation of a rule to the extent that such violation occurred before the date of enactment of this Act, or

(2) any act or practice with respect to which the Commission issues a cease-and-desist order, to the extent that such act or practice occurred before the date of enactment of this Act, unless such order was issued after such date and the person, partnership or corporation against whom such an order was issued had been notified in the complaint, or in the notice or order attached thereto, that consumer redress may be sought.

AUTHORIZATION OF APPROPRIATIONS

SEC. 207. The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by inserting after section 19 the following new section:

"SEC. 20. 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 $46,000,000 for the fiscal year ending June 30, 1976; and not to exceed $50,000,000 for the fiscal year ending in 1977. For fiscal years ending after 1977, there may be appropriated to carry out such functions, powers, and duties, only such sums as the Congress may hereafter authorize by law."

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

December 24, 1974

Dear Mr. Director:

The following bills were received at the White House on December 24th:

S.J. Res. 40
S.J. Res. 133
S.J. Res. 262
S. 251
S. 356
S. 521
S. 544
S. 663
S. 754
S. 1017
S. 1083
S. 1296
S. 1418
S. 2149
S. 2446
S. 2807
S. 2854
S. 2888
S. 2994
S. 3022
S. 3289
S. 3358
S. 3359
S. 3394
S. 3433
S. 3481
S. 3548
S. 3934
S. 3943
S. 3976
S. 4073
S. 4206
H.J. Res. 1178
H.J. Res. 1180
H.R. 421
H.R. 1715
H.R. 1820
H.R. 2208
H.R. 2933
H.R. 3203
H.R. 3339
H.R. 5264
H.R. 5463
H.R. 5773
H.R. 7599
H.R. 7684
H.R. 7767
H.R. 8214
H.R. 8322
H.R. 8591
H.R. 8958
H.R. 8981
H.R. 9182
H.R. 9199
H.R. 9588
H.R. 9654
H.R. 10212
H.R. 10701
H.R. 10710
H.R. 10827
H.R. 11144
H.R. 11273
H.R. 11796
H.R. 11802
H.R. 11847
H.R. 11897
H.R. 12044
H.R. 12113
H.R. 12427
H.R. 12884
H.R. 13022
H.R. 13296
H.R. 13869
H.R. 14449
H.R. 14461
H.R. 14600
H.R. 14689
H.R. 14718
H.R. 15173
H.R. 15223
H.R. 15229
H.R. 15322
H.R. 15977
H.R. 16045
H.R. 16215
H.R. 16596
H.R. 16925
H.R. 17010
H.R. 17045
H.R. 17085
H.R. 17468
H.R. 17558
H.R. 17597
H.R. 17628
H.R. 17655

Please let the President have reports and recommendations as to the approval of these bills as soon as possible.

Sincerely,

Robert D. Linder
Chief Executive Clerk

The Honorable Roy L. Ash
Director
Office of Management and Budget
Washington, D. C.