The original documents are located in Box 21, folder "1975/01/04 S356 Product Warranties and Federal Trade Commission Act Amendments (1)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

APPROVED
JAN 3 - 1975
JAN 4 - 1975

THE WHITE HOUSE

WASHINGTON

ACTION

LAST DAY: January 4

January 3, 1975

Posted 1/4/75
FOR RECORDS
1/6/75

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill S. 356 -- Product Warranties and Federal Trade Commission Act Amendments

BACKGROUND

S. 356 combines two distinct legislative actions: Title I, dealing with consumer product warranties, which the Administration supports; and Title II, providing numerous amendments to the Federal Trade Commission Act, many of which were drafted in conference without Administration consultation, which the Administration opposes. Both Justice and the FTC have reservations about Title II, and Justice is strongly advocating a veto.

The major concern of the Department of Justice is the independent litigation authority granted to the FTC, not only in Federal District Courts but also in the Supreme Court (should they disagree with the Solicitor General). Justice's point, which is very clearly developed in the proposed memorandum of disapproval at Tab B, is that the Attorney General has and must continue to control all Government litigation.

Additional information is provided in Paul O'Neill's Enrolled Bill report (Tab A).

CURRENT SITUATION

S. 356 presents the question of whether it is more important to have acceptable consumer product warranty legislation signed into law or to protect the litigating control of your Department of Justice. Since giving FTC separate litigation authority is one of many instances (albeit an extreme instance) of the dilution of the authority of the Department of Justice over Government litigation, one alternative would be to direct the Department of Justice to prepare comprehensive legislation which would amend this and other acts to restore to the Department of Justice full control over Government litigation.

Baroody indicates that Mel Laird, and several national retail corporations have called to urge approval, fearing much worse legislation next year. But the business community is essentially split on the issue.

OPTIONS

1. Sign the bill and direct Justice to prepare comprehensive litigation legislation.

   PRO: Would codify acceptable consumer product warranties legislation, and still signal your intention to protect government litigation authority.

   CON: Would further dilute authority of the Department of Justice over Government litigation.

2. Withhold approval from the bill and issue the attached memorandum of disapproval.

   PRO: Would clearly signal the Congress your intention to restore to the Department of Justice control over Government litigation.

   CON: Would sacrifice an acceptable consumer product warranty bill over a largely academic and complex litigation theory, and would run the risk of much more liberal legislation next year.

RECOMMENDATIONS:

Areeda	Disapproval
Baroody	Approval
Cole	Approval
Friedersdorf	Disapproval
O'Neill	Disapproval

AGENCY RECOMMENDATIONS:

Department of Justice	Disapproval (Memorandum of disapproval attached)
Department of Commerce	No objection
Board of Governors of the Federal Reserve System	No objection
Department of the Treasury	No objection
National Credit Union Administration	No objection
Administrative Conference of the United States	No objection (section 202)

Federal Trade Commission	Approval
Council of Economic Advisers	Approval
Department of Health, Education and Welfare	Approval
Federal Deposit Insurance Corporation	Approval
Federal Home Loan Bank Board	Approval
Department of Agriculture	Defers to FTC
Administrative Office of the United States Courts	No recommendation

DECISION: S. 356

_____ 1. Sign (Tab C)

_____ 2. Pocket Veto (Sign Memorandum of Disapproval at Tab B)

THE WHITE HOUSE

WASHINGTON

January 3, 1975

TELEPHONE NOTE FOR DR

Senator Stevens called today re S356(Warranty Bill). He is hoping that before it goes to the President, someone will read it very carefully and also call Jim Broyhill on it.

He feels it is the best possible bill we can get under present circumstances.

Stevens can be reached on 224-1021. I told him I would pass the message to you.

kathie

And Jim Broyhill - for it.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 31 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 356 - Product warranties and Federal Trade Commission Act amendments
Sponsors - Sen. Magnuson (D) Washington and Sen. Moss (D) Utah

Last Day for Action

January 4, 1975 - Saturday

Purpose

Provides disclosure standards for written consumer product warranties against defect or malfunction; defines Federal content standards for such warranties; establishes consumer remedies for breach of warranty or service contract obligations; and grants the Federal Trade Commission expanded authority in carrying out its consumer protection activities.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval (Memorandum of disapproval attached)
Department of Commerce	No objection
Board of Governors of the Federal Reserve System	No objection (Informally
Department of the Treasury	No objection
National Credit Union Administration	No objection
Administrative Conference of the United States	No objection (section 202)
Federal Trade Commission	Approval
Council of Economic Advisers	Approval
Department of Health, Education and Welfare	Approval
Federal Deposit Insurance Corporation	Approval
Federal Home Loan Bank Board	Approval
Department of Agriculture	Defers to FTC
Administrative Office of the United States Courts	No recommendation

Discussion

The enrolled bill consists of two parts: Title I, dealing with consumer product warranties; and Title II, providing numerous amendments to the Federal Trade Commission Act ("the Act"). During the development of this legislation, various executive agencies (principally the Federal Trade Commission (FTC), Justice and Treasury Departments) reported or testified to the Congress on a number of provisions which were identical or similar to those in the enrolled bill.

The provisions of Title I had been before the Congress for several years; were supported by the Administration in written reports and testimony before the Commerce Committees of both Houses; and in their enrolled form incorporate most of the Administration's proposals for amendments.

Title II contains numerous provisions which were drafted in conference, without the benefit of full consideration and informed discussion by the Administration and Commerce Committees. Two of the agencies most concerned with this legislation (i.e., the FTC and Department of Justice) have expressed substantial concern with Title II as enrolled, and Justice recommends that the bill be disapproved.

Title I - Consumer Product Warranties

S. 356 would not require that written warranties be provided on any consumer products, but such warranties as are given by suppliers would be subject to Title I of the bill. The most important provisions of Title I are as follows:

-- A consumer product is defined as any tangible personal property distributed in commerce and normally used for personal, family, or household purposes. (Section 101)

-- The FTC would be authorized to prescribe rules providing for disclosure of the terms and conditions of written warranties on consumer products. These provisions would be limited to consumer products costing more than $5.00. (Section 102)

-- The FTC would be denied authority to prescribe the duration of written warranties or to require any product to be warranted. (Section 102 (b)(1))

-- Suppliers of consumer products costing more than $10 would be required to designate their warranties as either "full" or "limited" warranties. Under a "full" warranty, the warrantor would be required to remedy product defects or malfunction within a reasonable time and without charge. A supplier offering a written warranty would be prohibited from disclaiming his implied warranties, although the duration of implied warranties could be limited somewhat in certain circumstances. Purchasers could elect either a refund or replacement if the product continued to be defective or to malfunction after a reasonable number of attempts were made to correct it. (Sections 103 and 104)

-- The FTC would be required to prescribe regulations governing any informal dispute settlement procedure which is incorporated in the terms of a warranty. Warrantors could make initial resort to such a procedure a precondition to lawsuits. (Section 110 (a))

-- Either the FTC or the Attorney General could bring court actions on its own initiative to restrain warrantors from making deceptive warranties or violating any prohibition of Title I. (Section 110 (c))

-- Any consumer who is damaged by a supplier's violation of Title I could bring suit for damages and other legal and equitable relief if (a) the claim were at least $25 and not more than $50,000, and (b) the warrantor had been given a reasonable opportunity to cure the breach involved. (Section 110 (d) and (e))

-- Consumer class actions also would be permitted if there were at least 100 named plaintiffs and warrantors had been given a reasonable opportunity to cure the breach involved. (Section 110 (d)(2))

-- Consumers who prevailed in court actions could be awarded compensation for their costs, including attorneys' fees. (Section 110 (d)(2))

Title II - Federal Trade Commission Act Amendments

The basic provisions of Title II are as follows:

-- The FTC's jurisdiction would be expanded from acts and practices "in" commerce to those "in or affecting" commerce. (Section 201)

-- Procedures would be established for FTC issuance of substantive rules defining unfair or deceptive acts or practices under section 5 of the Act. This FTC rulemaking authority would apply to all entities in or affecting commerce, except banks. In addition to following its present rulemaking procedures which are prescribed by 5 U.S.C. 553, Title II would direct the FTC to devise procedures for informal hearings, on a public record, with opportunity for oral presentation and limited cross-examination when the FTC finds issues of disputed fact which it is necessary to resolve. (Section 202)

-- Within sixty days after any substantive rule of the FTC takes effect, the Federal Reserve Board (FRB) would be required to issue substantially similar regulations applicable to banks (but not other financial institutions such as savings and loan associations or credit unions, which would be subject to FTC's rulemaking authority). This requirement would be waived whenever the FRB found that banks were not engaging in unfair or deceptive practices or that the "implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board." (Section 202 (f))

-- Compliance with the FRB's rules would be enforced by the Comptroller of the Currency, the FRB, and the Federal Deposit Insurance Corporation (FDIC) with regard to the banks over which they have regulatory jurisdiction. (Section 202 (f))

-- Each of these bank supervisory agencies would be required (a) to establish a separate division of consumer affairs to handle complaints and carry out the enforcement responsibilities pertaining to banks under Title II; and (b) to report annually to the Congress concerning their activities in this regard. (Section 202 (f))

-- Judicial review of final rules in appropriate circuit courts of appeals would be provided for, generally incorporating the standards under section 706 (2) of the Administrative Procedure Act, except that any rule could be held unlawful if the court found that the FTC's action "is not supported by substantial evidence in the rule-making record...taken as a whole." (Section 202 (e))

-- The FTC would be empowered to provide compensation for reasonable attorneys' and expert witnesses' fees and other costs of participating in rule-making proceedings, to any person representing an interest which is deemed necessary for a fair determination of the proceeding but who cannot afford the cost of participation. (Section 202 (h))

-- The FTC's authority to obtain information would be broadened to cover persons and partnerships as well as corporations. (Section 203)

-- The FTC would be granted exclusive authority to appear in its own name through its own legal representatives and to supervise the litigation in civil actions when seeking injunctions, pursuing consumer redress, participating in judicial review proceedings concerning FTC rules or cease and desist orders, or enforcing subpoenas. This authority would not preclude the Attorney General from intervening on behalf of the U.S. in these actions or any appeal thereof. Under existing law, the FTC could represent itself in such actions only if the Attorney General did not agree to represent the FTC within 10 days after FTC's written notification. (Section 204)

-- In any other civil action involving the Act, the FTC could represent itself only if the agency gives written notification and undertakes to consult with the Attorney General and the latter

fails within 45 days to initiate, defend, or intervene in such action. Under existing law, Justice Department has 10 rather than 45 days within which to make its evaluation. (Section 204)

-- The FTC could conduct litigation in the Supreme Court in any case where the FTC represented itself in the lower courts if the Solicitor General does not agree to represent the FTC within 60 days after the lower court decision, upon receiving an FTC request to do so, which must be made to him within 10 days of that decision. If the Solicitor General elects to represent the FTC, he "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." (Section 204)

-- The FTC's authority to enforce its administrative orders in the Federal courts would be strengthened. Under existing law, the FTC may initiate civil actions for knowing violations of its substantive rules and cease and desist orders; however, an alleged violator of such orders is subject to civil action only if named in the order. Under S. 356, any violator who has actual knowledge that his act or practice is unfair or deceptive would be subject to a maximum civil penalty of $10,000 per violation -- whether or not he is subject to the order on which the civil action is based. If the defendant is not subject to the order relied upon, any issues of fact against him must be tried de novo by the court in order to satisfy due process requirements. (Section 205)

-- The FTC would be empowered to bring action for consumer redress of violations of its rules and orders in Federal courts. Authorized relief would be limited only by the nature of the injury and by the remedial powers of the courts. However, punitive or exemplary damages would be unauthorized. According to the conference report on S. 356, it is intended that FTC actions for consumer redress would not bar private actions for redress. (Section 206)

-- For the overall operation of the FTC, S. 356 would authorize appropriations not to exceed $42 million for fiscal year 1975; $46 million for fiscal year 1976; $50 million for fiscal year 1977; and such sums as the Congress may authorize for subsequent fiscal years. (Section 207)

Problems expressed by agencies

In their views letters on the enrolled bill, several agencies expressed concern with various provisions of Title II as follows:

FTC rulemaking procedures (section 202) - The FTC considers the procedures governing issuance of substantive rules to be unnecessary and undesirable.

FRB rulemaking authority over banks (section 202(f)) - The Federal Home Loan Bank Board (FHLBB) and the National Credit Union Administration (NCUA) believe that federally insured savings and loan associations and credit unions, respectively, should be subject to the rulemaking authority of the FRB (similar to the treatment accorded to banks under S. 356) rather than that of FTC.

Throughout the development of this legislation, the Administration was on record with the same position as stated by the FHLBB and NCUA on the grounds that depository institutions serving the same consumers should not be subject to the possibility of varying regulations.

Control of litigation (section 204) - The Justice Department strongly opposes the provisions of S. 356 for FTC self-representation in the courts, on the grounds that:

> "...its provisions appear to authorize the Commission to litigate a matter over the protests of the Attorney General. With respect to FTC litigation, the Attorney General would be relegated to the role of an automaton--a role that no professional attorney can, in good conscience, accept. To require the Attorney General's historic duty to exercise his professional judgment whether a particular matter should be litigated to be controlled by the whims of his client, in this case the FTC, is not only unfair to the client but effectively deprives the Attorney General of the necessary supervision and control of Government litigation."

Civil penalties for knowing violations (section 205) - Justice states:

> "Whether this section can be constitutionally applied against a defendant who is not subject to the cease and desist order relied upon may depend upon his right to litigate the alleged

unfairness or deception of his act or practice. Since he will not have had notice or opportunity to defend his practice in an administrative proceeding against someone else, due process would seem to require he have the right to litigate all issues before the court. We also fear that the imposition upon the Government of proof of knowledge of wrongdoing against one subject to a cease and desist order, a burden not imposed by Section 5(1) of the existing law, will make traditional civil penalty enforcement of Commission orders more difficult."

Scope of Title I Applicability (section 101) - Commerce, Justice, and FTC all agree in oral discussion that the enrolled bill might be interpreted to apply to third-party endorsers--in addition to suppliers--who warrant products which they, themselves, do not manufacture, distribute or otherwise deal in directly. Good Housekeeping is a third-party endorser, and they are seriously concerned that Title I would have a detrimental effect on their business.

Conclusion

We believe that section 204 would seriously impair the Attorney General's control of litigation, particularly with respect to Supreme Court cases, and by itself warrants disapproval of the bill. A proposed memorandum of disapproval, based upon a draft submitted by Justice, is attached for your consideration.

Director

Enclosures

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

ADDRESS OFFICIAL CORRESPONDENCE
TO THE BOARD

December 26, 1974

Mr. William D. Skidmore
Chief, Business-General
Government Branch
Office of Management and Budget
New Executive Office Building
Room 7220
17th Street and Pennsylvania Avenue, N. W.
Washington, D. C. 20503

Dear Mr. Skidmore:

This letter is in response to your request for the views of the Federal Reserve Board on Enrolled Bill S. 356.

As we advised Mr. W. H. Rommel's office (Mrs. Yuille) by telephone on December 24, 1974, the staff of the Federal Reserve Board has no objections or comments concerning this proposal.

Very truly yours,

Griffith L. Garwood
Assistant Secretary of the Board

MEMORANDUM OF DISAPPROVAL

It is with great reluctance that I withhold my approval from S. 356, which deals with consumer product warranties and amendments to the Federal Trade Commission Act.

This bill would provide disclosure standards for written consumer product warranties against defect or malfunction; define Federal content standards for such warranties; establish consumer remedies for breach of warranty or service contract obligations; and grant the FTC expanded authority in carrying out its consumer protection activities.

My reluctance stems from the recognition that the Congress, and especially Senators Magnuson and Moss, have in this bill attempted to deal with the product warranty abuses which so plague our consuming public. I support this effort wholeheartedly. However, the Attorney General has advised me, and I agree, that the provisions of this bill which wrest from the Attorney General his traditional control of Government litigation particularly before the Supreme Court of the United States would have significant adverse impact on the Government's ability to present its position in court in a uniform and consistent manner.

A principal purpose of the Department of Justice is to insure that the Attorney General can effectively control Government litigation. This control is required by the need to insure that Government agencies do not take inconsistent legal positions in the Federal courts and that important legal issues are presented to appellate courts with the best possible case as a vehicle.

Judge Learned Hand recognized the need for giving this country's chief legal officer, the Attorney General, control of Government litigation when he wrote: "The Attorney General has powers of 'general superintendence and direction' over district attorneys...., and may directly intervene to 'conduct and argue any case in any court of the United States'... Thus, he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties." Sutherland v. International Insurance Co., 43 F.2d 969, 970 (2d Cir. 1930).

Chief Justice Warren Burger has written: "It is the unanimous view of the Justices that it would be unwise to dilute the authority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies." (See 1972 Hearings on the Study of the Securities Industry Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce 92d Cong., 1st Sess., ser 92-37b, pt. 3, at 1809).

There are additional problems with S. 356. The prescribed rulemaking procedures are inflexible and burdensome, and would actually impede the FTC's ability to protect the American consumer against unfair or deceptive practices. Moreover, the bill would provide an inconsistent allocation of rulemaking authority over the various types of financial institutions, unwisely subjecting them and the consumers they serve to a maze of varying and disparate standards. Finally, FTC's enforcement authority over the administrative orders which it

issues would be expanded in a manner which could impose an additional burden on the courts and make traditional civil penalty enforcement of such orders more difficult.

By withholding my approval from this bill, I hope to signal to the Congress my determination that our legal system, which must expand to keep pace with the expanding rights of our citizenry, do so in an organized and responsible fashion. This Administration will be pleased to work with the 94th Congress toward early enactment of meaningful warranty protection legislation.

THE WHITE HOUSE,

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

To- H. Hendricks 12-31-74 6:30 p.m.

DEC 31 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 356 - Product warranties and Federal Trade Commission Act amendments
Sponsors - Sen. Magnuson (D) Washington and Sen. Moss (D) Utah

Last Day for Action

January 4, 1975 - Saturday

Purpose

Provides disclosure standards for written consumer product warranties against defect or malfunction; defines Federal content standards for such warranties; establishes consumer remedies for breach of warranty or service contract obligations; and grants the Federal Trade Commission expanded authority in carrying out its consumer protection activities.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval (Memorandum of disapproval attached)
Department of Commerce	No objection
Board of Governors of the Federal Reserve System	No objection (Informally)
Department of the Treasury	No objection
National Credit Union Administration	No objection
Administrative Conference of the United States	No objection (section 202)
Federal Trade Commission	Approval
Council of Economic Advisers	Approval
Department of Health, Education and Welfare	Approval
Federal Deposit Insurance Corporation	Approval
Federal Home Loan Bank Board	Approval
Department of Agriculture	Defers to FTC
Administrative Office of the United States Courts	No recommendation

MEMORANDUM OF DISAPPROVAL

It is with great reluctance that I withhold my approval from S. 356, which deals with consumer product warranties and amendments to the Federal Trade Commission Act.

This bill would provide disclosure standards for written consumer product warranties against defect or malfunction; define Federal content standards for such warranties; establish consumer remedies for breach of warranty or service contract obligations; and grant the FTC expanded authority in carrying out its consumer protection activities.

My reluctance stems from the recognition that the Congress, and especially Senators Magnuson and Moss, have in this bill attempted to deal with the product warranty abuses which so plague our consuming public. I support this effort wholeheartedly. However, the Attorney General has advised me, and I agree, that the provisions of this bill which wrest from the Attorney General his traditional control of Government litigation would have significant adverse impact on the Government's ability to present its position in court in a uniform and consistent manner.

The Department of Justice ~~was established in 1870 for the~~ principal purpose of ~~insuring~~ that the Attorney General ~~could~~ can effectively control Government litigation. This control is required by the need to insure that Government agencies do not take inconsistent legal positions in the Federal courts and that important legal issues are presented to appellate courts with the best possible case as a vehicle.

Judge Learned Hand recognized the need for giving this country's chief legal officer, the Attorney General, control of Government litigation when he wrote: "The Attorney General has powers of 'general superintendence and direction' over

district attorneys..., and may directly intervene to 'conduct and argue any case in any court of the United States'.... Thus, he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties." Sutherland v. International Insurance Co., 43 F. 2d 969, 970 (2d Cir. 1930).

Chief Justice Warren Burger has written: "It is the unanimous view of the Justices that it would be unwise to dilute the authority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies." (See 1972 Hearings on the Study of the Securities Industry Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess., ser 92-37b, pt. 3, at 1809).

There are additional problems with S. 356. The prescribed rulemaking procedures are inflexible and burdensome, and would actually impede the FTC's ability to protect the American consumer against unfair or deceptive practices. Moreover, the bill would provide an inconsistent allocation of rulemaking authority over the various types of financial institutions, unwisely subjecting them and the consumers they serve to a maze of varying and disparate standards. Finally, FTC's enforcement authority over the administrative orders which it issues would be expanded in a manner which could impose an additional burden on the courts and make traditional civil penalty enforcement of such orders more difficult.

By withholding my approval from this bill, I hope to signal to the Congress my determination that our ~~expanding~~ legal system, which must expand to keep pace with the expanding rights of our citizenry, ~~not expand in chaotic or haphazard~~ do so in an organized and responsible fashion. ~~At the same time, the~~ This Administration will be ~~happy~~ pleased to work with the 94th Congress toward early enactment of meaningful warranty protection legislation.

THE WHITE HOUSE

January , 1975

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 936

Date: January 1, 1974 Time: 11:00 p.m.

FOR ACTION: Jim Cavanaugh
Max Friedersdorf veto
Phil Areeda veto-comments on statmt
Paul Theis
Geoff Shepard

cc (for information): Warren Hendriks
Jerry Jones
Jack Marsh

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, January 2 Time: noon

SUBJECT:

Enrolled Bill S. 356 - Product warranties and Federal Trade Commission Act amendments

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy JOhnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

THE WHITE HOUSE

WASHINGTON

1/2/75

MEMORANDUM FOR: WARREN HENDRIKS

FROM: MAX L. FRIEDERSDORF VL

SUBJECT: Action Memorandum - Log No. 936
Enrolled Bill S. 356 - Product warranties and Federal Trade Commission Act amendments

The Office of Legislative Affairs concurs with the Agencies that the enrolled bill should be VETOED.

Attachments

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 936

Date: January 1, 1974 Time: 11:00 a.m.

FOR ACTION: Jim Cavanaugh
Max Friedersdorf
Phil Areeda
Paul Theis
Geoff Shepard

cc (for information): Warren Hendriks
Jerry Jones
Jack Marsh

FROM THE STAFF SECRETARY

DUE: Date: Thursday, January 2 Time: noon

SUBJECT:

Enrolled Bill S. 356 - Product warranties and Federal Trade Commission Act amendments

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

~~Prepare Agenda and Brief~~ ____ ~~Draft Reply~~

____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy JOhnston, Ground Floor West Wing

1) Veto

2) Message should be softened, with emphasis on control of litigation in Supreme Court, using Burger quote

P. Areeda

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

pl

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

DEC 24 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined a facsimile of the enrolled bill, S. 356, the proposed Magnuson-Moss Warranty--Federal Trade Commission Improvement Act.

Our comments are directed primarily to title II of the bill, which make major revisions in the authority of the Federal Trade Commission in the area of consumer protection, and its ability to represent itself in Federal courts, including the Supreme Court. Title I, which addresses consumer product warranties, has been before the Congress for several years, has been supported by the Department in earlier comments, and has been enacted to take into account most of our previous objections and suggestions.

Basically, title I seeks to improve the adequacy of disclosure and performance under consumer product warranties by establishing federal minimum standards for warranties (Section 104), and providing that any warranty designated by the warrantor as a "full warranty" must meet those standards. One failing to do so must be conspicuously designated as "limited". (Section 102). One offering a written warranty may not disclaim implied warranties, though duration of such implied warranties may be limited to a reasonable duration in certain circumstances. (Section 108).

Many of the standards for disclosure and performance are stated in general terms; the Commission must flesh them out by rulemaking. Violations of the statute and Commission interpretive and substantive rules may be violations of section 5 of the FTC Act, and may give rise to private actions, including class actions over which Federal district courts shall have jurisdiction pursuant to section 110, but the availability of private relief is limited by requirements that informal settlement procedures, to be established pursuant to Commission regulation, be exhausted before suit is filed.

Important protections to competition in the marketing of consumer products are provided by specific denial to the Commission of authority to prescribe the duration of written warranties or to require any product to be warranted (section 102(b)(1)(B)(2)) and a prohibition on conditioning any warranty upon the consumer using a designated brand of product or service in connection with the warrantied product unless the Commission specifically approves such requirement as essential to the functioning of the warrantied product (section 102(c)).

Title II, which deals with "Federal Trade Commission Improvements" contains major departures from existing law. Unfortunately, in our view, these innovations were drafted in conference, without the benefit of careful consideration and informed discussion, and are not always marked by clarity of draftsmanship. Because of the limited time available to consider the results, and our uncertainty as to Congressional intent as to some aspects, the comments offered here are tentative.

Section 202 of the bill defines rulemaking procedures to be used exclusively by the Commission in fashioning interpretive or substantive rules defining unfair or deceptive acts or practices pursuant to section 5 of the Act. Any rulemaking the Commission may undertake with respect to unfair methods of competition is reserved to existing Commission rulemaking authority pursuant to section 6 of the Act. Section 202 of the bill establishes a format for notice, comment and hearing explicitly grounded in the formal rulemaking procedures of 5 U.S.C. 553, but further directs the Commission to devise procedures for informal hearings, on a public record, with opportunity for oral presentation and limited cross-examination when the Commission finds issues of disputed fact which can best be resolved in this manner. This hybrid procedure seeks to balance the need, in appropriate situations, for adversary inquiry with the public interest in expeditious consideration of administrative proceedings. The extent to which this compromise is effective will depend upon the Commission's implementation of its discretion to fashion procedures appropriate to particular rules and issues.

The Department of Justice is most concerned with section 204 of the bill, which would amend section 16 of the Federal Trade Commission Act to authorize the Commission to control the litigation of the following types of actions: section 13 actions relating to injunctive relief, section 19 suits relating to consumer redress, judicial reviews of Commission rules and section 5 cease and desist orders, and

actions under section 9 relating to subpena enforcement. Apparently all other litigation under the Act could be conducted by the Commission if the Attorney General has failed to commence, defend, or intervene in an action within 45 days after receiving a Commission request to do so. If the Commission does represent itself, it "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."

Proposed section 16(a)(3) of the Act would authorize the Commission to conduct litigation in the Supreme Court in any case in which the Commission represented itself below if the Solicitor General does not agree to represent the Commission within 60 days after the lower court decision, after receiving a Commission request to do so, which must be made to him within 10 days of that decision. If the Solicitor General elects to represent the Commission before the Supreme Court he "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."

Even construing the ambiguities of proposed section 16 in favor of this Department, its provisions appear to authorize the Commission to litigate a matter over the protests of the Attorney General. With respect to FTC litigation, the Attorney General would be relegated to the role of an automaton--a role that no professional attorney can, in good conscience, accept. To require the Attorney General's historic duty to exercise his professional judgment whether a particular matter should be litigated to be controlled by the whims of his client, in this case the FTC, is not only unfair to the client but effectively deprives the Attorney General of the necessary supervision and control of Government litigation.

The reasons why this and previous administrations as well as the Congress have centralized control of Government litigation within the Department of Justice are, I am sure, familiar to you. Suffice it to say that any legislation which gives the Attorney General something less than complete control over the in-court litigating position of a Government agency is unacceptable to this Department.

Finally, the bill would significantly extend the authority of the Commission to enforce its administrative orders in the Federal courts. Presently the Commission, upon detecting an unfair or deceptive practice, must first obtain an administrative cease and desist order. Only

if that order is violated may it be enforced in the Federal courts through a civil penalty action. Section 205 of the bill creates a new class of civil penalty actions for "knowing violations" of substantive rules and cease and desist orders. The Commission may seek civil penalties for violations of substantive rules defining unfair or deceptive practices if the defendant had actual knowledge or knowledge fairly implied on the basis of objective circumstances that his act was unfair or deceptive and prohibited by the rule. Civil penalty action may be based upon a final cease and desist order against one, whether or not subject to that order, who has actual knowledge that his act or practice is unfair or deceptive and unlawful. In the latter circumstance, if the defendant is not subject to the order relied upon, issues of fact against such defendant must be tried de novo by the court.

Whether this section can be constitutionally applied against a defendant who is not subject to the cease and desist order relied upon may depend upon his right to litigate the alleged unfairness or deception of his act or practice. Since he will not have had notice or opportunity to defend his practice in an administrative proceeding against someone else, due process would seem to require he have the right to litigate all issues before the court. We also fear that the imposition upon the Government of proof of knowledge of wrongdoing against one subject to a cease and desist order, a burden not imposed by Section 5(l) of the existing law, will make traditional civil penalty enforcement of Commission orders more difficult.

By Section 206 of the bill, the Commission is empowered to seek consumer redress of violations of its acts and orders in Federal courts. The Commission may sue for restitution, rescission, and other forms of equitable relief, or for damages on behalf of consumers, for acts or practices which give rise to a suit based upon a final order need not be subsequent acts in violation thereof, but the same acts or practices upon which the Commission based its adjudicative proceeding. If the Commission proceeding was litigated, the Commission's findings of fact are made conclusive on the court, unless the Commission has provided otherwise in its final order.

This is a major departure from the prospective enforcement authority vested in the Commission under present law. We think it nonetheless a desirable one, in an appropriate case, and we are pleased that discretion to grant consumer

redress is vested in the courts, not the agency. Because we view this as a significant and powerful law enforcement tool, however, we deplore the Congress' decision, in section 204, to give the Commission exclusive authority to bring and litigate these cases by its own attorneys.

We note also that the standard of proof applicable to these cases is a novel one: the Commission must establish that the act or practice is one "which a reasonable man would have known under the circumstances was dishonest or fraudulent." We assume this is intended to be a demanding standard, as it should be where such far-reaching relief is contemplated, but we are unaware of precedent which will materially assist in its definition by the courts.

In spite of what we regard as a commendable attempt by the Congress to correct the abuses of consumer product warranties, it is our unreserved recommendation that this bill not receive Executive approval. As we have described above, the section 204 intrusion on the Attorney General's litigating responsibilities is completely unacceptable to this Department. A proposed veto message is attached.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

MEMORANDUM OF DISAPPROVAL

It is with great reluctance that I withhold my approval from S. 356, the Magnuson-Moss Warranty--Federal Trade Commission Improvement bill.

My reluctance stems from the recognition that the Congress, and especially Senators Magnuson and Moss, have in this bill attempted to deal with the product warranty abuses which so plague our consuming public. However the Attorney General has advised me, and I agree, that the provisions of this bill which wrest from the Attorney General his traditional control of Government litigation have significant adverse impact on the Government's ability to present its position in court in a uniform and consistent manner.

The Department of Justice was established in 1870 for the principal purpose of insuring that the Attorney General could effectively control Government litigation. This control is required by the need to insure that Government agencies do not take inconsistent legal positions in the Federal courts and that important legal issues are presented to appellate courts with the best possible case as a vehicle.

Judge Learned Hand recognized the need for giving this country's chief legal officer, the Attorney General, control of Government litigation when he wrote: "The Attorney General has powers of 'general superintendence and direction' over district attorneys..., and may directly intervene to 'conduct and argue any case in any court of the United States'.... Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties." Sutherland v. International Insurance Co., 43 F.2d 969, 970 (2d Cir. 1930).

Chief Justice Warren Burger has written: "It is the unanimous view of the Justices that it would be unwise to dilute the authority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies." See, Hearings on the Study of the

Securities Industry Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess., ser 92-37b, pt. 3, at 1809 (1972).

By withholding my approval from this bill, I hope to signal to the Congress my determination that our expanding legal system, which must expand to keep pace with the expanding rights of our citizenry, not expand in chaotic or haphazard fashion. Such an orderly development requires that Government litigation be conducted under the supervision of the Attorney General and that S. 356 not be approved.

THE UNDER SECRETARY OF COMMERCE
Washington, D.C. 20230

DEC 26 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Ash:

This is in reply to your request for the views of this Department concerning S. 356, an enrolled enactment

> "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,"

to be cited as the "Magnuson-Moss Warranty--Federal Trade Commission Improvement Act".

This Department would have no objection to approval by the President of S. 356.

Enactment of this legislation will not involve any increase in the budgetary requirements of this Department.

Sincerely,

John K. Tabor

John K. Tabor

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

DEC 23 1974

Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Attention: Assistant Director for Legislative Reference

Sir:

Your office has asked for the views of this Department on the enrolled enactment of S. 356, "Magnuson-Moss Warranty - Federal Trade Commission Improvement Act."

The enrolled enactment would prescribe disclosure and designation standards for written warranties, define Federal content standards for full warranties and establish meaningful consumer remedies for breach of warranty or service contract obligations. It would vest rulemaking authority in the Federal Trade Commission, except insofar as banks are concerned.

Under section 202(a) of the enrolled enactment, the Federal Reserve Board would be required to prescribe regulations applicable to banks to prevent unfair or deceptive consumer acts and practices. Compliance with these regulations would be enforced by the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation with respect to the banks over which they have regulatory jurisdiction. Each bank supervisory agency would be required to establish a separate division of consumer affairs to carry out its responsibilities under the enrolled enactment and to report annually to the Congress.

The Department would have no objection to a recommendation that the enrolled enactment be approved by the President.

Sincerely yours,

Richard R. Albrecht
General Counsel

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

Office of General Counsel

GC/JLO:eor
December 23, 1974

Mr. W. H. Rommel
Assistant Director for Legislative Reference
Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Dear Mr. Rommel:

This will acknowledge receipt of your request of December 20, 1974, for our views and recommendations on enrolled bills S. 356 and H.R. 12113.

With respect to S. 356, although we are disappointed that credit unions were not included along with banks under the regulatory commands of the Federal Reserve Board in order to avoid disparate treatment among competitors in the financial marketplace, we raise no objection to the subject enrolled bill.

As regards H.R. 12113, we also raise no objection to the subject enrolled bill.

Sincerely yours,

John L. Ostby

JOHN L. OSTBY
General Counsel

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037

December 24, 1974

OFFICE OF
THE CHAIRMAN

Mr. W. H. Rommel
Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Rommel:

This is in response to your memorandum of December 20, requesting our comments on enrolled bill S.356, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.

We shall limit our comments to section 202 of the bill, dealing with rulemaking by the Federal Trade Commission. Section 202 would add a new section 18 to the Federal Trade Commission Act, prescribing procedures which the Commission must follow in adopting rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. Briefly stated, section 18(b) would require that when prescribing such a rule the Commission must not only publish a notice of proposed rulemaking and permit interested persons to submit written comment (the ordinary rulemaking procedure prescribed by the Administrative Procedure Act, 5 U.S.C. §553), but the Commission must also provide an opportunity for an "informal" hearing under the procedures set out in subsection (c). Such procedures include opportunity for oral presentation and, where "the Commission determines that there are disputed issues of material fact it is necessary to resolve," an opportunity to present rebuttal submissions and to conduct cross-examination. Rules promulgated under section 18(a)(1)(B) would be subject to judicial review in the United States Courts of Appeals, and could be set aside if not supported by substantial evidence in the rulemaking record * * * taken as a whole."

When this bill was sent to the House-Senate Conference, we commented, in response to requests from Chairman Magnuson and Chairman Staggers, on section 18, as passed by the House. A copy of Chairman Anthony's letter is enclosed.

In our judgment section 18, as contained in the enrolled bill, is a considerable improvement over the version we criticized and, indeed, appears to meet our most serious objections.

First, the special rulemaking procedures will apply only to legislative rules and not to interpretive rules and general statements of policy. Furthermore, the terminology criticized on page 4 of our enclosed letter has been deleted.

Second, section 18 mandates oral argument, whereas under section 553 the holding of such oral proceedings is discretionary with the agency. The Administrative Conference's Recommendation 72-5 urges that legislation not mandate procedural steps beyond those required by section 553, except for "special reason." This departure from section 553 minima in the present legislation, however, is not a major one and can probably be justified in the interest of full deliberation where time, typically, is not of the essence.

Third, although section 18 still requires, in addition to oral argument, the opportunity, under certain conditions, for rebuttal and cross-examination, the Commission's authority to control the length and direction of the proceeding is considerably increased over that contained in the earlier version. Notably, the Commission may require that cross-examination be conducted by the presiding officer rather than by the participants themselves. In addition, and, perhaps, most significantly, the Conference report states that opportunity for rebuttal and cross-examination are required only on issues of specific fact and not on issues of legislative fact. If the courts look to the Conference report as an authoritative interpretation of the statutory phrase "disputed issues of material fact," the problem of the Commission bogging down in excessive trial-type procedures is greatly reduced. Since consideration of many, if not most proposed rules of general applicability involves exclusively questions of legislative fact, the Commission would often be able to dispense with cross-examination entirely. (However, the consequences of improperly denying or limiting cross-examination are severe (§18(e)(3)(B) and are likely to cause the Commission to act with extreme caution in exercising its authority to direct the course of the proceeding.)

Fourth, although the standard for judicial review (§18(e)(3)) still includes the "substantial evidence" test, contrary to the recommendation in Paragraph 4 of our Recommendation 74-4, the House-Senate Conference Report emphasizes that substantial evidence review applies only to "disputed issues of material fact" and not to "findings or determinations of legislative fact." This is consistent with the interpretation which some courts are at present giving to analogous statutory provisions for judicial review of agency rules, see Industrial Union Department v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974); Amoco Oil Co. v. EPA, 501 F.2d 722, 740 (D.C. Cir. 1974). If this judicial trend persists, we believe the substantial evidence provision of section 18 will not create unmanageable problems.

Fifth, there is retained (§18(g)) a procedure for seeking exemptions from rules adopted under subsection (a)(1)(B), but the procedural requirements in the earlier version for disposing of such requests (criticized on page 3 of our letter) have been eliminated.

In sum, while we would have preferred a shorter and simpler rulemaking provision, on analysis, section 18 appears generally consistent with our Recommendation 72-5 and only mildly inconsistent with Recommendation 74-4.

We note that section 202(d) directs the Administrative Conference to conduct a study and evaluation of the rulemaking procedures under section 18. We shall, of course, be glad to comply, assuming that there will be an adequate base of experience for such a study.

Sincerely yours,

Richard K. Berg

Richard K. Berg
Executive Secretary

Enclosures

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037

October 7, 1974

OFFICE OF
THE CHAIRMAN

Honorable Warren G. Magnuson
Chairman
Senate Committee on Commerce
5202 New Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

You have requested our views on the proposed section 18 of the Federal Trade Commission Act as set forth in section 202(a) of H.R.7917.

The provisions of section 18, which would govern rulemaking by the Federal Trade Commission, are violative of the principles set forth in two recent formal recommendations of the Administrative Conference, Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability and Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability. I enclose copies of both recommendations.

I.

Recommendation 72-5 is directed to a problem we perceive in the recent tendency of Congress to prescribe more elaborate procedures for the making of rules of general applicability than the notice-and-comment procedures required by the Administrative Procedure Act, 5 U.S.C. §553. In particular, the recommendation warns against encumbering such rulemaking by requiring trial-type procedures -- presentation of testimony under oath, cross-examination, etc. -- because such formal and intensive scrutiny of particular facts is seldom suited to the resolution of the broader issues on which the formulation of rules depends.

Subsection 18(a)(2) of the proposed amendment would govern Federal Trade Commission procedures for adopting rules defining with specificity acts or practices which are unfair or deceptive and within the scope of section 5(a)(1) of the Federal Trade Commission Act. In addition to requiring the opportunity for written and oral comment on all such rules, the subsection would require trial-type procedures in all rulemaking proceedings in which there are "disputed issues of material fact". In the abstract, such a procedural requirement may seem entirely reasonable; but the problem is that although we may think of the word "fact" as applying to a very specific, particularized datum, it applies just as well to much more general phenomena. It is an "issue of fact" whether a particular company has engaged in an act which constitutes an unfair labor practice under the National Labor Relations Act. But it is also an "issue of fact" whether consumers

are often endangered by unsafe products which could be rendered harmless. The latter type of "fact" is sometimes referred to as a "legislative fact". It was the factual basis for the determination the Congress made when it enacted the Consumer Product Safety Act -- after legislative hearings, which were not, of course, governed by trial-type procedures.

Agencies also often deal with legislative facts; and usually do so when engaged in making rules of general applicability. It is as inappropriate and unrealistic there, as it is in legislative hearings, to apply a procedural technique designed for the resolution of particularized factual disputes rather than for the establishment of general factual conclusions. The reason is well explained in the case of UBEN, Inc., v. United States, 396 F.2d 601 (2d Cir. 1968), cert. denied, 89 S. Ct. 238 (1968), involving the adoption of a rule by the Federal Communications Commission revising the respective broadcasting rights of daytime and fulltime radio stations. The court rejected the contention that the FCC should have held a separate evidentiary hearing with respect to each broadcaster who claimed that his existing license would be modified by the new rule. It said (396 F.2d at 618):

> "Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them."

In those instances in which this distinction has been lost sight of, the result has usually been palpable impairment of the rulemaking process. The Food and Drug Administration is required to use trial-type techniques for much of its general rulemaking pertaining to standards for food products. No proceeding subject to this requirement has been completed in less than two years; two have taken more than ten years; a hearing transcript of over 7,700 pages has been devoted exclusively to the question whether peanut butter should consist of 87-1/2 percent or 90 percent peanuts.

In short, when trial-type procedures have been required for rulemaking of general applicability, they have tended to produce a virtual paralysis of the administrative process. I see no reason to expect a more satisfactory result in this case. The "material facts" which the FTC will have to consider in its rulemaking under subsection 18(a)(2) include innumerable legislative facts -- such as whether a particular abuse is "in fact" a widespread problem in a particular industry, or whether a certain regulatory requirement would "in fact" contravene legitimate business practices. It is doubtful that the FTC will be able to make such determinations in any number if trial-type procedures are imposed.

Of course, in particular FTC rulemaking proceedings certain issues of "specific fact" may arise -- and if they could be identified in advance, it might be desirable for Congress to require trial-type procedures for them. But such prior identification of the appropriate issues is seldom possible, since they hinge so much upon the nature

of the particular rule under consideration and the contested points that arise in the particular proceeding. Ordinarily, the agency must be accorded discretion to apply trial-type procedures in the appropriate instances that appear as a particular rulemaking unfolds. This is the course urged upon the agencies by Conference Recommendation 72-5; it might also be urged by the present legislation. But imposing trial-type procedures indiscriminately upon all issues of material fact may prove tantamount to eliminating the rulemaking authority entirely.1/

I believe that there is no single current issue of administrative procedure on which the experts -- in private practice, in the agencies and in the law schools -- are more in accord than the proposition set forth above: that trial-type procedures should not be applied across-the-board to the making of rules of general applicability.

II.

The provisions of section 18(a)(3), governing judicial review of Commission rules, are inconsistent with Conference Recommendation 74-4. Section 18(a)(3)(c) provides that a Commission rule "shall not be affirmed unless * * * supported by substantial evidence in the record taken as a whole." Use of the "substantial evidence" test as a standard for judicial review of rules of general applicability invites confusion regarding the proper scope and nature of such review. As it is generally understood, the substantial evidence criterion serves the sole function of testing whether evidence is sufficient to support agency findings of fact. The substantial evidence standard is properly applied to specific agency factual determinations required to be made on an administrative record. But it is ill-suited if not meaningless as applied to the complicated mixture of fact, judgment, prediction, and compromise which properly underlies an agency decision to issue a rule of general applicability. For this reason the Conference urges in paragraphs 3 and 4 of Recommendation 74-4 that the appropriate standard for review of such a rule is whether the rule is "arbitrary, capricious [or] an abuse of discretion." Where such a

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1/An added disincentive to rulemaking is the requirement in section 18(c) that the Commission, in passing upon applications for exemptions, observe substantially the same cumbersome procedures as were followed in the original adoption of the rule. Particularly inappropriate, in my view, is the provision in section 18(c)(4) that on judicial review the Commission's denial of an exemption not be upheld unless "supported by substantial evidence." I see no reason why the Commission, having adopted a valid rule, should have the burden of demonstrating by evidence why its application to a person concededly within its terms should not be waived. The likely result of section 18(c) is that even after a rule is adopted the Commission will be tied up indefinitely in subsidiary administrative and judicial proceedings involving substantially the same issues as the rulemaking proceeding was intended to resolve.

rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires the reviewing court to decide, in light of the information before it * * * whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported."

III.

Still another difficulty which I have with section 18 is its repeated departure from the terminology of the Administrative Procedure Act (APA), and its minor and confusing variation of the requirements which the APA imposes. Some of these divergences seem inadvertent, others deliberate. They all contribute to a balkanization of administrative practice which appears to be an accelerating trend, and which if continued will result in a body of law that is unnecessarily specialized, arcane and confusing to the public, to the practicing bar and even to the courts.

Section 18(a)(1), for example, provides that, for those rules subject to the procedures of section 18(a)(2), the Commission may issue only "procedural, administrative, and advisory rules." The terms "administrative rules" and "advisory rules" are not contained in the APA, nor do they, to my knowledge, have any generally understood meaning. Unless the phrase "procedural, administrative and advisory rules" includes everything contained within the APA phrase "interpretative rules, general statements of policy . . . [and] rules of agency organization, procedure, or practice," subsection 18(a)(1) apparently prevents the FTC from acting by rule in some areas where agencies generally may do so.

Another example of an unfortunate and confusing departure from standard terminology is contained in section 18(a)(2)(A), which requires that the promulgation of a final rule be accompanied by "a statement of basis and purpose based on the information and comments compiled" in the rulemaking proceeding. The APA merely requires "a concise general statement . . . [of the rule's] basis and purpose." This difference in terminology is doubtless intentional, but in departing from the well understood provisions of the APA, it leaves unanswered a number of questions, such as: Is the rule invalid if the statement relies on any material not adduced at the hearing? If so, is the corollary that the agency must spread on the record all the information on which it relies? And is it consistent to require that the statement be based only on the information and comments brought forth in the rulemaking proceeding, when on judicial review the agency may justify its action by other material (see section 18(a)(3)(A))?

I am sure that the drafters of the present proposals fully intend at least some of the departures from standard APA terminology and treatment. Where that is not so, I would urge that conforming changes be made to facilitate agency and court application of this new legislation. But where the departures are intentional, there is raised the more important question whether the Congress intends to abandon the principle of a relatively uniform, standardized administrative procedure set forth in the Administrative Procedure Act. While occasional variations in certain instances may be consistent with that principle, the departures contained in the present legislation do not seem justified by any peculiarities of the regulatory program involved.

The provisions of H.R.7917 which I have discussed seem to represent a current trend. In recent years, there has been a visible and steady erosion of standardized administrative practice, through individualized provisions contained in new pieces of regulatory legislation where no real reason for individualized treatment exists. While absolute standardization, of course, is not desirable, the basic principle of a uniform administrative practice, with only such variations as operational differences justify, serves several important values. It is indispensible to the retention of an administrative system that can be fathomed by the general public and penetrated by lawyers who are not specialists in narrow fields of Federal practice. It is helpful to the courts in their review of agency action, facilitating the development of overall principles of judicial review and enabling the creation of a body of case law that can serve as precedent in more than one limited field. Finally, and perhaps most important, an allegiance to a standard body of procedural principles such as that contained within the APA has great advantages in the legislative process. The procedural provisions of major substantive legislation are understandably not the portions to which the Congress devotes its closest attention; and the comments it receives from both the agencies and the private sector are inclined to dwell upon the extent, rather than the manner, of the regulation that is to be imposed. It is generally desirable, then, for the Congress to adhere to the judgments it made when procedure itself was the center of its attention rather than merely the incidental accompaniment of a substantive program under examination. Those judgments are likely to be significantly more sound than the procedural innovations which may be confected, often hastily, with each new piece of substantive legislation.

I do not suggest that the procedural framework of the APA established in 1946 leaves no room for improvement. But it is clear to me that if the standards set in 1946 are no longer adequate, they should be changed through revision of the Administrative Procedure Act. Piece-meal, haphazard revision within the context of substantive legislation will in my view do more harm to the system as a whole than good to the particular program under consideration.

If there is any further assistance my office can provide, I hope you will advise me.

Sincerely yours,

Robert A. Anthony
Chairman

Enclosures

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
NEW EXECUTIVE OFFICE BUILDING
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

RECOMMENDATION 72-5: Procedures for Adoption of Rules of General Applicability

Adopted December 14, 1972

The Administrative Procedure Act, 5 U.S.C. § 553 (1970), provides simple, flexible and efficient procedure for rulemaking, including publication of a notice of proposed rulemaking in the Federal Register, opportunity for submission of written comments, and opportunity in the discretion of the agency for oral presentation. This notice-and-comment rulemaking procedure is extensively used and on the whole has worked well. Each agency is of course free to provide additional procedural protection to private parties in any proceeding.

There are statutes that require procedures in addition to those required by § 553. Some require opportunity for oral argument, some require agency consultation with advisory committees, and some require trial-type procedure.

The Administrative Conference believes that statutory requirements going beyond those of § 553 should not be imposed in absence of special reasons for doing so, because the propriety of additional procedures is usually best determined by the agency in the light of the needs of particular rulemaking proceedings. The Administrative Conference emphatically believes that trial-type procedures should never be required for rulemaking except to resolve issues of specific fact.

Recommendation

1. This recommendation applies only to rules of general applicability and not to rules of particular applicability, only to substantive rules and not to procedural rules, only to legislative rules and not to interpretative rules, and only to rulemaking governed by § 553 and not to rulemaking excepted from the requirements of § 553.

2. In future grants of rulemaking authority to administrative agencies, Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. § 553, except that when it has special reason to do so, it may appropriately require opportunity for oral argument, agency consultation with an advisory committee, or trial-type hearings on issues of specific fact.

3. Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact. Ordinarily it should not require such procedures for making rules of general applicability, except that it may sometimes appropriately require such procedures for resolving issues of specific fact. Existing statutes imposing a requirement of trial-type procedures for rulemaking of general applicability should be reexamined in light of these principles.

4. A study of proceedings conducted by the Food and Drug Administration pursuant to § 701(e) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 371(e) (1970), has demonstrated that that section should be amended so as to make clear that trial-type hearings are not required except on issues of specific fact.

5. Each agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond those of § 553, such as opportunity for oral argument, agency consultation with an advisory committee, opportunity for parties to comment on each other's written or oral submissions, a public-meeting type of hearing, or trial-type hearing for issues of specific fact.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037

OFFICE OF
THE CHAIRMAN

RECOMMENDATION 74-4: PREENFORCEMENT JUDICIAL REVIEW OF RULES OF GENERAL APPLICABILITY

(Adopted May 30-31, 1974)

With increasing frequency, rules of general applicability adopted by agencies informally pursuant to 5 U.S.C. §553 are being reviewed by the courts directly, before they are applied to particular persons in adjudicative proceedings. Such review may be by courts of appeal under statutes, mostly older statutes, providing generally for judicial review of orders of specific agencies, or under recent statutes providing specifically for the direct review of rules issued by new agencies or by newly created authority. The district courts also review rules directly in the exercise of their power under the Administrative Procedure Act to review agency action not otherwise reviewable.

The trend toward immediate review of agency rules has been accompanied by confusion over the appropriate scope and standard of review. In particular, conceptual and practical difficulties have arisen from the use by Congress and the courts of phrases such as "hearing," "record" and "substantial evidence on the record as a whole," traditionally associated with review of orders entered after a formal evidentiary hearing, in the new and different context of preenforcement review of agency rules adopted informally.

This recommendation, addressed to Congress, the Judicial Conference and the agencies, seeks to dispel the confusion by (1) stating what administrative materials should be included in the record on review and (2) clarifying the standards for reviewing the adequacy of the factual basis and rationality of rules. The recommendation accepts the present pattern of preenforcement review of rules and does not call for either more or less of such review. Nor does it suggest that any particular procedures should be followed by agencies in adopting rules.

Recommendation

1. In the absence of a specific statutory requirement to the contrary, the following are the administrative materials that should be before a court for its use in evaluating, on preenforcement judicial review, the factual basis for rules adopted pursuant to informal procedures prescribed in 5 U.S.C. §553: (1) the notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of

the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency's concise general statement or final order and any documents referred to therein. */ References to the "record" or "whole record" in statutes pertaining to judicial review of rules adopted under Section 553 should be construed as references to the foregoing in the absence of a legislative intent to the contrary. The Conference does not assume that the reviewing court should invariably be confined to the foregoing materials in evaluating the factual basis for the rule.

2. The term "substantial evidence on the record as a whole," or comparable language, in statutes authorizing judicial review should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed by the agency whose actions are subject to the statute and, in particular, should not be taken as a legislative prescription that in rulemaking agencies must follow procedures in addition to those specified in 5 U.S.C. §553.

3. The appropriate standard for determining whether a rule of general applicability adopted after informal rulemaking rests on an adequate foundation is stated in 5 U.S.C. §706(2)(A), which provides that a reviewing court must set aside action found to be "arbitrary, capricious [or] an abuse of discretion." Where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information before it (including the administrative materials described in paragraph 1), whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported.

4. Statutes providing for judicial review of rules adopted after informal rulemaking should refer only to the standards for review of such rules set forth in 5 U.S.C. §706, including the "arbitrary, capricious, [or] abuse of discretion" standard of Section 706(2)(A) (but not including the "substantial evidence" standard of Section 706(2)(E), which by its terms is inapplicable to such rules). Properly applied, those standards are adequate to ensure appropriate judicial scrutiny of rules adopted informally. Judicial review statutes that speak in terms of review according to the standard of "substantial evidence" should be construed as establishing a standard of review over informal rulemaking comparable to that set forth in Section 706(2)(A), unless a contrary intent clearly appears.

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*/ The court may of course limit its consideration to those materials that parties cite. Whether the agency may withhold from the parties to the judicial review proceeding or the court on the ground of confidentiality any materials otherwise called for is left by the recommendation to be decided under existing law.

Recommendation 74-4

Separate Statement of Malcolm S. Mason

The debate on this Recommendation demonstrates that there are large differences of fundamental approach on many interrelated underlying issues. Under these circumstances, Professor Verkuil's paper, the Committee study, and the Conference debate have served a useful purpose in calling attention, in this influential forum, to the need for further thought on these matters. They do not, however, lay a rational foundation for a specific, formal, intricately constructed Recommendation, which purports to carry the authority of the Administrative Conference. Here the real disagreements have been hidden by the parliamentary process; that can only be harmful. This kind of rush to recommend is something I think the Conference should scrupulously avoid.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE CHAIRMAN

The Honorable Roy L. Ash
Director, Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Dear Mr. Ash:

This is in response to your request for the views of the Federal Trade Commission upon Enrolled Bill S. 356, 93d Congress, 2d Session, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.

Title I of S. 356 prescribes disclosure and designation standards for written warranties, defines Federal content standards for full warranties and establishes consumer remedies for breach of warranty or service contract obligations.

Title II of the bill, "Federal Trade Commission Improvement," would affect the powers of the Commission in several ways. First, Section 201 would expand the Commission's jurisdiction from acts and practices "in commerce" to acts and practices "in or affecting commerce."

Section 202 establishes rulemaking procedures for the issuance of substantive rules for unfair or deceptive acts or practices in or affecting commerce under Section 5(a)(1) of the Federal Trade Commission Act. In addition to following its present rulemaking procedures which are prescribed by Section 553 of Title 5 of the United States Code, the Commission would be required to publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; allow interested persons to submit written data, views and arguments; provide an opportunity for an informal hearing; and promulgate, if appropriate, a final rule based on the matter in the rulemaking record together with a statement of basis and purpose. If the Commission determines that there are disputed issues of material fact that it is necessary to resolve,

any interested person could present rebuttal submissions and conduct (or have conducted) such cross-examination of persons as the Commission determines to be appropriate and to be required for a full and true disclosure with respect to such issues.

Review of Commission rules would be in the United States Circuit Courts of Appeals and the court could hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), (D) of Section 706 (2) of Title 5 of the United States Code or if the court found that the Commission's action "is not supported by substantial evidence in the rulemaking record . . . taken as a whole." In addition, the Court could set aside the rule if it found that a Commission determination that the petitioner "is not entitled to conduct cross-examination or make rebuttal submission" or a Commission ruling "limiting the petitioner's cross-examination or rebuttal submission" has "precluded disclosure of disputed material facts which was necessary for fair determination by the Commission for the rule-making proceeding taken as a whole."

Section 203 would expand the Commission's authority to obtain information by amending Sections 6, 9 and 10 of the Federal Trade Commission Act to apply to persons and partnerships as well as corporations.

Section 204 would replace Section 5(m) of the Federal Trade Commission Act, modifying and clarifying the Commission's authority to represent itself in court proceedings. This section grants the Commission authority to appear in its own name through its own attorneys when seeking injunctions, pursuing consumer redress, participating in judicial review proceedings, or enforcing subpoenas and other such report requirements. These provisions do not significantly change existing law, and they are consistent with actual and current practice. In other civil actions, the Commission could appear in its own name through its own attorneys 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. Under current law, the Department of Justice has 10 days rather than 45 within which to make its evaluation. With respect to Supreme Court cases, the

Attorney General would have the right to represent the Commission before the Supreme Court. If he refused to appeal or file a petition for certiorari, the Commission could represent itself through its own attorneys in the Supreme Court. In the Commission's view, this provision clarifies an authority currently resident in Section 5(m) of the Act.

Section 205 of the bill would authorize the Commission to commence civil actions to recover civil penalties for knowing violations of the Federal Trade Commission Act.

Finally, Section 206 would authorize the Commission to seek consumer redress in United States District Courts against any person who violates a substantive trade regulation rule or who engages in conduct which results in a final Commission cease-and-desist order 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 Commission is concerned that the rulemaking procedures of Section 202 are undesirable and unnecessary. We would clearly have preferred that they not be adopted. However, other provisions of the bill would naturally enhance the authority of the Commission and enable the Commission to serve American consumers. We recommend that the bill be signed into law.

In accordance with Circular No. A-19 Revised, a cost estimate prepared by staff is enclosed.

By direction of the Commission.

Lewis A. Engman
Chairman

Enclosure

COST ESTIMATE

General Counsel's Office

Increased costs made necessary by S. 356 in the operations of the Office of General Counsel are already included in that Office's FY 76 budget request now pending before OMB.

Bureau of Consumer Protection

The Bureau of Consumer Protection estimates that passage of the new law, S. 356, will increase manpower and operating costs approximately $455,000 in FY 75 and $960,000 in FY 76.

The provision providing grants totalling up to $1,000,000 per annum for advocacy in rulemaking proceedings, would, if fully implemented, require an additional $500,000 in FY 75 and an additional $1,000,000 in FY 76.

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

December 26, 1974

Dear Mr. Rommel:

This is in response to your request for the views of the Council of Economic Advisers on S. 356 -- The Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act.

I recommend that the President sign the bill. It will improve the quality of the information available to consumers in a manner that will not impose undue costs on sellers. Hence, on balance, it will tend to enhance economic efficiency and well being.

Sincerely yours,

Alan Greenspan

Mr. Wilfred H. Rommel
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D. C.

THE WHITE HOUSE

WASHINGTON

December 24, 1974

MEMORANDUM

TO: WILFRED H. ROMMEL
Assistant Director for
Legislative Reference
Office of Management and Budget

Attention: Mrs. Garziglia

FROM: VIRGINIA H. KNAUER Theodore Wilson
Special Assistant to the President
for Consumer Affairs

SUBJECT: Enrolled Bill, S. 356, "Magnuson-Moss Warranty
--Federal Trade Commission Improvement Act"

This is in response to your request for a report on S. 356, an enrolled bill "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."

Title I of the bill, Consumer Product Warranties, would provide consumers with forthright and unambiguous information as to the extent that suppliers will back their wares and would reverse the practice that has almost become an institution today with some suppliers providing warranties which take away more than they give. Title I also enables the consumer economically to pursue his own remedies when there is a breach of a warranty on service contract obligation.

Title II, Federal Trade Commission Improvements, introduces several amendments into the Federal Trade Commission Act.

While I question the desirability of Section 202, Rulemaking, in my view Title II should generally enhance the ability of the Federal Trade Commission to carry out its consumer protection and enforcement responsibilities.

Accordingly I recommend that the bill be approved.

FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C. 20429

OFFICE OF THE CHAIRMAN

December 26, 1974

Honorable Roy L. Ash
Director
Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Dear Mr. Ash:

By enrolled bill request dated December 20, 1974, your Office requested our views and recommendations on S. 356, 93d Congress, an enrolled bill to be cited as the "Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act."

Title I of the enrolled bill sets certain Federal standards with respect to terms and disclosures which must be contained in consumer product warranties. Title II of the enrolled bill makes a number of amendments to the Federal Trade Commission Act (15 U.S.C. 41 et seq.). We assume that our views and recommendations have been solicited with regard to section 202 of the bill. That section, in part, authorizes the Board of Governors of the Federal Reserve System to define by regulation unfair trade practices of banks. The Federal Reserve is required to issue regulations for banks which are substantially similar to FTC unfair trade practice regulations, unless it finds that any such regulation conflicts with monetary policy or is inapplicable to banks and publishes this finding within 60 days. The bill also requires each Federal bank regulatory agency to establish a Consumer Affairs Division for enforcement of the Federal Reserve regulations and to report to the Congress annually on that Division's activities.

The approach taken by the enrolled bill on the matter of unfair trade rules affecting banks is essentially similar to the approach suggested in our May 11, 1973 letter to Chairman Sparkman of the Senate Committee on Banking, Housing and Urban Affairs (copy enclosed). Accordingly, the Corporation recommends that the President approve S. 356.

Sincerely,

Frank Wille

Frank Wille
Chairman

Enclosure

FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C. 20429

OFFICE OF THE GENERAL COUNSEL

MAY 11 1973

Honorable John J. Sparkman
Chairman
Committee on Banking, Housing
and Urban Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This refers to your April 11, 1973 letter requesting our views in connection with S. 356 as marked up by the Senate Commerce Committee.

As pointed out in your letter, section 212 of the bill, which represents a proposal you and Senator Tower made in a letter dated April 3, 1973 to Chairman Magnuson of the Senate Commerce Committee, would give the Federal Trade Commission substantive rulemaking jurisdiction over banks in the unfair trade practice area. That section would require the FTC to delegate to the Federal bank regulatory agencies the authority to enforce FTC rules in this area with respect to banks, except that the FTC could require any such agency to redelegate its enforcement authority to the FTC if after a public hearing the FTC found such redelegation to be necessary in order to prevent financial institutions from using unfair or deceptive practices. As also noted in your letter, former section 206 granting the FTC general substantive rulemaking authority in the unfair trade practice area has been deleted from the bill at the FTC's request, because the Commission believes that pending litigation will confirm its substantive rulemaking power in this area in broader terms than would obtain if former section 206 were to be enacted.

Because of the unique character of the banking business and the special expertise which the Federal bank regulatory agencies have developed over the years in regulating the banking industry, we believe that explicitly conferring unfair trade practice jurisdiction on these agencies would clearly be a more appropriate way of establishing a comprehensive and integrated regulatory framework for policing unfair or deceptive practices that may be engaged in from time to time by certain banks, than granting

comparable jurisdiction to the FTC. Following the model established by the Truth in Lending Act, we would recommend that Congress designate one of the Federal bank regulatory agencies to issue the substantive rules in the unfair trade practice area which would apply to all federally insured banks, with authority to enforce such rules being granted to all of the Federal bank regulatory agencies in respect of the institutions which they regularly examine. In exercising this legislative rulemaking power, the designated bank regulatory agency could be required to consult with the FTC for the purpose of avoiding the issuance of rules applicable to banks which would conflict with similar rules which the FTC (assuming it obtains such authority) has issued or contemplates issuing in the nonbanking area.

If the Congress should, however, grant to the FTC rulemaking power over banks, we would have particular difficulty with the mandatory redelegation provisions in S. 356 which authorize the FTC in effect to publicly indict a Federal bank regulatory agency for alleged failure to carry out what would be a statutory duty of such agency under the bill, namely to enforce compliance with FTC unfair trade practice rules that would apply to banks. If enacted, this provision would seem to constitute an implicit recognition by Congress that the Federal bank regulatory agencies might not faithfully discharge a congressional directive and, therefore, must be policed by a sister Federal agency, the FTC. We reject this assumption. We believe that the Federal bank regulatory agencies can and will faithfully execute any duty Congress may confer on them and that such agencies should be accountable to the President and Congress and <u>not</u> to another independent agency.

Finally, we concur in the tentative opinion stated in your letter that section 212(b) of the revised S. 356 would give the FTC legislative rulemaking authority over banks, whereas the Commission does not presently appear to have, and under the bill would not be granted, similar rulemaking authority over nonbank businesses now within its jurisdiction. The Corporation would oppose such a result since it does not believe the banking industry should be singled out for such legislation.

Sincerely,

(Signed) Frank Wille

Frank Wille
Chairman

LR

FEDERAL HOME LOAN BANK BOARD

WASHINGTON, D. C. 20552

320 FIRST STREET N.W.

FEDERAL HOME LOAN BANK SYSTEM
FEDERAL HOME LOAN MORTGAGE CORPORATION
FEDERAL SAVINGS & LOAN INSURANCE CORPORATION

OFFICE OF
GENERAL COUNSEL

December 23, 1974

Mr. Wilfred H. Rommel
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Attention: Mrs. Garziglia

Dear Mr. Rommel:

This is in response to your request of December 20, 1974 for the views and recommendations of the Bank Board regarding enrolled bill S. 356, the "Magnuson-Moss Warranty - Federal Trade Commission Improvement Act."

The Bank Board's major concern with this bill, as it was finally adopted by Congress, is the fact that Federally regulated savings and loan associations are not afforded treatment comparable to that given the other Federally regulated financial institutions. It is the Board's view that institutions subject to our supervision should be regulated in the area of consumer protection by the Federal Reserve Board and this agency rather than by the FTC. This would put all Federally regulated, competing financial institutions on the same footing. It is our understanding that this has been the position of the FTC and the Administration as well.

However, S. 356 appears to be an otherwise meritorious bill, and the Bank Board would recommend Presidential approval of the legislation. Due to the apparent haste of the final Congressional consideration of the bill, we do not believe that the Congress has reached a fixed conclusion on this issue, and it is our intention to propose to the 94th Congress an appropriate amendment to rectify the problem created by the inconsistent allocation of rulemaking and enforcement authority over the various types of financial institutions.

Sincerely,

Henry L. Judy

Henry L. Judy
Deputy General Counsel

LR

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

December 24, 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in reply to your request for a report on the enrolled enactment S. 356, "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."

This Department defers to the Federal Trade Commission since this bill does not directly affect the operations of the Department.

Sincerely,

J. Phil Campbell

J. Phil Campbell
Acting Secretary

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR
WILLIAM E. FOLEY
DEPUTY DIRECTOR

December 23, 1974

W. H. Rommel
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C.

Dear Mr. Rommel:

This will acknowledge receipt of your memorandum transmitting for our views and recommendations enrolled bill S. 356, 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."

Although this enrolled bill has not been submitted to the Judicial Conference for comment it is the type of legislation in which the Conference normally defers as a matter of legislative policy to the Congress but urges that the Congress consider the impact of the legislation upon the federal court system. In the circumstances no recommendation is made concerning Executive approval.

Sincerely,

William E. Foley
Deputy Director

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 936

Date: January 1, 1974 Time: 11:00 a.m.

FOR ACTION: Jim Cavanaugh
Max Friedersdorf
Phil Areeda
Paul Theis
Geoff Shepard

cc (for information): Warren Hendriks
Jerry Jones
Jack Marsh

FROM THE STAFF SECRETARY

DUE: Date: Thursday, January 2 Time: Noon

SUBJECT:

Enrolled Bill S. 356 - Product warranties — Federal Trade Commission Act amendments

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy JOhnston, Ground Floor W. Wing

1974 DEC 2 AM 8 27

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

For the President
Warren K. Hendriks

Shepard
+ Arends agree

MEMORANDUM OF DISAPPROVAL

It is with great reluctance that I withhold my approval from S. 356, which deals with consumer product warranties and amendments to the Federal Trade Commission Act.

This bill would provide disclosure standards for written consumer product warranties against defect or malfunction; define Federal content standards for such warranties; establish consumer remedies for breach of warranty or service contract obligations; and grant the FTC expanded authority in carrying out its consumer protection activities.

particularly the Supreme Court of the United States

My reluctance stems from the recognition that the Congress, and especially Senators Magnuson and Moss, have in this bill attempted to deal with the product warranty abuses which so plague our consuming public. I support this effort wholeheartedly. However, the Attorney General has advised me, and I agree, that the provisions of this bill which wrest from the Attorney General his traditional control of Government litigation would have significant adverse impact on the Government's ability to present its position in court in a uniform and consistent manner.

The Department of Justice ~~was established in 1870 for the~~ is to serve principal purpose of ~~insuring~~ that the Attorney General ~~could~~ can effectively control Government litigation. This control is required by the need to insure that Government agencies do not take inconsistent legal positions in the Federal courts and that important legal issues are presented to appellate courts with the best possible case as a vehicle.

Judge Learned Hand recognized the need for giving this country's chief legal officer, the Attorney General, control of Government litigation when he wrote: "The Attorney General has powers of 'general superintendence and direction' over

district attorneys..., and may directly intervene to 'conduct and argue any case in any court of the United States'.... Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties." Sutherland v. International Insurance Co., 43 F. 2d 969, 970 (2d Cir. 1930).

Chief Justice Warren Burger has written: "It is the unanimous view of the Justices that it would be unwise to dilute the authority of the Solicitor General as to Supreme Court jurisdiction in cases arising within the Executive Branch and independent agencies." (See 1972 Hearings on the Study of the Securities Industry Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess., ser 92-37b, pt. 3, at 1809) [redacted].

There are additional problems with S. 356. The prescribed rulemaking procedures are inflexible and burdensome, and would actually impede the FTC's ability to protect the American consumer against unfair or deceptive practices. Moreover, the bill would provide an inconsistent allocation of rulemaking authority over the various types of financial institutions, unwisely subjecting them and the consumers they serve to a maze of varying and disparate standards. Finally, FTC's enforcement authority over the administrative orders which it issues would be expanded in a manner which could impose an additional burden on the courts and make traditional civil penalty enforcement of such orders more difficult.

By withholding my approval from this bill, I hope to signal to the Congress my determination that our ~~expanding~~ legal system, which must expand to keep pace with the expanding rights of our citizenry, ~~not expand in chaotic or haphazard~~ do so in an organized and responsible fashion. ~~At the same time, the~~ This Administration will be pleased to work with the 94th Congress toward early enactment of meaningful warranty protection legislation.

THE WHITE HOUSE

January , 1975