

Reauthorization Bill Would Increase the Resources and Authority of the Federal Trade Commission

This week, Senator Daniel K. Inouye (D-HI) and Senator Byron Dorgan (D-ND) introduced the Federal Trade Commission Reauthorization Act of 2008,¹ a proposed legislative measure that seeks to increase the resources and the authority of the Federal Trade Commission (“FTC” or “Commission”).

An April 8, 2008 hearing on the proposed *FTC Reauthorization Act of 2008* (“Bill”) before the U.S. Senate Committee on Science, Commerce and Transportation (“Committee”) elicited much praise and little opposition from witnesses and members of the Committee.

The proposed measure would:

- Extend the FTC’s authority to new areas;
- Remove protections in its rulemaking procedures;
- Give it power to seek civil penalties against companies committing unfair or deceptive practices;
- Encourage it to target lenders; and
- Increase its budget by ten percent each year for seven years.

If passed into law, the *FTC Reauthorization Act of 2008* would represent the most significant expansion of Commission authority in decades.

Notable provisions outlined in the Bill include measures that would:

- Introduce civil penalties for first violations;
- Streamline rulemaking under Section 5 of the *Federal Trade Commission Act* (“FTCA”); and
- Extend jurisdiction to non-profit organizations and telecommunications common carriers.

CIVIL PENALTIES FOR FIRST VIOLATIONS

If approved for legislation, the *FTC Reauthorization Act of 2008* will authorize the Commission to seek civil penalties for knowing violations of Section 5 of the FTCA. Currently, the Commission is permitted to seek restitution for consumers, disgorgement of ill-gotten gains, and recovery for violations of statutes that allow civil penalties, and violations of Commission rules and cease and desist orders. Because of the broad sweep of Section 5 – which prohibits unfair acts and practices – the agency has never had authority to seek civil penalties in a first challenge of a company’s advertising or marketing. In prepared testimony, the Commissioners stated that expanded civil penalty authority would aid the Commission in its effort to address spyware, data security, and telephone record pretexting by providing appropriate deterrence.²

STREAMLINED RULEMAKING UNDER SECTION 5

Provoked by the FTC’s vigorous regulatory campaign in the 1970s, Congress required the Commission to

¹ FTC, Press Release *FTC Chairman and Commissioners Testify Before Senate Committee on Commerce, Science, and Transportation on Proposed “Federal Trade Commission Reauthorization Act of 2008”* (Apr. 8, 2008), available at <http://ftc.gov/opa/2008/04/reauth.shtm>.

² Prepared Statement of the FTC Before the S. Comm. on Commerce, Sci., and Transp., 110th Congr. 9-11 (2008), available at <http://ftc.gov/os/testimony/P034101reauth.pdf>.

follow specific procedures designed to protect affected parties in its rulemakings. Since then, the Commission's general rulemaking procedures have required:

- Publication of an advance notice of proposed rulemaking;
- Acceptance of public comment before issuing a notice of proposed rulemaking; and
- Opportunities for interested parties to cross-examine hostile witnesses before a presiding officer.³

Adopting the proposed legislation will permit the Commission to discard these old prescriptions and to use the simple notice-and-comment provisions of the *Administrative Procedures Act* ("APA").⁴

EXTENDING JURISDICTION TO NON-PROFIT ORGANIZATIONS AND COMMON CARRIERS

Removing the Non-Profit Exemption

The Bill also seeks to repeal current exemptions on jurisdiction both for non-profit organizations and telecommunications common carriers. The current exemption in the FTCA for most non-profit organizations positions traditional charitable organizations outside the Commission's jurisdiction. Despite this, the Commission has still managed to successfully bring actions against non-profit and other organizations in cases where the agency demonstrated that these organizations operated for the financial benefit their members. However, the proposed measure will repeal the existing exemption, subjecting charitable, religious, educational, and other 501(c)(3) organizations to the requirements of the FTCA.⁵

Removing the Telecom Exemption

Similarly, the Bill will repeal the exemption granted to telecommunications common carriers subject to the *Communications Act of 1934*. Currently, these common

carriers are exempted from the FTCA's prohibitions on unfair or deceptive or practices and unfair methods of competition. In its testimony, the Commission has noted that based on its expertise, it is particularly well-situated to address advertising, marketing, billing, and collection issues. Repeal of the common carrier exemption would give the Commission the authority to apply Section 5 to many telecommunications practices.⁶

Targeting Mortgage Lending Practices

Finally, the proposed legislation will authorize federal agencies with authority over financial institutions to promulgate rules under the FTCA, and would allow state attorneys general to bring cases under rules that the Commission itself promotes. The Bill anticipates that the FTC, in coordination with the banking agencies, would issue its own rules governing subprime and nontraditional mortgages.

CONCLUSION

A detailed description of the *FTC Reauthorization Act of 2008* provisions can be found on the U.S. Senate Committee on Commerce, Science, and Transportation's website.

Please be advised that attorneys in Kelley Dreye & Warren's Advertising Law Practice Group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division ("NAD"), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

³ *Id.* at 24.

⁴ 5 U.S.C. § 553.

⁵ Prepared Statement of the FTC, *supra* note 2, at 16-19.

⁶ Prepared Statement of the FTC, *supra* note 2, at 20-21.

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