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FALSE OR MISLEADING MAIL MATTER

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HEARING
BEFORE THE
COMMITTEE ON POSTAL OPERATIONS
OF THE
COMMITTEE ON
OFFICE AND CIVIL SERVICE
USE OF REPRESENTATIVES
EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

H.R. 6102

A BILL TO AMEND SECTION 4005 OF TITLE 39, UNITED STATES CODE, RELATING TO FRAUDULENT, FALSE, OR MISLEADING AND LOTTERY MAIL MATTER, AND FOR OTHER PURPOSES

JUNE 7, 1966

Printed for the use of the
Committee on Post Office and Civil Service



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1966



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FALSE OR MISLEADING MAIL MATTER

TUESDAY JUNE 7, 1966

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON POSTAL OPERATIONS OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 346, Cannon House Office Building, Hon. Thaddeus J. Dulski (chairman of the subcommittee) presiding.

(H.R. 6102 follows:)

[H.R. 6102, 89th Cong., 1st sess.]

A BILL To amend section 4005 of title 39, United States Code, relating to fraudulent, false, or misleading and lottery mail matter, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That—

(1) Subsection (a) of section 4005 of title 39, United States Code, is amended by striking out the word "fraudulent," and substituting instead thereof the word "misleading," and inserting after the word "promises" the following: "(without any regard to whether or not such pretenses, representations, or promises are intentional)".

(2) Subsection (a) (1) of section 4005 of title 39, United States Code, is amended by deleting therefrom the words "fraudulent" or "lottery mail" and inserting instead thereof the word "unlawful".

(3) The caption of section 4005 of title 39, United States Code, is amended to read:

"§ 4005. False or misleading and lottery mail matter".

(4) The table of contents of chapter 51 of title 39, United States Code, is amended by deleting after "4005." the words "Fraudulent and Lottery Matter" and inserting instead thereof "False or misleading, and lottery mail matter."

Mr. DULSKI. The subcommittee will come to order.

The Subcommittee on Postal Operations is meeting today to begin hearings on H.R. 6102, a bill to amend section 4005 of title 39, United States Code, relating to fraudulent, false, or misleading and lottery mail matter, and for other purposes. H.R. 6102 is sponsored by our colleague, Representative Morris K. Udall, a valued member of the committee. A similar bill, S. 1364, has been introduced by Senator Williams of New Jersey in the other body.

The general purpose of this legislation is to strengthen postal laws which are directed to the protection of the public against schemes to obtain money or property through the mail by false promises or representations. I believe it is important to note especially that these laws are intended to protect the unwary and unsuspecting—those who by reason of advanced age, infirmity, or lack of worldly knowledge are unusually susceptible to being victimized.

The Subcommittee on Postal Operations, and I personally, have been closely concerned for a number of years with the seemingly constant problem of closing up loopholes in the postal laws which, if left open, are adverse to the public interest. This is a very sensitive area, and the technical and legal problems are not to be minimized. However, a review of the record shows that our subcommittee has been successful in bringing about some needed improvements.

The law to keep obscenity out of the mails, presently contained in sections 4006 and 4007 of title 39, United States Code, is a prime example. Another example is found in section 1461 of title 18, the Criminal Code, conferring jurisdiction in obscenity cases at the place of delivery as well as the place of mailing. This venue change was developed in our subcommittee, and the bills prepared here were referred to the Committee on the Judiciary.

Still another desirable change brought out of this subcommittee became Public Law 86-676, establishing a Judicial Officer in the Post Office Department empowered to both receive evidence and make decisions as to the issuance of appropriate orders by the Postmaster General in fraud and obscenity cases.

This background will demonstrate, I am sure, that the subcommittee is always deeply interested in legislative proposals which are designed to prevent cheating of the public through use of the U.S. mails.

I will ask our distinguished member of the committee, Mr. Daniels, to introduce the Senator from New Jersey.

Mr. DANIELS. Thank you, Mr. Chairman.

It is my pleasure to present to this committee one of our very able men from the other body, the junior Senator from the State of New Jersey, Harrison A. Williams, Jr., otherwise known by his popular name, Pete Williams. He has established quite a record for himself during the period of time he has served in the Senate. He is the author of many pieces of legislation of the Great Society.

I understand he has a very busy schedule this morning and his presence is required in the other body. Therefore, I will be brief and present to the committee Senator Harrison A. Williams, Jr.

**STATEMENT OF HON. HARRISON A. WILLIAMS, JR., A U.S. SENATOR
FROM THE STATE OF NEW JERSEY; ACCOMPANIED BY GLADYS
KESSLER, EXECUTIVE ASSISTANT TO SENATOR WILLIAMS**

Senator WILLIAMS. I appreciate that very much from my good friend from New Jersey, Congressman Daniels.

Mr. Chairman, I just got a phone call. One of my chickens is coming home to roost in a subcommittee of the Labor Committee on the Senate side and they are asking me to come over and explain the bill I have introduced as a part of the minimum wage bill. Therefore, I regret I have to leave without talking. But I would like to say the bill now before you is a very important tool in the Post Office Department's efforts to stop the fraudulent and deceptive use of the mails.

This matter came to my attention through the Senate Special Committee on Aging. I happened to be chairman of what was called the Subcommittee on Frauds and Misrepresentations Affecting the Elderly, and it is unbelievable how the sharksters are defrauding and misleading, in so many respects, the elderly through the mails. The

bill I introduced, which is identical to the one before you, I presented because of the evidence we had that the mail was being so used. Frequently, not only under the five fingers of fraud, but in instances where there was clearly misrepresentation in the sale of lands or the sale of products for medical cures, we were advised that the Post Office Department right now is poorly equipped to strike down these people who are clearly misrepresenting their products.

I know Mr. Montague, who is here today and will testify, was most helpful to us in the hearings that we had—and we had many days of hearings on this very subject—and he will give you any additional details you may want.

With your permission I would like to present my full statement and I know if there are any questions my legal counsel, Miss Kessler, is here. She is closer to law school than I am by about a quarter of a century and probably knows a lot more of the technical aspects. I understand, under the legislation before you, anybody who falls under the act has all the protection of the Administrative Procedures Act and the other protections all the way to the Supreme Court, and there should be no danger. But that, I am sure, will be fully explored.

Mr. DANIELS. Mr. Chairman, I realize the Senator must get away but I do have one question: How would the proposed bill implement existing law?

Senator WILLIAMS. It would permit the Post Office Department, as an administrative matter, not as a criminal matter, to implement their opportunity to intercept mail that is clearly misleading.

Mr. DANIELS. They do not have that authority today?

Senator WILLIAMS. As I understand it, now you have to run the full gamut of the requirements, proving fraud and intent, and all the rest. In my statement I describe one or two examples of individuals who skipped away from evidence of fraudulent intent by saying they were advised that what they were doing was all right and therefore were acting in good faith. This defeated the effort to stop it because all the elements of fraud were not proven.

Mr. DANIELS. Thank you.

Mr. DULSKI. Your statement will be inserted in the record at this point. Thank you for appearing before us today. We know you have a busy schedule.

Senator WILLIAMS. Thank you very much.

(The following statement was submitted for the record:)

PREPARED STATEMENT OF HON. HARRISON A. WILLIAMS, JR., A U.S. SENATOR
FROM THE STATE OF NEW JERSEY

Mr. Chairman, I am delighted to be testifying before you today on H.R. 6102. As you probably know, I have introduced identical legislation in the Senate and I am pleased that action is now underway on the House side to move this bill toward speedy passage.

In 1963 the Senate Special Committee on Aging—of which I am a member—held three crowded days of hearings which, in disturbing detail, described the many schemes to defraud or deceive older Americans. We heard about health frauds and quackery, mail-order land sale schemes, dancing studio deceptions that often literally took life savings from elderly victims, and we received information on so-called investment opportunities or second career plans.

The Special Committee on Aging, which as you know does not act on legislation but makes recommendations based on its factfinding hearings, quickly authorized establishment of a subcommittee to specifically deal with victimization of the elderly. I was named chairman of the Subcommittee on Frauds and Misrepre-

sentations Affecting the Elderly, since renamed the Subcommittee on Consumer Interests of the Elderly.

In 1964 I conducted hearings on four subjects: installment sales of "retirement sites," quackery and medical deceptions, deceptive methods of selling health insurance, and preneed burial plans.

While I will not attempt to set forth all the details of our subcommittee's findings and recommendations, let me just say that we were moved and often angered by what we saw and heard. The voluminous evidence given at these hearings made it clear that our older citizens have become a clearly defined market—not only for reputable businessmen with new and valuable services and products for the elderly—but also to those who are looking for a vast new group to victimize.

It has been estimated that elderly Americans now have an annual income of almost \$40 billion. Many of them are desperate for cure of illness or relief from pain; many invest in questionable schemes because of anxiety about waning physical resources and energies; many become victims of pitchmen simply because they are lonely and want to hear someone's voice.

One of the most useful and effective means of doing business for these purveyors of grief has become the U.S. mails. They are fast, reliable, and can cast a wide net for those wishing to ensnare the gullible and ill-formed. Despite the conscientious and vigorous efforts of the Post Office Department to keep fraudulent businessmen from using the mails, these schemers have used existing legal loopholes with great skill, our subcommittee learned.

Consequently, the subcommittee urged, on pages 78 and 79 of its 1965 report, passage of remedial legislation to enable our postal inspectors to take swifter action against those using the mail to defraud innocent victims. The legislation we are considering today, H.R. 6102 (and on the Senate side it is S. 1364) will, I am confident, further the Post Office's efforts to stop fraudulent and deceptive use of the mails without in any way jeopardizing or infringing the rights of those who may be affected.

Under the present statute, the Post Office Department is empowered to proceed criminally or civilly against alleged defrauders. Any prosecution brought under the criminal fraud sections naturally requires the traditional elements of clear and specific intent to defraud.

However, the Post Office Department can also take administrative action against a suspected defrauder by intercepting his mail, marking it "fraudulent," and returning it to the sender. In this way, those who might have been lured into certain unsavory schemes, will have their moneys or applications returned and will be on clear notice that they were dealing with shady operators.

Until now, the postal inspectors have been required to apply the criminal standards of specific intent to defraud to these administrative sanctions. The legislation before us today would remove that obstacle to the Department's enforcement efforts.

Let me emphasize one thing: the legislation we are discussing today concerns only the administrative and not the criminal section of the existing fraud statute. So long as the Post Office Department makes an administrative determination that an advertisement is false and misleading as a factual matter, this amendment will allow the Department to stop the fraudulent advertiser from receiving his ill-gotten gains and to return them to the victimized senders. Moreover, the accused is fully protected. He receives the protection of the Administrative Procedure Act during proceedings at the departmental level; upon receiving an adverse ruling from the Department he can go into Federal District Court to get an injunction against the Department's administrative determination; an adverse ruling from the Department can be appealed all the way through the Federal courts up to the Supreme Court if the accused so wishes.

While I know that Mr. Montague, Chief Inspector for the Post Office Department, will outline more of the specifics, I think that one rather pitiable example will vividly highlight this entire problem area.

The Post Office tried to stop the advertisement of a product claiming to be a "sex energizer tablet." There was clear medical evidence from physicians and a psychiatrist at the Department's hearing that these tablets were absolutely worthless for the advertised purposes, and that at present no group of drugs is effective as a safe aphrodisiac. The promoter testified in his own behalf, merely denying any intent to defraud and claiming that he had based his claims for the pill's potency on some conversation he claimed to have with a doctor at some prior time. But because of this vague and unspecific testimony, the Department was unable to prove the requisite fraudulent intent, and these highly suggestive ads are still being sent to gullible and hopeful victims through the country.

Mr. Chairman, I think it high time that we give the Department the tools it needs to protect the public interest before more money is lost and more hopes dashed through these shady schemes. The Department is primarily concerned with protecting the public before the fact; before the hard-earned money of those living on small incomes is thrown away on foolish schemes. I think H.R. 6102 will greatly aid the Department in carrying out that task and I strongly urge that this subcommittee take favorable action on it.

Mr. DULSKI. Our next witness is from the Post Office Department, Mr. Henry Montague, chief postal inspector, and with him are Mr. William F. Lawrence, associate general counsel, and Mr. Abraham Levine from the Office of the General Counsel.

STATEMENTS OF HENRY MONTAGUE, CHIEF POSTAL INSPECTOR, POST OFFICE DEPARTMENT, AND WILLIAM F. LAWRENCE, ASSOCIATE GENERAL COUNSEL, POST OFFICE DEPARTMENT, ACCOMPANIED BY ABRAHAM LEVINE, OFFICE OF THE GENERAL COUNSEL, AND CHARLES A. MILLER, BUREAU OF THE CHIEF POSTAL INSPECTOR, DIRECTOR OF FRAUD AND MAILABILITY DIVISION, POST OFFICE DEPARTMENT

Mr. MONTAGUE. Mr. Chairman, we also have with us Mr. Charles A. Miller, Bureau of the Chief Postal Inspector and director of the Fraud and Mailability Division.

Mr. DULSKI. You may proceed.

Mr. MONTAGUE. Mr. Chairman, we have presented to you a letter dated June 6, 1966, addressed to Hon. Tom Murray, chairman of the Committee on Post Office and Civil Service, by Postmaster General Lawrence F. O'Brien, urging the enactment of this legislation. I would request that the Postmaster General's statement be placed in the record at this point.

Mr. DULSKI. Without objection it is so ordered.

(The letter follows:)

OFFICE OF THE POSTMASTER GENERAL,
Washington, D.C., June 6, 1966.

Hon. TOM MURRAY,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for a report on H.R. 6102, a bill to amend the postal fraud statute (39 U.S.C., § 4005) so as to convert the present proscription "fraudulent" to "misleading." The proposed amendment would enable the Department to enforce the law without having to establish an intent to deceive on the part of violators.

The Department urges the enactment of this legislation.

The existing burden of establishing an intent to deceive is unreasonable and unwarranted in light of the underlying purpose of section 4005 of title 39, United States Code, which was designed to protect the remitter against misrepresentation rather than to punish the violator. *Donaldson v. Read Magazine*, 338 U.S. 178.

In administering the present law we have experienced serious difficulty in obtaining evidence of an intent to deceive. This is partly due to the fact that the Department is without subpoena power. Also, the respondent or violator of the statute usually does not take the witness stand to testify when a case is brought. As a result the Department is unable to develop through cross-examination information which is essential to establish an intent to deceive. Because of the present requirement to prove actual intent to deceive, this Department has a greater burden of proof in its administrative cases against false advertising than other agencies operating in similar areas, such as the Food and Drug Administration and the Federal Trade Commission.

The proposed legislation will facilitate action against fraudulent enterprises and aid in the President's efforts to protect consumers. We therefore recommend its enactment.

The Bureau of the Budget has advised that from the standpoint of the administration's program there is no objection to the submission of this report to the committee.

Sincerely yours,

LAWRENCE F. O'BRIEN, *Postmaster General.*

Mr. MONTAGUE. Mr. Chairman and members of the subcommittee, I appreciate very much the opportunity to appear before this subcommittee to discuss H.R. 6102. Essentially this bill would amend the civil postal fraud statute (sec. 4005, title 39, United States Code) by changing the word "fraudulent" to "misleading." This would eliminate the present burden of proving intent at departmental hearings held under the provisions of this statute—hearings which are in no way designed to criminally punish, but rather to merely protect the vast consuming public from loss of money and, in far too many instances, further erosion of health, through reliance on false claims made through the U.S. mails.

The majority of all mail-order businesses are operated honestly and legitimately and need fear nothing from the enactment of this amendment. It is only those relatively few promoters who, because of shallow scruples and thirst for financial gain, resort to deceptive word trickery and outright lies to sell their product or services, that need fear anything, and even in such instances, they need only fear that the U.S. postal service will not be available to them as a convenient medium through which money may be filched from victims. They need fear nothing more from the enactment of this amendment.

Such restriction, applied only after the fullest observance of due process of law, cannot, in my opinion, be fairly characterized as punitive. It would seem rather to represent a reasonable minimum effort to assure that a Government-operated service, in this instance the postal service, is not utilized for the practice of chicanery and deceit upon citizen consumers of this country.

As you know, the Department through its postal inspection service exercises consumer protection for the most part by virtue of investigative jurisdiction over two postal fraud statutes—the civil statute to which we are specifically addressing ourselves today and the criminal statute embodied in section 1341, title 18, United States Code. A violation of the first, when satisfactorily proven after a formal hearing, results in the issuance of an order requiring the postmaster at the promoter's delivery point to return to the senders all mail addressed to the promoter or the business name involved. The criminal statute on the other hand is punitive and provides criminal penalties of up to 5 years in prison and/or \$1,000 fine for each mailing charge.

Proof of intent, or bad faith if you will, is an essential legal requisite to conviction under the criminal statute and, speaking for the postal inspection service, we would have it no other way. Reasonable people would not suggest that anyone should be deprived of liberty or subjected to heavy fine unless persuasive proof of intentional or conscious wrongdoing is present. We question, however, whether such degree of proof should also be required in each given instance before the Post Office Department can legally refuse to be the instrumentality by which far too many American consumers continue to be fleeced of badly needed money on the basis of false, misleading, and deceptive claims.

During the first 9 months of this fiscal year, postal inspectors completed investigations of 7,676 promotions on the basis of complaints or other indications of possible fraudulent activity. Many were of an extremely complex and involved nature dealing, individually, with millions of dollars in consumer payments. The evidence obtained in 578 cases was of sufficient weight as to warrant formal referral to U.S. attorneys for consideration of prosecution under the criminal statute. In 323, or 55.8 percent of these 578 cases, prosecution was not undertaken—the problem of proof of intent representing a central factor in many instances. There is no question but if proof of falsity of advertising claims was the only legal requirement under the civil or administrative statute, that a considerable number of those promotions in which prosecution was not undertaken could have been effectively proceeded against through mail stoppage.

May I cite several examples of our problems in this area.

In 1964 we received word that an elderly medical practitioner was advertisting an amazing electrical device called the Magnetron, by direct mail and through newspapers. The small cabinet-type device sold for \$197.50 and its use, according to the claims, would cure such conditions and ailments as varicose veins, prostate difficulty, arthritis, ulcers, diabetes, failing heart, and bleeding piles. Our investigation determined that the device supplied less than 30 millionth of an ampere of current to the patient—about one-half of that which one would receive by holding three flashlight batteries in the hand and somewhat less than one would experience by sleeping under an electric blanket.

In investigating further we found the practitioner had sold some 300 of the machines—his own work product and invention—to ailing people over a 3-State area. Our inspectors located and interviewed some 50 purchasers, many aged and in the most pitiful physical and financially destitute circumstances. Evidence of false representations was clearly present and the investigating inspector and the U.S. attorney felt that proof of intent, or bad faith, was also available. The practitioner was arrested for mail fraud and tried before a judge sitting without jury. The court readily found the device worthless but could not find sufficient evidence that the practitioner knew, himself, that the device was worthless as to supply the necessary requirement of intent. Consequently, the trial resulted in acquittal. I cite this case merely to point out that under present technical requirements of proof, action under the civil statute—merely to halt further use of the mails—may be equally as difficult to provide. While Department hearing examiners might conceivably require somewhat less proof of intent than criminal courts, this is more than overbalanced by our lack of subpoena power or authority to pay witness fees in connection with administrative hearings. Thankfully, the practitioner referred to in this instance decided on his own to desist from further use of the mails.

Since our concentrated program on suspected land fraud promotions began in 1962, we have authorized 461 investigations in this area. Criminal indictments involving 82 defendants have been returned in 31 prosecutive cases. Twenty-three promoters have already been convicted in cases wherein an estimated \$50 million was lost by the public. The potential loss of many more millions was halted through our investigations.

Here, too, as in the case of many of our other fraud prosecutions, the mails at times continue to be used to flech further funds from victims during the interim between indictment and trial. The investigation of the Lake Mead Land & Water Co. in Arizona began in 1962. Evidence that the desert property was not in fact "an enchanted city in the making," that the "favorite swimming hole" pictured in the advertising brochure was in truth a cattle-watering pond not even located on the promoter's property; that various springs and wells depicted in the literature were also not located on the property, was not too difficult to ascertain but proof of intent or personal knowledge on the part of the principal promoter, of course, required considerably more time.

An indictment was returned in October 1963 and conviction resulted in June 1965. Three thousand home or investment seeking persons, many of the elderly group, lost a total of \$1 million before the enterprise was finally stopped through conviction. The promoter continued to receive payments by mail up to the very end.

Our case files are replete with similar examples of our present inability to promptly cut off the flow of funds to dishonest mail-order promoters whose advertising claims can be shown fairly readily to be false yet where proof of fraudulent intent cannot readily be shown.

The criminal statute we believe was primarily designed to provide a strong deterrent to those swindlers who might look longingly at the anonymity and convenience provided by the U.S. mails in reaching potential victims. Regrettably, in times of rising economy and easy flow of money, too many dishonest promoters succumb to the temptation, as reflected in the fact that in fiscal year 1965 a total of 929 arrests were made under mail fraud or related charges. This is the largest annual total in history and represents a 31-percent increase over the previous year.

Nevertheless, we consider the criminal statute an effective weapon with which to bring outright swindlers to justice. The problem, I feel, is that some added measure of protection should be afforded the public from loss in the many cases where actual intent or, bad faith, is difficult to prove but where false and misleading representations can adequately be proven.

This amendment if enacted should aid in furnishing that protection.

Thank you.

Mr. DULSKI. Thank you very much, Mr. Montague.

I understand Mr. William F. Lawrence, Associate General Counsel, has a statement also.

Mr. LAWRENCE. Yes, sir.

Mr. DULSKI. Before we proceed with his statement I would like to ask Mr. Montague some questions. We commend you on your brevity and the presentation you have made. You have done an outstanding job in this field.

Let us come down to an important issue. Are you familiar with the Krebiozen controversy?

Mr. MONTAGUE. Yes.

Mr. DULSKI. How would Krebiozen be affected by this legislation? As you know, the Food and Drug Administration took the promoters of Krebiozen to court and they were acquitted. The jury found the representations were not fraudulent. Under H.R. 6102, would you proceed in the same manner as the Food and Drug Administration?

Mr. MONTAGUE. If we could prove that the advertising concerning Krebiozen was misleading and misrepresented the product, providing this amendment were enacted, we would be able to deny the use of the mail for obtaining returns from selling the product Krebiozen.

In that case, however, it is my recollection the Food and Drug Administration had difficulty in getting the promoter to submit specimens for laboratory analyses—I am speaking from recollection and what I read in the newspapers. I do not know how they would prevent us from getting specimens and samples by mail for our purposes. In other words, if this was being advertised as a cure and we could prove otherwise based on analyses, medical testimony, and so on, then the use of the mail could be denied with regard to mail matter addressed to the promoter regarding the Krebiozen business.

Mr. DULSKI. Suppose the Food and Drug Administration first took it to court and the respondent was acquitted. Then, later, postal inspectors gathered evidence and went to court where the respondent was found guilty? Does your Department work in cooperation with the Food and Drug Administration?

Mr. MONTAGUE. We work very closely with the Food and Drug Administration. In fact, postal inspectors assisted in preparing the mail-count indictments upon which that case was tried. We know what Food and Drug is doing in this field and they know what we are doing. We work very closely. But in applying it to our own case, where we are talking about criminal action on the one hand and administrative action on the other, that is what is giving us difficulty at the present time. We do not have the facility to act speedily enough to fully protect the public. It takes a considerable time to work up a case for criminal prosecution. We have to go sometimes into long auditing procedures to show the money was siphoned off for purposes not shown in the advertising; and we have to show intent. So, if we were able to proceed independently on misrepresentation and deception, administratively, we could still continue with our investigation of the criminal features. We think this is the way it should be. We think the people who use the mails with intent to defraud are criminals just as a man who takes a gun and goes out to rob a post office or some other business. The only difference is that in fraud the man is using his wiles and brain and is taking money from people who cannot afford to lose the money, whereas a man with a gun usually takes money from someone who can better afford to lose it.

We feel the enactment of this amendment would assist us greatly in further protecting the consuming public.

Mr. DULSKI. I believe Barnum and Bailey Circus said that "a sucker is born every minute." Do you not think the people who see these things advertised are taking a risk?

Mr. MONTAGUE. Without doubt; yes.

Mr. DULSKI. I have no further questions. Mr. Daniels?

Mr. DANIELS. Mr. Chairman, may I suggest Mr. Lawrence first testify and then we can open the panel for discussion.

Mr. DULSKI. Yes. You may proceed, Mr. Lawrence.

Mr. LAWRENCE. Mr. Chairman and members of the subcommittee, I am William F. Lawrence and I am the Associate General Counsel in charge of legislative and mailability matters.

The General Counsel and all of us connected with the postal fraud activity appreciate and welcome the opportunity to appear before

this subcommittee to present additional views of the Post Office Department in support of H.R. 6102, a bill to amend the postal fraud statute (title 39, United States Code, sec. 4005). I have with me Mr. Abraham Levine of our Office who has had considerable experience in these matters. This statute is the administrative or civil postal fraud statute. In effect, this law provides for the return of mail to the senders by a local postmaster after it has been found that a scheme is being conducted wherein remittances are sought by means of the mails based on false or fraudulent pretenses, representations, or promises.

There are two postal fraud statutes—the administrative or civil statutes referred to, and title 18, United States Code, section 1341, which is the criminal postal fraud statute. The essential distinctions between the two statutes are these: (1) The criminal statute is a punitive statute seeking to punish the promotor of a fraudulent scheme by fine or imprisonment. The administrative statute is a protective or preventive statute seeking to protect the remitter from being victimized by the fraudulent representations employed. It protects the remitter by the return of his mail, containing remittance, addressed to the unscrupulous promotor, following the issuance of a fraud order under the statute, or after execution of a compromise agreement wherein the promotor agrees to return remittances; (2) under the criminal statute, the enterprise need not seek remittances in the mail and the statute is operative so long as the mail facilities are used in any facet of the scheme. On the other hand, the administrative or civil statute requires that remittances be sought in the mails; and (3) the criminal statute makes no provision for the return of mail or remittances to the victim as does the administrative statute.

In order to establish a violation of the civil postal fraud statute, we have to prove that (1) the advertising in question is being employed by the promotor and seeks remittances in the mail; (2) the advertising contains express or implied representations which are material and false as a matter of fact; and that (3) the false representations were made with intent to deceive. We are not usually troubled with meeting the burden of proof as to the first two elements; we are seriously hampered by the necessity of meeting the burden of proof as to the element of intent. This burden would be eliminated by the enactment of H.R. 6102.

Section 4005 speaks of "false or fraudulent in" the disjunctive. Up until 1949, we proceeded on the premise this meant that an order under the statute could be issued on the basis of either falsity or fraudulency, that is to say, whether intent to deceive is present or not. In 1949 the U.S. Supreme Court, in *Reilly v. Pinkus* (338 U.S. 269), as a collateral finding in a medical postal fraud case, construed the phrase "false or fraudulent" as meaning "false and fraudulent," and since that decision we have been shackled with the burden of establishing the intent to deceive.

The operation of a man's mind is a most difficult thing to prove. In our instance, this task is even more formidable since we do not have subpoena power to build certain pertinent evidence bearing on the element of intent. Moreover, the promotor-respondent in our fraud hearings seldom takes the stand to testify, and we are thus deprived of the opportunity to cross-examine him. Time and time again, we are faced with situations where utter falsity is established by the evi-

dence and there is no question but that the remitter has been deprived of his money on the basis of misleading and deceiving representations. Yet, fraud orders, under the statute, were denied because the hearing examiners were of the belief that the evidence presented was insufficient to establish intent to deceive.

Many times I have heard hearing examiners state, after hearings, they were convinced the representations were false, however the showing of intent to deceive was not sufficiently made to warrant issuance of an order.

The majority of cases submitted to our Office for consideration are medical fraud cases involving advertising representations offering cures, treatments, or remedies for a myriad of diseases, ailments and conditions. The consequences of the falsity involved in these cases could be far reaching. In these instances, the victims' monetary loss is far outweighed by the physiological detriments involved. Materially false representations as to the therapeutic value or efficacy of a medicinal product have the same consequences whether the representations were made with or without intent to deceive.

H.R. 6102, providing for the issuance of an unlawful order, amends title 39, United States Code, section 4005, so as to eliminate the necessity for establishing the intent to deceive, which we feel does not rightfully or logically belong in an administrative or civil statute, and which we believe is incompatible with the underlying purpose of such a statute. Section 4005 was unquestionably designed to protect the remitter against false representations rather than to punish the violator (*Donaldson v. Read Magazine*, 338 U.S. 178).

The proceedings under the statute are in the nature of equitable, in rem proceedings rather than in personam. We seek no action directed against the promoter. The action is directed against the mail addressed to the promoter. We do not deprive the promoter of any property rights. This is so since the sender, under an applicable postal regulation, reserves the right to recall his mail at any time before actual delivery (Postal Manual, section 153.5). An order under section 4005, directing the local postmaster to return mail to the senders, is in effect a vicarious recall of mail belonging to the senders. We think it reasonable to assume that a remitter would want to have his money returned if apprised of the fact that it was illegally or dishonestly sought by the advertiser. Under the order in question, we recall the mail on behalf of the senders.

It has been brought to our attention that there are those, including certain mail-order operators, who voice protest against passage of a bill in the nature of H.R. 6102, on the ground that it would deprive a mail-order promoter of his business even where he unintentionally misrepresented his wares or services. It is submitted that this contention is without merit. It is our position that the presence or absence of intent when false representations are employed, is not a logical criteria for predicating violation of a statute intended to protect the consumer against improvident remittances. Second, it is our position that any commercial undertaking is not deemed legitimate if it depends on profits derived from deceptive, misleading or false claims and representations. Neither the civil or criminal postal fraud statute nor H.R. 6102 deprives a man of any legitimate undertaking. They merely deny the mail-order operator the right to receive mail and remittances which he sought on the basis of false ^{fr}

misleading representations. The mail-order operator has no justifiable or legal cause for complaint if he is deprived of a business activity which is conducted dishonestly. There is no legal reason or moral justification for protecting one in the employment of untruthful statements beamed at a gullible public. The mail-order operator who is apprised of his use of false representations, by way of prior notification by the Post Office Department or charges in a formal complaint, is ethically and morally obliged to revise his advertising matter so as to obviate existing falsity. He is privileged, of course, to disagree with the Department's position and have his day in court, or he may, in good faith, undertake a reasonable settlement in fair compromise of existing differences. Surely, he cannot complain if he insists on following an objectionable course of conduct and then finds his mail cut off.

Moreover, the statute or the proposed amendment does not necessarily deprive one of his business since the entrepreneur is still permitted to sell his wares by means other than the use of the mails, or by means other than the particular advertising matter declared objectionable. Additionally, where an order affecting the mail is rendered, and the promoter later cleans up his advertising, he reserves the right to continue in business after applying to the Judicial Officer of the Department under our rules of practice, for revocation of the priorly issued fraud order (sec. 201.29, Rules of Practice in Proceedings Relative to Fraud, etc.; 26 F.R. 12771; 39 CFR, pt. 201).

At this point we would like to introduce our rules of practice for incorporation into the record.

Mr. DULSKI. Without objection, it is so ordered.

(The rules of practice referred to follow:)

RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO FRAUD, LOTTERY, AND
OBSCENITY ORDERS UNDER 39 U.S.C. 4003, 4005, AND 4006, 26 F.R. 12771,
39 CFR PART 201

Sec.		Sec.	
201.1	Authority for rules.	201.19	Subpenas.
201.2	Scope of rules.	201.20	Witness fees.
201.3	Informal dispositions.	201.21	Depositions.
201.4	Office, business hours.	201.22	Transcript.
201.5	Complaints.	201.23	Proposed findings and conclusions.
201.6	Interim impounding.	201.24	Decisions.
201.7	Notice of hearing.	201.25	Exceptions to initial decision or tentative decision.
201.8	Service.	201.26	Judicial Officer.
201.9	Filing documents for the record.	201.27	Motion for reconsideration.
201.10	Answer.	201.28	Orders.
201.11	Default.	201.29	Modification or revocation of orders.
201.12	Amendment of pleadings.	201.30	Supplemental orders.
201.13	Continuances and extensions.	201.31	Computation of time.
201.14	Hearings.	201.32	Official record.
201.15	Change of place of hearing.	201.33	Public information.
201.16	Appearances.		
201.17	Presiding officers.		
201.18	Evidence.		

§ 201.1 *Authority for rules.*

These rules of practice are issued by the Judicial Officer of the Post Office Department (see § 201.26), pursuant to authority delegated by the Postmaster General. (R.S. 161, as amended, 5 U.S.C. 22, 39 U.S.C. 309, 501, 74 Stat. 554 (Public Law 86-676), Headquarters Circular 61-45 (26 F.R. 10813)).

§ 201.2 *Scope of rules.*

These rules of practice shall be applicable in all formal proceedings before the Post Office Department initiated under or pertaining to 39 U.S.C. 4003, 4005, and 4006, including such cases instituted under prior rules of practice pertaining to these or predecessor statutes, unless timely shown to be prejudicial to the respondent.

§ 201.3 *Informal dispositions.*

These rules do not preclude the disposition of any matter by agreement between the parties either before or after the filing of a complaint when time, the nature of the proceeding, and the public interest permit.

§ 201.4 *Office, business hours.*

The offices of the officials mentioned in these rules are located at the Post Office Department, 12th and Pennsylvania Avenue N.W., Washington, D.C. and are open Monday through Friday from 8:45 a.m. to 5:15 p.m.

§ 201.5 *Complaints.*

When the General Counsel of the Post Office Department or his designated representative believes that a person (1 U.S.C. 1) is using the mails in a manner requiring formal administrative action under 39 U.S.C. 4005 or 4006, he shall prepare and file with the Docket Clerk a complaint which names the person involved; states the legal authority and jurisdiction under which the proceeding is initiated; states the facts in a manner sufficient to enable the person named therein to make answer thereto; and recommends the issuance of an appropriate order. The person so named in the complaint shall be known as the respondent.

§ 201.6 *Interim impounding.*

In preparation for or during the pendency of a proceeding initiated under 39 U.S.C. 4005 or 4006, mail addressed to a respondent may be impounded upon obtaining an appropriate order from a U.S. District Court, as provided in 39 U.S.C. 4007, as amended by 74 Stat. 553 (Public Law 86-673).

§ 201.7 *Notice of hearing.*

When a complaint is filed the Docket Clerk shall issue a notice of hearing stating the time and place of the hearing and the date for filing an answer which shall not exceed 15 days from the service of the complaint, and a reference to the effect of failure to file an answer or appear at the hearing (see §§ 201.10 and 201.11). Whenever practicable, the hearing date shall be within 30 days of the date of the notice.

§ 201.8 *Service.*

(a) The Docket Clerk shall cause a notice of hearing and a copy of the complaint to be transmitted to the postmaster at any office of address of the respondent or to the inspector in charge of any division in which the respondent is doing business, which shall be delivered to the respondent or his agent by said postmaster or a supervisory employee of his post office or a postal inspector. A receipt acknowledging delivery of the notice shall be secured from the respondent or his agent and forwarded to the Docket Clerk, Room 3350, Post Office Department, Washington, D.C., to become a part of the official record.

(b) In the event no person can be found to accept service of the notice of hearing and complaint pursuant to paragraph (a) of this section, the notice may be delivered in the usual manner as other mail addressed to the respondent. A statement, showing the time and place of delivery, signed by the postal employee who delivered the notice of hearing shall be forwarded to the Docket Clerk and constitute evidence of service.

§ 201.9 *Filing documents for the record.*

(a) Each party shall file with the Docket Clerk, pleadings, motions, orders, and other documents for the record. The Docket Clerk shall cause copies to be delivered promptly to other parties to the proceeding and to the presiding officer.

(b) The parties shall submit four copies of all documents unless otherwise ordered by the presiding officer. One copy shall be signed as the original.

(c) Documents shall be dated and state the docket number and title of the proceeding. Any pleading or other document required by order of the presiding officer to be filed by a specified date shall be delivered to the Docket Clerk on or before such date. The date of filing shall be entered thereon by the Docket Clerk.

§ 201.10 *Answer.*

(a) The answer shall contain a concise statement admitting, denying, or explaining each of the allegations set forth in the complaint.

(b) Any facts alleged in the complaint which are not denied or are expressly admitted in the answer may be considered as proved, and no further evidence regarding these facts need be adduced at the hearing.

(c) The answer shall be signed personally by an individual respondent, or in the case of a partnership by one of the partners, or, in the case of a corporation or association, by an officer thereof.

(d) The answer shall set forth the respondent's address and the name and address of his attorney.

(e) The answer shall affirmatively state whether the respondent will appear in person or by counsel at the hearing.

(f) If the respondent does not desire to appear at the hearing in person or by counsel he may request that the matter be submitted for determination pursuant to paragraph (b) of § 201.11.

§ 201.11 *Default.*

(a) If the respondent fails to file an answer within the time specified in the notice of hearing, he shall be deemed in default, and to have waived hearing and further procedural steps. The Judicial Officer shall thereafter issue an order without further notice to the respondent.

(b) If the respondent files an answer but fails to appear at the hearing, the presiding officer shall receive complainant's evidence and render an initial decision.

§ 201.12 *Amendment of pleadings.*

(a) Amendments proposed prior to the hearing shall be filed with the Docket Clerk. Amendments proposed thereafter shall be filed with the presiding officer.

(b) By consent of the parties a pleading may be amended at any time. Also, a party may move to amend a pleading at any time prior to the close of the hearing and, provided that the amendment is reasonably within the scope of the proceeding initiated by the complaint, the presiding officer shall make such ruling on the motion as he deems to be fair and equitable to the parties.

(c) When issues not raised by the pleadings but reasonably within the scope of the proceedings initiated by the complaint are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments as may be necessary to make the pleadings conform to the evidence and to raise such issues shall be allowed at any time upon the motion of any party.

(d) If a party objects to the introduction of evidence at the hearing on the ground that it is not within the issues made by the pleadings, but fails to satisfy the presiding officer that an amendment of the pleadings would prejudice him on the merits, the presiding officer may allow the pleadings to be amended and may grant a continuance to enable the objecting party to rebut the evidence presented.

(e) The presiding officer may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented and which are relevant to any of the issues involved.

§ 201.13 *Continuances and extensions.*

Continuances and extensions will not be granted by the presiding officer except for good cause shown.

§ 201.14 *Hearings.*

Hearings are held in room 5241, Post Office Department, Washington, D.C., or other locations designated by the presiding officer.

§ 201.15 *Change of place of hearing.*

Not later than the date fixed for the filing of the answer, a party may file a request that a hearing be held to receive evidence in his behalf at a place other than that designated for hearing in the notice. He shall support his request with a statement outlining:

(a) The evidence to be offered in such place;

(b) The names and addresses of the witnesses who will testify; and

(c) The reasons why such evidence cannot be produced at Washington,

D.C.

The presiding officer shall give consideration to the convenience and necessity of the parties and the relevancy of the evidence to be offered.

§ 201.16 *Appearances.*

- (a) A respondent may appear and be heard in person or by attorney.
- (b) An attorney may practice before the Department in accordance with applicable rules issued by the Judicial Officer. See part 202 of this chapter.
- (c) When a respondent is represented by an attorney, all pleadings and other papers subsequent to the complaint shall be mailed to the attorney.
- (d) A respondent must promptly file a notice of change of attorney.

§ 201.17 *Presiding officers.*

- (a) The presiding officer at any hearing shall be a Hearing Examiner qualified pursuant to the Administrative Procedure Act (5 U.S.C. 1010) or the Judicial Officer (74 Stat. 553, Public Law 86-676). The Chief Hearing Examiner shall assign cases to Hearing Examiners upon rotation so far as practicable. The Judicial Officer may, for good cause shown, preside at the reception of evidence in proceedings where expedited hearings are requested by either party.
- (b) The presiding officer shall have authority to:
 - (1) Administer oaths and affirmations;
 - (2) Examine witnesses;
 - (3) Rule upon offers of proof, admissibility of evidence and matters of procedure;
 - (4) Order any pleading amended upon motion of a party at any time prior to the close of the hearing;
 - (5) Maintain discipline and decorum and exclude from the hearing any person acting in an indecorous manner;
 - (6) Require the filing of briefs or memorandums of law on any matter upon which he is required to rule;
 - (7) Order prehearing conferences for the purpose of the settlement or simplification of issues by the parties;
 - (8) Order the proceeding reopened at any time prior to his decision for the receipt of additional evidence; and
 - (9) Render an initial decision, which becomes the final departmental decision unless a timely appeal is perfected: the Judicial Officer may issue a tentative or a final decision.

§ 201.18 *Evidence.*

- (a) Except as otherwise provided in these rules, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern. However, such rules may be relaxed to the extent that the presiding officer deems proper to insure a fair hearing. The presiding officer shall exclude irrelevant, immaterial, or repetitious evidence.
- (b) Testimony shall be under oath or affirmation and witnesses shall be subject to cross-examination.
- (c) Agreed statements of fact may be received in evidence.
- (d) Official notice or knowledge may be taken of the types of matters of which judicial notice or knowledge may be taken.
- (e) Authoritative writings of the medical or other sciences, may be admitted in evidence but only through the testimony of expert witnesses or by stipulation.
- (f) Lay testimonials will not be received in evidence as proof of the efficacy or quality of any product or thing sold through the mails.
- (g) The written statement of a competent witness may be received in evidence provided that such statement is relevant to the issues, that the witness shall testify under oath at the hearing that the statement is in all respects true, and, in the case of expert witnesses, that the statement correctly states his opinion or knowledge concerning the matters in question.
- (h) A party who objects to the admission of evidence shall make a brief statement of the grounds for the objection. Formal exceptions to the rulings of the presiding officer are unnecessary.

§ 201.19 *Subpenas.*

The Post Office Department is not authorized by law to issue subpenas requiring the attendance or testimony of witnesses.

§ 201.20 *Witness fees.*

The Post Office Department does not pay fees and expenses for respondent's witnesses or for depositions requested by respondent.

§ 201.21 *Depositions.*

(a) Not later than 5 days after the filing of respondent's answer, any party may file application with the Docket Clerk for the taking of testimony by deposition. In support of such application the applicant shall submit under oath or affirmation a statement setting out the reasons why such testimony should be taken by deposition, the time and the place, and the name and address of the witness whose deposition is desired, the subject matter of the testimony of each witness, its relevancy, and the name and address of the person before whom the deposition is to be taken.

(b) If the application be granted, the order for the taking of the deposition will specify the time and place thereof, the name of the witness, the person before whom the deposition is to be taken and any other necessary information.

(c) Each witness testifying upon deposition shall be duly sworn, and the adverse party shall have the right to cross-examine. The questions and answers together with all objections, shall be reduced to writing and, unless waived by stipulation of the parties, shall be read to and subscribed by the witness in the presence of the deposition officer who shall certify it in the usual form. The deposition officer shall file the testimony taken by deposition as directed in the order. The deposition officer shall put the witness on oath. All objections made at the time of examination shall be noted by the deposition officer and the evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, a party may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim. Objections to relevancy or materiality of testimony, or to errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties and errors of any kind which might be obviated, cured or removed if promptly presented, are waived unless timely objection is made at the taking of the deposition.

(d) At the hearing, any part or all of the deposition may be offered in evidence by any party who was present or represented at the taking of the deposition or who had notice thereof. If the deposition is not offered and received in evidence, it shall not be considered as a part of the record in the proceeding. The admissibility of depositions or parts thereof shall be governed by the rules of evidence.

(e) The party requesting the deposition shall pay all fees required to be paid to witnesses and the deposition officer, and shall provide an original and one copy of the deposition for the official record, and shall serve one copy upon the opposing party.

(f) Within the United States or within a territory or insular possession, subject to the dominion of the United States, depositions may be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; within a foreign country, depositions may be taken before a secretary of an embassy or legation, consul general, vice consul or consular agent of the United States, or any other person designated in the order for the taking of a deposition.

(g) Depositions may also be taken and submitted or written interrogatories in substantially the same manner as depositions taken by oral examination. When a deposition is taken upon written interrogatories and cross-interrogatories, none of the parties shall be present or represented, and no person, other than the witness, a stenographic reporter, and the officer shall be present at the examination of the witness, which fact shall be certified by the officer, who shall propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness' own words.

§ 201.22 *Transcript.*

(a) Hearings shall be stenographically reported by a contract reporter of the Post Office Department under the supervision of the assigned presiding officer. Argument upon any matter may be excluded from the transcript by order of the presiding officer. A copy of the transcript shall be a part of the record and the sole official transcript of the proceeding. Copies of the transcript shall be supplied to the parties to the proceeding by the reporter at rates not to exceed the maximum rates fixed by contract between the Post Office Department and the reporter. Copies of parts of the official record other than the transcript may be obtained by the respondent from the reporter upon the payment to him of a reasonable price therefor.

(b) Changes in the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. No

physical changes shall be made in or upon the official transcript, or copies thereof, which have been filed with the record. Within 10 days after the receipt by any party of a copy of the official transcript, or any part thereof, he may file a motion requesting correction of the transcript. Opposing counsel shall, within such time as may be specified by the presiding officer, notify the presiding officer in writing of his concurrence or disagreement with the requested corrections. Failure to interpose timely objection to a proposed correction shall be considered to be concurrence. Thereafter, the presiding officer shall by order specify the corrections to be made in the transcript. The presiding officer on his own initiative may order corrections to be made in the transcript with prompt notice to the parties of the proceeding. Any changes ordered by the Hearing Examiner other than by agreement of the parties shall be subject to objection and exception.

§ 201.23 *Proposed findings and conclusions.*

(a) Each party to a proceeding, except one who fails to answer the complaint or having answered, either fails to appear at the hearing or indicates in the answer that he does not desire to appear, may, unless at the discretion of the presiding officer such is not appropriate, submit proposed findings of fact, conclusions of law and supporting reasons either in oral or written form in the discretion of the presiding officer. The presiding officer may also require parties to any proceeding to submit proposed findings of fact and conclusions of law with supporting reasons. Unless given orally the date set for filing of proposed findings of fact and conclusions of law shall be within 15 days after the delivery of the official transcript to the Docket Clerk who shall notify both parties of the date of its receipt. The filing date for proposed findings shall be the same for both parties. If not submitted by such date, or unless extension of time for the filing thereof is granted, they will not be included in the record or given consideration.

(b) Except when presented orally before the close of the hearing, proposed findings of fact shall be set forth in serially numbered paragraphs and shall state with particularity all evidentiary facts in the record with appropriate citations to the transcript or exhibits supporting the proposed findings. Each proposed conclusion shall be separately stated.

§ 201.24 *Decisions.*

(a) *Initial decision by hearing examiner.* A written initial decision shall be rendered with all due speed. The initial decision shall include findings and conclusions, with the reasons therefor, upon all the material issues of fact or law presented on the record, and the appropriate order or denial thereof. The initial decision shall become the final departmental decision unless an appeal is perfected in accordance with § 201.25.

(b) *Tentative or final decision by the Judicial Officer.* When the Judicial Officer presides at the hearing he shall issue a final or a tentative decision. Such decision shall include findings and conclusions, with the reasons therefor, upon all the material issues of fact or law presented on the record, and the appropriate order or denial thereof. The tentative decision shall become the final departmental decision unless exceptions are filed in accordance with § 201.25.

(c) *Oral decisions.* The presiding officer may render an oral decision (an initial decision by a hearing examiner, or a tentative or final decision by the Judicial Officer) at the close of the hearing when the nature of the case and the public interest warrant. A party who desires an oral decision shall notify the presiding officer and the opposing party at least 5 days prior to the date set for the hearing. Either party may submit proposed findings and conclusions either orally or in writing at the conclusion of the hearing.

§ 201.25 *Exceptions to initial decision or tentative decision.*

(a) A party in a proceeding presided over by a hearing examiner, except a party who failed to file an answer, may appeal to the Judicial Officer by filing exceptions in a brief on appeal within 15 days from the receipt of the examiner's initial decision.

(b) A party in a proceeding presided over by the Judicial Officer, except one who has failed to file an answer, may file exceptions within 15 days from the receipt of the Judicial Officer's tentative decision.

(c) If an initial or tentative decision is rendered orally by the presiding officer at the close of the hearing, he may then orally give notice to the parties participating in the hearing of the time limit within which an appeal must be filed.

(d) Upon receipt of the brief on appeal from an initial decision of a hearing examiner, the Docket Clerk shall promptly transmit the record of the proceedings

to the Judicial Officer. The date for filing the reply to an appeal brief or to a brief in support of exceptions to a tentative decision by the Judicial Officer is 10 days after the receipt thereof. No additional briefs shall be received unless requested by the Judicial Officer.

(e) Briefs upon appeal or in support of exceptions to a tentative decision by the Judicial Officer shall be filed in triplicate with the Docket Clerk and contain the following matter in the order indicated:

(1) A subject index of the matters presented, with page references; a table of cases alphabetically arranged; a list of statutes and texts cited with page references.

(2) A concise abstract or statement of the case.

(3) Numbered exceptions to specific findings and conclusions of fact or conclusions of law of the presiding officer.

(4) A concise argument clearly setting forth points of fact and of law relied upon in support of each exception taken, together with specific references to the parts of the record and the legal or other authorities relied upon.

(f) Unless permission is granted by the Judicial Officer no brief shall exceed 50 printed or 100 typewritten pages, double spaced.

(g) The Judicial Officer will extend the time to file briefs only upon written application for good cause shown. The Docket Clerk shall promptly notify the applicant of the decision of the Judicial Officer on the application. If the appeal brief or brief in support of exceptions is not filed within the time prescribed, the defaulting party will be deemed to have abandoned the appeal or waived the exceptions, and the initial or tentative decision shall become the final departmental decision.

§ 201.26 *Judicial Officer.*

The Judicial Officer is authorized (a) to act as presiding officer at hearings, (b) to render tentative decisions, (c) to render final departmental decisions, (d) to issue departmental orders for the Postmaster General, (e) to refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final departmental decision and (f) to revise or amend these rules of practice. The entire official record will be considered before a final departmental decision is rendered. Before rendering a final departmental decision, the Judicial Officer may order the hearing reopened for the presentation of additional evidence by the parties.

§ 201.27 *Motion for reconsideration.*

Within 10 days from the date thereof, or such longer period as may be fixed by the Judicial Officer, either party may file a motion for reconsideration of a final departmental decision. Each motion for reconsideration shall be accompanied by a brief clearly setting forth the points of fact and of law relied upon in support of said motion.

§ 201.28 *Orders.*

If an order is issued which prohibits delivery of mail to a respondent it shall be incorporated in the record of the proceeding. The Docket Clerk shall cause the order to be published in the Postal Bulletin and transmitted to such postmasters and other officers and employees of the postal service as may be required to place the order into effect.

§ 201.29 *Modification or revocation of orders.*

A party against whom an order has been issued may file an application for modification or revocation thereof. The Docket Clerk shall transmit a copy of the application to the General Counsel, who shall file a written reply. A copy of the reply shall be sent to the applicant by the Docket Clerk. Thereafter an order granting or denying such application will be issued by the Judicial Officer.

§ 201.30 *Supplemental orders.*

When the General Counsel or his designated representative shall have reason to believe that a person is evading or attempting to evade the provisions of any such order by conducting the same or a similar enterprise under a different name or at a different address he may file a petition with accompanying evidence setting forth the alleged evasion or attempted evasion and requesting the issuance of a supplemental order against the name or names allegedly used. Notice shall then be given by the Docket Clerk to the person that the order has been requested and that an answer may be filed within 10 days of the notice. The Judicial Officer for good cause shown, may hold a hearing to consider the issues in controversy,

and shall, in any event, render a final decision granting or denying the supplemental order.

§ 201.31 *Computation of time.*

A designated period of time under these rules excludes the day the period begins, and includes the last day of the period unless the last day is a Saturday, Sunday, or legal holiday, in which event the period runs until the close of business on the next business day.

§ 201.32 *Official record.*

The transcript of testimony together with all pleadings, orders, exhibits, briefs, and other documents filed in the proceeding shall constitute the official record of the proceeding.

§ 201.33 *Public information.*

The Law Librarian of the Post Office Department maintains for public inspection in the Law Library copies of all initial, tentative, and departmental decisions. The Docket Clerk maintains the complete official record of every proceeding.

REVA BECK BOSONE,
Judicial Officer.

DECEMBER 31, 1961.

ERRATA SHEET FOR POST OFFICE DEPARTMENT RULES OF PRACTICE

The following corrections should be made in the various rules of practice as indicated:

	In section	Change	To read
1. Fraud.....	201.1.....	74 Stat. 354....	74 Stat. 554.
2. Eligibility to practice.....	202.3(a).....	202.2(d).....	202.2(c).
	202.3(b).....	202.2(d).....	202.2(c).
	202.6(a)(1).....	203.1.....	202.2.

Mr. LAWRENCE. The proposed amendment to section 4005 would be held constitutional by the courts. As stated in *Mueller v. U.S.* (262 F. 2d 443, 447), a Federal Trade Commission case:

It is settled law that congressional control of the mails under the power conferred by the Constitution, includes the power to forbid the use of the mails for deceptive transactions which are detrimental to the financial well-being of the Nation.

The constitutionality of section 4005 has been upheld for many years, and the removal therefrom of the element of intent would furnish no basis for questioning constitutionality.

Noteworthy is the fact that at the time of the *Reilly v. Pinkus* decision in 1949, the Post Office Department's fraud order provided for the return of all mail addressed to the violator. In the instance of the mail-order promoter engaged in the sale of a number of different products advertised by the same trade name, the fraud order virtually destroyed his business by cutting off the receipt of mail pertaining to any and all of his products. The Supreme Court was mindful of this situation when it rendered its decision indicating the necessity for establishing an intent to deceive. As a result of a decision rendered by the U.S. Circuit Court of Appeals, District of Columbia, in 1956, the Department amended its fraud orders so as to provide for the return of mail relating only to the particular product involved in the fraud proceeding, and permitting the promoter to receive all other mail (*Tourlanes Publishing Company v. Summerfield*, 231 F. 2d 773). The validity of the amended order was upheld in 1959 (*Parker v. Summerfield*, 265 F. 2d 960).

There are a number of criminal statutes wherein convictions are permissible without the necessity for establishing intent. There are administrative statutes of regulatory agencies operative against false advertising where intent is not an element of required proof. The Food, Drug, and Cosmetic Act imposes criminal penalties for misbranding through deceptive packaging (sec. 303, 21 U.S.C.A. 333). Neither intent to defraud nor awareness of violation need be proved for the imposition of criminal penalties under the deceptive packaging section of that act. The validity of this act has been upheld by the courts (*U.S. v. Dotterweich*, 320 U.S. 277, 281; *U.S. v. Parfait Powder Puff Co.*, 163 F. 2d 1008, cert. denied 332 U.S. 851). The Food and Drug Administration has authority to undertake seizure action where false labeling of a product is involved and the establishment of intent is not required. The Securities and Exchange Commission is authorized to proceed against the use of a false stock prospectus without the burden of establishing intent. The Air Pollution Act (43 Stat. 604, 33 U.S.C., secs. 431-437) is a criminal statute and yet the Government does not have the burden of establishing intent (*U.S. v. The Catherine*, 212 F. 2d 89).

The proposed amendment, as a matter of established judicial precedent under section 4005, will not result in an unlawful order unless the material in question is misrepresented and proven so by substantial evidence. Advertising matter which contains exaggerated claims, puffing, or which constitutes opinion rather than fact, will not be the subject of an order. Wherever feasible and consonant with established policy, advertisers alleged to be violating the statute, as would be amended by H.R. 6102, will be given an opportunity to discontinue the objectionable representations before a formal complaint is served.

We believe the proposed amendment would hurt no one except the unscrupulous mail-order promoter. H.R. 6102 would help the legitimate and honest mail-order advertiser who deserves the protection of fair competition and who is entitled to a means whereby the reputation and integrity of the mail-order business can be safeguarded.

The bill would meet with the approval of all ethical advertising media and organizations concerned with honesty in advertising. The type of amendment proposed here meets with the favor of such organizations as the National Better Business Bureau, Inc., and the National Association of Real Estate Boards. The need for this type of remedial legislation was expressed by the Special Senate Committee on Aging, Subcommittee on Frauds and Misrepresentations Affecting the Elderly referred to by Senator Williams earlier. On January 31, 1965, this subcommittee recommended the earliest possible passage of an administrative statute that would remove the difficulties caused by the element of intent.

H.R. 6102 is in keeping with the underlying objective of the President's Consumers Advisory Council in connection with consumer protection. This protection should not be hampered by an undue burden of establishing intent. Consumer interests should be protected against dishonest advertising that can be mustered. We believe H.R. 6102 is a step in the right direction.

Thank you.

Mr. DANIELS. Mr. Montague, do any of your other associates have statements to make?

Mr. MONTAGUE. No, sir, Mr. Chairman. The Judicial Officer of the Post Office Department, Mrs. Reva Beck Bosone, has presented a statement for the record. I believe the chairman has that.

Mr. DANIELS. She is not present?

Mr. MONTAGUE. She is not present. We have no other formal statements to present at this time.

Mr. DANIELS. Later on in this proceeding we will insert her statement in the record if there is no objection.

Under the proposed legislation just exactly how would the Department proceed to issue an order and what would be the effect of the order?

Mr. LAWRENCE. Mr. Chairman, I would like to have Mr. Levine answer that, if you please.

Mr. LEVINE. Our procedure under the proposed amendment would not be a radical departure from our present procedure under our rules of practice. Of course the significant differences would be of a substantive nature. Under the proposed amendment we would not have the burden of establishing intent, but the methodology in our approach so far as complaints received, we would in most cases make the respondent aware of the objections the Department has with respect to the advertising promotion involved. We would be definitive in that regard in pointing out specifically the language that is objectionable and the reasons why the language appears to be objectionable. The respondent may then revise his advertising matter so as to eliminate the objectionable language, or he may file an affidavit of discontinuance, which is our name for a settlement agreement.

In the event, after such prior notification, the respondent continues to carry on his promotion, we would prepare a formal complaint based upon the advertising representations, charging they are substantially false and recommending the issuance of an unlawful order.

A full hearing would be held before a hearing examiner. Both sides would have an opportunity to present a record. The respondent would have every opportunity of due process, the presentation of testimony, and the opportunity to cross-examine.

The hearing before the hearing examiner would result in an initial decision from which either side can appeal to the Judicial Officer of the Department, who is the alter ego for the Postmaster General, and her decision, referred to as a departmental decision, is final so far as the General Counsel's Office is concerned but is not final so far as the respondent is concerned. He can go in the district court and apply for an injunction, asking that the local postmaster impound the mail until the case is decided. We do not have that right of appeal.

The order itself, under the proposed amendment, called an unlawful order, would be a directive issued by the Judicial Officer to the local postmaster directing him to return all mail to the sender with an imprint "unlawful."

Mr. DANIELS. Where an order is issued by the Judicial Officer, the Post Office Department would intercept the mail sent by whom?

Mr. LEVINE. The senders, the so-called remitters.

Mr. DANIELS. You mean the person who has been solicited by the promoter?

Mr. LEVINE. Let us call it the consumer. It is the consumer's mail. As indicated in the statement read to you gentlemen before, actually what we are going after, what we are impounding, is not

the advertiser's mail. We are impounding the remitter's mail. The consumer's mail.

Mr. DANIELS. Which would usually be the money contained in the letter?

Mr. LEVINE. Generally, and so hoped by the promoter. Under these instructions to local postmasters, there is a variance as indicated before between our present type of order and the ones we had during the *Reilly v. Pinkus* case. Today the postmaster is obligated to notify the advertiser that he is holding his mail for a limited period of time giving the promoter an opportunity to appear at the post office, open the mail, and he may receive any and all mail which is not related to the objectionable scheme. Only the mail which is related to the scheme will be sent back to the senders or the consumer. This was not the situation during the days of *Reilly v. Pinkus*. I may say that if we were in the Supreme Court today—*Reilly v. Pinkus* was filed in 1956—I am fairly certain we would present a formidable argument and the Court would not have made the finding it did with respect to impounding.

We are stuck with a finding and our only recourse is through the mandate of the Congress. We cannot go to the Supreme Court again because of what I pointed out again, because our last day in court ends with the decision by the judicial order. We cannot get to the Court. We have no alternative but to appear and ask for remedial action by way of amendment.

Mr. DANIELS. I would like to point out to you that Deputy Attorney General Ramsey Clark has suggested to the committee that it is of questionable policy to permit the Postmaster General to issue a mail fraud order on a finding of deceptiveness or that an advertisement would tend to mislead mail patrons, without also making a finding of intent to defraud. Do you have any comment to make on that statement?

Mr. LAWRENCE. Mr. Chairman, it is true that the Deputy Attorney General is of the view that the statute, as would be amended by H.R. 6102, would provide a penalty, the severity of which, in some cases, may be far greater than the wrong committed. However, we believe that Congress has the authority to govern the conduct of commerce in the mails. Certainly Congress has the authority to enact legislation which would prohibit our mail patrons from being gypped out of their funds. Further, we think the absence of proving intent would not render section 4005 in constitutional jeopardy. There are ample judicial and administrative cases clearly defining these phrases. Moreover, we have other Government agencies such as the Federal Trade Commission which work day by day and consider cases and give rulings under the words "false" and "misleading" without the burden of proving intent.

Mr. HENDERSON. Mr. Chairman, would you yield?

Mr. DANIELS. I yield to the gentleman.

Mr. HENDERSON. In your legal opinion, what would be the difference in interpretation if the committee wrote "false pretenses," leaving out your suggested word "misleading"?

Mr. LEVINE. May I reply to that question?

Insofar as the Department is concerned, I do not think it would make any material difference in our procedure or in meeting the burden of proof under the proposed amendment. There is more than

ample judicial precedent sustaining the validity of a statute which predicates responsibility or liability on deception and misleading statements and false statements.

Mr. HENDERSON. The Deputy Attorney General, Ramsey Clark, has suggested that the omission of intent to defraud with respect to misleading mail matter may permit the imposition of too severe a penalty for an act which would be otherwise regarded by the courts as permissible puffing. You are not really asking us to eliminate the burden of proving that the mail matter is false and misleading? It is not enough for it just to be false advertising if it misleads no one. I think if we took the misleading out that you still would have to prove in court that it was false advertising, that it was misleading, and did mislead someone, and all these other things that the courts have required of you.

What difference would it make if we took the word "misleading" out?

Mr. LAWRENCE. The words "false" and "misleading" are not synonymous. Certainly a scheme may be artfully designed to mislead yet not be sufficient to conclude falsity. False advertising is complete untruth. Misleading advertisement is artfully designed with at least some semblance of truth in it. I do not think it is of any comfort to mail patrons who have been cheated out of their money as to whether the unscrupulous mail-order promoter used false advertising rather than misleading advertising. In other words, the promoters deliberately designed their articles to cheat whether it legally amounts to false or misleading advertisement is of no concern to the public. Our concern, of course, is to prevent the public from being duped out of their funds. However, a false representation has a tendency to mislead. Double indemnity in the proposed amendment is to add this word "misleading" which in the past in other agencies and in the courts has raised no serious problem. There are any number of decisions where, based on statutes using deception, deceptive, misleading and false, and there is no question about it being ambiguous or difficult to understand.

In the final analysis the test is this: whether the representations presented, false representations, do they induce the purchaser to send his remittances? It is the inducement to make a purchase that is one of the major tests of the term, whether it has that misleading influence or bearing on a consumer. I do not think we need to be concerned about the word "misleading" as presently stated.

Mr. HENDERSON. Do I understand you to say we do not need to be concerned about leaving it in or taking it out?

Mr. LEVINE. We urge that it remain in the bill.

Mr. HENDERSON. Our objective is to get away from the burden of having to prove the actual intent.

Mr. LEVINE. That is right.

Mr. HENDERSON. Suppose we accomplish that, and the Supreme Court declares the word "misleading" unconstitutionally vague. I do not want you to complicate your own problem.

Mr. LAWRENCE. In our view, the word "misleading" has sufficient judicial ground rules making it clear that section 4005 as proposed to be amended by H.R. 6102 would not render any part of the statute unconstitutionally vague.

Mr. HENDERSON. As I understood your reasoning, you are talking about "misleading," and comparing it with the Federal Trade Commission. If I present an advertisement that is obviously so far-fetched it is misleading to no one, I would expect the Federal Trade Commission to take me into court because of that action. I would not expect the Post Office Department to take any action on that type of advertising through the mail until it had misled someone.

Before any action may be taken, there must be a remittance or a consumer sending a remittance back.

Mr. LEVINE. May I clarify something I fear that you are misconstruing of the body of law pertaining to section 4005 and which would be applying to H.R. 6102. You speak of evidence or indication that someone had been deceived or misled. By that do you mean we have to prove that some individual was actually misled? That is not the law.

Mr. HENDERSON. That is right. In order to stop a remittance, has not someone sent money back in for the Post Office Department to stop mail?

Mr. LEVINE. We have to establish the prima facie evidence in each case that the mails were used by the advertiser; that the advertisement seeks remittance in the mail and purchase is made to get the product. The courts have held repeatedly, evidence that any individual had been defrauded or deceived is not necessary for the issuance of an order under section 4005. The advertisement must be false and fraudulent and have a capacity to deceive. We may not get complaints in a given instance. On the other hand, we may get numerous complaints. We do not have to wait for complaints from the consumer.

Mr. HENDERSON. Can you possibly get into court without an actual stopping of the mail?

Mr. LEVINE. Yes. We do not get into court. We have an administrative hearing. I imagine you are referring to court in that sense?

Mr. HENDERSON. Yes.

Mr. LEVINE. We have a hearing and present our evidence there. Invariably there will be testimony indicating that people have sent remittances based on the advertisement. They have received the product or service. The representations concerning these things were false. There may be complaints from the members of the public.

Mr. HENDERSON. There may not be?

Mr. LEVINE. There may not be. It would not make any difference from the letter of the law.

Mr. HENDERSON. If you showed that there was a remittance, and that obviously one person has been misled from the false advertisement, you would not need the word "misleading."

I am sort of arguing with you in this case because I think the subcommittee is willing to give you what you need. You say you need this.

Thank you, Mr. Chairman.

Mr. DANIELS. Would it be satisfactory to substitute for the language proposed in the legislation under consideration the words "false pretenses, statements, or misrepresentations"? Would such language require proof of intent?

Mr. LAWRENCE. Yes; standing alone such language would require proof of intent. To eliminate the burden of proving intent, it is

necessary to eliminate expressly this requirement as H.R. 6102 would do.

Mr. DANIELS. Thank you.

Are there any further questions?

Mr. HENDERSON. Mr. Chairman, I wonder if I might ask one question, not on this legislation, but certainly this legislation stimulates me to ask the question.

I want to assume a case where a merchant has obviously and admittedly defrauded a customer in person and uses the mail thereafter to collect or attempt to collect his account. Is there any authority in law for anyone to interfere with the use of the mail in that instance? That is, to prevent the collection of the account that we assume was based upon fraud? I hope that I have spelled out my case. I could be a little more specific.

Mr. LAWRENCE. I do not understand the case.

Mr. HENDERSON. Take the case where a merchant has defrauded a customer. He lied about the merchandise.

Mr. LEVINE. How would he be doing it?

Mr. HENDERSON. In person in the store, and thereafter, only using the mail for collecting the account. Is there any authority in law for anyone to interfere with use of the mail in that instance?

Mr. LEVINE. I may answer that insofar as the present administrative statute is concerned. The answer is no. We would not have jurisdiction under that statute because under section 4005 you have to seek remittances in the mail.

Mr. HENDERSON. You may not be able to respond to the second part of my question. Would this be true with uniformed military personnel? I am assuming a case now where the customer that was defrauded is a military man. The mail is being sent to him at a military address. Can you advise me whether or not a military authority may have the mail returned or not delivered because of the fact of fraud?

Mr. LEVINE. It would not make any difference whether the source of grievance happens to be military or civilian. I might reiterate that we would not have jurisdiction under the administrative fraud statute because originally, initially, remittances from this soldier were not sought in the mail. There might be certain aspects of a criminal nature. I would rather not comment on that and pass the buck to Mr. Montague, because under the criminal statute you do not have to seek remittance in the mail. The mail must be used in any facet of the scheme. As long as the mail is used and there is a scheme to defraud somebody, there would be jurisdiction, criminally speaking.

Mr. MONTAGUE. It would be possible under the criminal statute to obtain a prosecution where there is fraud and where the mail is an integral part of the scheme. In fact, in chain referral schemes, which are quite prevalent today, the contact is made in person by a salesman who prevails upon the customer to sign a contract. The fraud, so to speak, is committed at that time through misrepresentation without the use of mails. The further part of the scheme requires payment by mail, contact by mail, or other feature where the mail does come into use. That would violate the criminal statute.

Mr. HENDERSON. I can clearly see that.

Mr. Chairman, might I go off the record a moment?

Mr. DANIELS. Yes.

(Discussion off the record.)

Mr. HENDERSON. Thank you, Mr. Chairman.

Mr. DANIELS. Mr. Montague, on behalf of this committee, I want to thank you and your panel for coming here and giving us your views.

At this time I would like to insert in the record a letter of Deputy Attorney General Ramsey Clark to the chairman of the full committee, Tom Murray.

Without objection, the letter will be entered in the record at this point.

(The letter follows:)

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., June 7, 1966.

Hon. TOM MURRAY,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice concerning H.R. 6102, a bill "To amend section 4005 of title 39, United States Code, relating to fraudulent, false, or misleading and lottery mail matter, and for other purposes."

Section 4005 of title 39 of the United States Code authorizes the Postmaster General

Upon evidence satisfactory to * * * [him] that any person is engaged in conducting a scheme or device for obtaining money or property through the mails by means of false or fraudulent pretenses, representations or promises * * *

to return mail addressed to such a person and forbid payment of money orders drawn to such a person. The courts have held that proof of actual intent to deceive is necessary in order for the Postmaster General to impose the statutory sanctions. Thus, a merely negligent or incorrect statement would be insufficient to invoke the prescribed penalty. *Reilly v. Pinkus*, 338 U.S. 269, 276 (1949).

H.R. 6102 would amend section 4005 to permit the Postmaster General to impose the statutory sanctions in cases involving false or misleading representations without regard to whether such representations are intentional.

The Department of Justice does not know of the need for this legislation and therefore defers to the Post Office Department. However, we invite the committee's attention to several other aspects of this question.

In *Reilly v. Pinkus*, *supra*, the Court considered the Government's contention that the respondent was barred from using the mails, "regardless of the question of good faith, even if the respondent believed in all of his representations * * * if they were false as a matter of fact." The Court disposed of that contention as follows:

It is not amiss to point out that the Federal Trade Commission does have authority to issue cease-and-desist orders in cases like this without findings of fraud. * * * But that remedy does not approach the severity of a mail fraud order. * * * Unlike the Postmaster General, the Federal Trade Commission cannot bar an offender from using the mails, an order which could wholly destroy a business. See Brandeis, J., dissenting in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 417 *et seq.* The strikingly different consequences of the orders issued by the two agencies on the basis of analogous misrepresentations emphasize the importance of limiting Post Office Department orders to instances where actual fraud is clearly proved. 338 U.S. at 277.

In our view, the Court's discussion of the invocation of a mail fraud order in the absence of a fraud finding raises constitutional questions with respect to legislation to confer such authority upon the Postmaster General. If the need for this measure is sufficiently great, the Congress may wish to leave the ultimate determination of this question to the courts.

As a matter of policy, we question whether the Postmaster General should be authorized to issue a mail fraud order on a finding that mail matter is misleading, without also making a finding of intent to defraud. The potential total destruction of a business solely on a finding that the mail matter is misleading emphasizes the need for careful consideration of this proposal.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

Mr. DANIELS. In addition thereto, without objection, I offer the statement of Hon. Reva Beck Bosone in support of H.R. 6201.

(The statement follows:)

PREPARED STATEMENT OF HON. REVA BECK BOSONE, JUDICIAL OFFICER OF THE
POST OFFICE DEPARTMENT

Mr. Chairman and members of the committee, it may be trite, but it is true, when I say to you that I am specially pleased to participate in this hearing today in supporting the proposed amendment to the law. It is always a pleasure for me to come up on the Hill and meet my former colleagues and new Members of Congress.

I know as a former Member the tireless efforts that you conscientious Members of the House of Representatives give in effort and study to formulating the laws that are best for all the people of this great country.

As a former judge of 12 years' experience in Salt Lake City, Utah, and as the Judicial Officer of the Post Office Department here in Washington, I want to make it clear that I am 100 percent for the proposed amendment that is the subject of this hearing. I think it is extremely necessary as a protective measure to the consuming public.

At the outset there are three points that I want to emphasize: First, the purpose of this measure is to protect the American consumer from the schemes of unscrupulous promoters; second, legitimate producers and sellers of honest merchandise have nothing to fear from the enactment of the bill; and third, no person's right to a full hearing and constitutional due process of law will be abridged if this legislation is enacted.

Under the present provisions of section 4005 of title 39, United States Code, before a fraud order can be issued it must be found that there exists a scheme to obtain money or property from members of the public by means of false or fraudulent pretenses, representations or promises. It is thus important to know what fraud consists of. In the case of *U.S. v. Wunderlich*, 342 U.S. 98, at page 100, the Supreme Court, Mr. Justice Minton speaking for the Court, said:

By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest.

The Court also said, and this is extremely important,

* * * fraud should be alleged and proved, as it is never presumed.

These propositions were stated in another way by the U.S. District Court for the Southern District of New York in the case of *U.S. Nature Products Corp. v. Schaffer*, 125 F. Supp. 374, at page 378:

To sustain a fraud order of the Post Office Department, the Government must show by substantial evidence not only that the claims made are unfounded * * * but further an actual intent to deceive. * * *

Fraud is not presumed. It must be consciously shown under circumstances not susceptible of other interpretations. * * * There must be an intent to deceive * * *.

The New York Court continued with the following quotation from *Jeffries v. Olesen*, decided in 1954 by the U.S. District Court for the Southern District of California (121 F. Supp. 463, 473):

Throughout more than half a century the Supreme Court has consistently held that in such a case—a case wherein there is lacking either the essential element of falsity in fact or the equally essential element of fraud in intent and purpose—a fraud order is beyond the lawful authority conferred upon the Postmaster General under 39 U.S.C.A. §§ 259 and 732. [Predecessors of present § 4005.]

Thus, we see that before the issuance of a fraud order can be justified it is almost necessary—by direct proof, or by circumstances approaching direct proof in weight and credibility—to show the inner workings of the mind and the purpose of the operator of a mail-order enterprise. The mere statement of this requirement is sufficient to show the burden placed upon the Government when it files a complaint looking toward the issuance of a postal fraud order. For, as it has been said, you can't draw a picture of a man's intent.

Some cases from the fairly recent experience within the Department will serve to illustrate the point that is being made. In New York City an organization was engaged in the sale through the mail of a device which produced conductive heat, generated vibrations, and emitted infrared emanations. This product was being marketed on the basis of claims that it would afford quick temporary relief to sufferers of minor aches and pains associated with arthritis, rheumatism, bursitis, and the like. Although it was found by the hearing examiner in the initial decision and by the Judicial Officer in the departmental decision that some of the representations made by the promoter were not entirely true, nevertheless, because of a diversity of opinion by medical experts and physicians, there was not a sufficient basis in the record to warrant a finding of "an intention to cheat or be dishonest" on the part of the operator. Although some of the promoter's statements were false, his fraudulent intent was not clearly apparent.

Another instance involved the sale through the mails by a woman in California of certain cosmetics which were represented by the owner to be efficacious in removing wrinkles from the face and neck of the user to such an extent that the user would look 20 years younger. In this case, at the administrative level, which is to say within the Post Office Department, it was found that in engaging in this business in this manner the owner was operating a fraudulent scheme. The operator then initiated an action in the U.S. District Court for the Northern District of California to enjoin the enforcement of the fraud order which had been issued. (Civil No. 41938, order filed July 6, 1964.) In this case, the court did enjoin the enforcement of the fraud order although he did find that there had been "exaggeration on the part of the plaintiff's mail advertising." Thus, the court agreed that there were misleading statements in the promoter's advertising, but he was not satisfied that these statements were made with the requisite fraudulent intent.

Sex being the engrossing subject that it is, it is to be expected that entrepreneurs will enter this field in the hope of making money by advertising and selling various nostrums and devices through the mails. There are two recent examples of such cases. These cases involved the sale of devices to be used by men while engaging in the sex act and the devices were represented as being capable of providing greater satisfaction to both the male and the female, thereby producing greater sexual and marital harmony. In these cases, as in those previously mentioned, there was a strong feeling on the part of the triers of fact that the statements made by the seller were misleading as to the efficacy of the products sold but that there was not sufficient basis to support a finding that would stand up under the scrutiny of the courts that an intent to deceive existed in the mind of the seller. In a later case, which also involved the sale of a sex device, the hearing examiner said that no comfort should be taken from those two cases by others engaged in similar activities because—

Even where certain sex devices for males—different in nature than Erect-Aide—have been the subject matter of hearings on fraud complaints—and no postal fraud order has resulted from the hearing procedure—the reason generally has not been a finding that fraud does not exist but only that the * * * proof * * * has been less than adequate to persuade the trier of fact that the transactions are fraudulent within the meaning of 39 U.S. Code 4005.

Thus, the crucial point in these cases has been the question of the intent of the seller.

From the foregoing cases it will be seen that the areas in which a large number of Post Office Department cases are brought under this statute are in the fields of health, cosmetics, and sex. In regard to health matters, appeals are made to those who perhaps are, like the drowning man, reaching for a straw in the hope that some product—always advertised as being newly discovered and the product of scientific research—will provide them with heretofore unavailable relief and comfort. Concerning the field of sex, those persons at whom a great portion of the advertising material is directed, are those who are advanced in years or who, by reason of some psychic or physical problem, are unable to achieve a normal sex life. The sellers of cosmetics, in this time of the ever-extending period of life and the preponderant survivorship of women, have a growing and always fertile field within which to work.

Of course, for all of the conditions in these three areas, disabled, disfigured, or unhappy people should consult with physicians. For example, we have heard testimony from some of the most widely recognized physicians in the country that for certain types of arthritis there is no known cure. Doctors of equal caliber have testified before us that from 80 to 95 percent of sexual incapacity is of psychic

origin. Yet, the peddlers of pills continually prey on the weaknesses and hopes of arthritics and people who are impotent. No one knows how many people have died because of their having placed reliance on some quack medicine purchased through the mails. Furthermore, we have been told by reputable physicians that some of the sex devices being sold are of such construction that their use could cause a woman to bleed to death.

The fact is, however, that many people who suffer these conditions are reluctant to confide their problems in their physicians and they leap at the opportunity to buy something which holds out to them a hope of much-wanted relief or improvement. Furthermore, it has been found that the greatest appeal that these alluring representations have is for persons of lower levels of education and intelligence; but as it has often been said, this statute was designed to protect not only the sophisticated but also the gullible and the innocent. But, despite some vigorous and able investigation and presentation of the cases, these people who most need protection from the blandishments of merchants without conscience are left to be victimized because of the difficulty of proving that the false claims made by a seller were made with an "intent to deceive."

In his State of the Union Message, delivered at the opening of the second session of this Congress, the President said, "We must also act to prevent the deception of the American consumer * * *."

The Post Office Department is an integral part of the overall machinery of the Government which serves to protect the American consumer. While I repeat that this bill, if enacted, will not inconvenience a single legitimate producer or seller, nor will it result in the abridgment of the constitutional rights of anyone, the enactment of this legislation will help the Department more effectively to carry out its part of the consumer protection program.

I hope the committee will see fit to give a favorable report to H.R. 6102, a bill to amend section 4005 of title 39, U.S. Code, relating to fraudulent, false, or misleading and lottery mail matter, and for other purposes.

Mr. DANIELS. At this time, I call to testify, Mr. Richard C. Olson, legislative assistant to Hon. Morris K. Udall, sponsor of H.R. 6102.

STATEMENT OF RICHARD C. OLSON, LEGISLATIVE ASSISTANT TO HON. MORRIS K. UDALL

Mr. OLSON. Thank you, Mr. Chairman. I am in the position of a comedian standing off stage listening to all of his best jokes being told by somebody else. I am here this morning representing Congressman Udall who regrets that he was not able to be here to speak for himself and speak in behalf of his own bill; especially after he had expressed to the chairman his great interest in having this bill brought up today. Mr. Udall asked me to speak for him today and I have a prepared statement.

Mr. DANIELS. Do you have a prepared statement for the subcommittee?

Mr. OLSON. I have. Mr. Udall has provided me with a prepared statement, which I would like to submit to the subcommittee for inclusion in the record. In addition to that, Mr. Udall asked me to make some additional remarks, if I may.

Mr. DANIELS. You may proceed.

Mr. OLSON. Thank you.

I have listened to the other witnesses who have appeared here this morning and, on the basis of their remarks, greatly edited the remarks I was going to make because they have covered so much of the ground that Mr. Udall wanted to cover.

Mr. DANIELS. Under those circumstances, may I suggest that you submit your written statement for the record and that you proceed to supplement it with any views you care to express.

Mr. OLSON. Thank you, Mr. Chairman.

(The statement follows:)

PREPARED STATEMENT OF HON. MORRIS K. UDALL, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA

Mr. Chairman and members of the subcommittee, I am pleased to have this opportunity to testify before you in support of my bill, H.R. 6102, which is designed to deny the use of the mails for the promotion of dubious schemes through mail-order solicitation. This legislation was also introduced in the Senate by Senator Harrison Williams, Jr.

Most realtors are reputable and ethical, but the practices of some unscrupulous promoters have long been a source of serious concern to me. In Arizona, particularly, their real estate operations have resulted in cruel losses to the aged and unwary. Our senior citizens who believe they are making a sound investment are often the unfortunate victims of shady real estate transactions promoted by misleading mail advertisements. As an example, real estate lots advertised as having access to roads, water, electricity, and telephone service actually had access to none of these facilities. Questionable practices by dishonest promoters through mail-order solicitation have also been revealed in the areas of health insurance for elderly citizens, prepaid funeral plans and health foods, and the services and/or products have been grossly misrepresented.

Under existing law, the Post Office Department has the authority to withhold mail addressed to promoters suspected of falsely representing products or services only when the actual intent to defraud is proved. Even in cases when false or misleading information can be demonstrated by the Government, no action can be taken against the promoter unless it is proved that he actually intended to misrepresent his product or service.

This "proof of intent" requirement severely hampers the Post Office Department in protecting the public from unethical operators. Postal officials do not have the power to require the presence of a suspected offender at a hearing, to subpoena witnesses in civil fraud proceedings, nor do they have access to the books and records of a suspected offender.

The problem is clearly stated in the testimony of Chief Postal Inspector Montague before the Senate Special Subcommittee on Aging, in which he said:

* * * There are evident misrepresentations in this advertising, but we have to prove that there is a scheme to defraud, that there is an intent to defraud. We have to have this fully documented. We have to get behind the scenes, in every one of these representations, to determine what arrangements were made beforehand, what they are setting up to do in the future. In fact, in many of these cases, you have to have a complete audit of the books to determine what has been done with the money which has been taken in. You can't just go into court and say this has been a misrepresentation and get a fraud conviction on that basis, and we are in the same situation with our administrative procedure. We have to prove intent to defraud, that there has been a scheme devised.

The "proof of intent" provision of existing law places a greater burden upon the Post Office Department than upon other Federal agencies operating in similar areas, such as the Food and Drug Administration and the Federal Trade Commission.

The purpose of H.R. 6102 is not to prosecute the offenders, but to protect innocent victims from the appeals of dishonest promoters by deleting from existing law the "proof of actual intent to defraud," requirement. My bill simply substitutes the word "misleading" for the word "fraudulent" and adds a parenthetical phrase explicitly stating that such pretenses, representations, or promises need not be intentional.

This language would change only the administrative procedures of the Post Office Department by giving the authority to withhold and return to the sender mail addressed to a firm suspected of misrepresenting its products or services. It would not affect the criminal statutes which require proof of fraud to prosecute the offender.

Mr. Chairman, there is a real need for this legislation. It would provide the necessary tool for the Post Office Department to deal with a very serious problem. I sincerely hope that H.R. 6102 will receive prompt and favorable action by your subcommittee.

Mr. OLSON. I should like to say that the need for this legislation became apparent to Mr. Udall through a series of grossly misleading mail campaigns seeking to sell real estate in our own State of Arizona. Mr. J. Fred Talley, the Arizona State real estate commissioner,

testified in 1964 before Senator Williams' subcommittee in the Senate. At that time he said, and I quote:

One of the most glaring examples of misrepresentations of lot sales in the entire West, I am ashamed to admit, is in my own State of Arizona.

In addition, testimony received by Senator Williams' subcommittee has revealed countless other examples of misrepresentations through the mails. Today we have heard abundant evidence from the Post Office Department that this is a serious problem which needs attention.

I have been listening to the remarks of the earlier witnesses and simply would like to make two or three points.

I would say it is important that the subcommittee recognize that administrative proceedings would still occur when the Post Office Department acted under this amended statute. A mailer whose literature had been questioned would still be able to appear at a public hearing and be represented by counsel. He would still have recourse to the courts. However, the object of such proceedings would be not to prove fraud but to prove misrepresentation.

Mr. Udall feels very strongly that this slight change in the present statute would deny no rights to persons using the mail. It would not interfere in any way with legitimate uses of the mails and, in fact, it would merely extend to the Post Office Department procedures presently employed by the Federal Trade Commission and affirmed by the courts enabling the Commission to act against advertisers making false promises to the public.

In regard to this matter of false or misleading representations, the question is whether both of those terms are needed to get at the problem that we are discussing.

It seems to Mr. Udall that both terms are needed in the law. The reason for this is that it is entirely possible for a mailer to send out literature which would be misleading, while at the same time it was not actually false. For example, he might send out a packet of material regarding a real estate promotion and in this packet he might truthfully state that he was selling certain parcels of land in certain counties, certain States, and that there were certain advantages related to the property.

Yet, those statements in themselves might not be enough to convince a prospective buyer that this was an attractive proposition. Perhaps in the same packet the mailer might include photographs which did not state that they represented the property in question, but which, nevertheless, painted a very glowing scene and one which would mislead people receiving literature.

It occurs to us that this kind of misrepresentation could be made while at the same time it would be quite difficult to establish that this was, in fact, a false statement of the property being offered. Therefore, for the consideration of the subcommittee, it seems that there is at least a possibility that the two terms are not overlapping and that they do each serve separate functions.

Mr. DANIELS. Let us take the reverse of that situation.

Mr. OLSON. Pardon me?

Mr. DANIELS. Let us take the converse of the example you have just described. Would it suffice to merely use the word "false" without using the word "misleading"? You heard the dialog between the subcommittee, Mr. Montague, Mr. Levine, and Mr. Lawrence,

with respect to the word "misleading." What comment do you have on that?

Mr. OLSON. It would be my view that simply using the word "false" might leave an avenue for a dishonest operator to continue to send out solicitations which were misleading.

Mr. DANIELS. Is it your view that the word "false" does not imply that it was intended to be misleading?

Mr. OLSON. No; I would certainly agree that the word "false" would imply the concept "misleading." However, I do not feel that the word "false" entirely covers the possibilities of misleading the public. In other words, it would be possible to mislead without meeting the full requirements of the definition of "false."

Mr. Chairman, that is the extent of the remarks that I wanted to make in addition to Mr. Udall's prepared statement.

Thank you.

Mr. DANIELS. Mr. Henderson, any questions?

Mr. HENDERSON. I believe not, Mr. Chairman.

Mr. DANIELS. Thank you, Mr. Olson.

Mr. Harding de C. Williams, assistant secretary-counsel, National Association of Real Estate Boards.

Mr. WILLIAMS. Yes, sir.

Mr. DANIELS. Do you propose to testify on this legislation?

Mr. WILLIAMS. Mr. Chairman, if I might, I would like to submit Mr. Emlen's statement for the record and comment very briefly on it, if I may.

Mr. DANIELS. You may. Proceed, Mr. Williams.

The statement of Alan L. Emlen, chairman of the Realtors' Washington Committee of the National Association of Real Estate Boards, will, without objection, be inserted in the record at this point.

(The statement follows:)

STATEMENT OF ALAN L. EMLEN, CHAIRMAN, REALTORS' WASHINGTON COMMITTEE,
NATIONAL ASSOCIATION OF REAL ESTATE BOARDS

Mr. Chairman and members of the subcommittee, my name is Alan L. Emlen. I am a realtor engaged in the business of real estate brokerage in Philadelphia. I appear here as chairman of the Realtors' Washington Committee of the National Association of Real Estate Boards. Our association consists of 1,519 local boards of realtors with a membership of more than 83,000. I am here to testify in favor of H.R. 6102, which would amend section 4005 of title 39, United States Code, to make it clear that the intent of the person committing the acts proscribed therein is irrelevant to the enforcement of the section.

Our interest in this bill stems from our long-standing concern with the problems of fraudulent land sales by mail. Fraudulent land sales not only reflect on the real estate profession as a whole, but are a violation of articles 3 and 4 of our association's code of ethics, administered by our local boards and binding on our members. Article 3 of the code provides that it is "the duty of a realtor to protect the public against fraud, misrepresentation or unethical practices in the real estate field." Article 4 requires the realtor to ascertain all pertinent facts concerning property with which he deals in order to avoid concealment or misrepresentation of a material fact.

Realtors have actively participated in working toward effective legislative remedies to the problem of interstate land sales. In 1962, for example, our License Law Committee drafted a suggested model law for control by the States of sales of subdivisions located within their borders, and we have worked in close cooperation with the National Association of License Law Officials on the subject. At the Federal level also, we have given close study to proposed remedies such as requiring SEC-type disclosure of information on land sold in interstate commerce or through use of the mails.

While we believe that effective State legislation and enforcement of laws regulating subdivision sales is an effective answer to this problem, we are also convinced that existing criminal and civil powers of the Federal agencies, which operate in the field of fraud and deception, must continue to be essential supplements to State action.

In 1964 we adopted a statement of policy (attached as an appendix to this statement) which calls upon the Congress to enact legislation to authorize the Post Office Department to stop the use of the mails upon evidence of a misrepresentation of a material fact in advertising the sale of any commodity. This is the purpose and intent of H.R. 6102.

While a State can effectively regulate subdivisions within the State, or advertisements placed in the State for out-of-State developments, the State has no power to police the mail that enters or leaves its boundaries.

The subcommittee has heard testimony on the difficulties encountered by the Post Office Department in enforcing the civil fraud statute set forth in 39 U.S.C.A. 4005. The case of *Reilly v. Pincus* (338 U.S. 269 (1948)), which held that actual intent must be established prior to the issuance of a fraud order, is a serious impediment to the enforcement of the statute, especially in view of the fact that the Department lacks the power to subpoena witnesses and records.

Since section 4005 was intended to be a protection for the recipients of mail against misstatements of fact rather than a punishment for the sender, we concur in the view that Congress did not intend to apply the common law requirement of intent to the term "fraudulent" as used in that section. Certainly the protection of persons not in a position to ascertain the truth or falsity of a particular fact has nothing to do with the intent of the person stating it. The misstatement or misrepresentation, once having been acted upon, the damage is done.

The Federal Trade Commission, for example, is not required to establish intent as a basis for cease and desist orders in false advertising cases. I realize that the differences between fraud orders and cease and desist orders impressed the Court in the *Reilly* case, and that the Court was reluctant to uphold an order stopping all of the appellee's mail—thus putting him out of business—unless clear intent to defraud had been established. I understand, however, that fraud orders are more flexible at present than they were at the time of that case, in that they now apply only to mail received as a result of the fraudulent practice rather than to all mail. In addition, enactment of H.R. 6102 would not affect the rights of administrative and judicial review, as well as injunctive relief, available to persons subject to a mail fraud proceeding.

Enactment of H.R. 6102 would give the Department an effective alternative to criminal action against fraudulent land developers. We commend the Department in its vigorous enforcement of the criminal fraud provisions of 18 U.S.C.A. 1341, and its cooperation with the Department of Justice and the Federal Trade Commission in enforcing that statute.

We strongly recommend that the subcommittee act favorably on H.R. 6102.

STATEMENT OF POLICY ADOPTED BY THE DELEGATE BODY, NATIONAL ASSOCIATION
OF REAL ESTATE BOARDS, NEW YORK CITY, NOVEMBER 14, 1964

We are concerned about the abuses which have occurred in the sale of lands by mail, and commend the Post Office Department and the Federal Trade Commission for their efforts in preventing the use of the mails for purposes of defrauding the public.

Judicial interpretation of the civil statute relating to fraudulent use of the mails, however, has curtailed its effectiveness by requiring proof of actual intent to defraud before action by the Post Office Department can be taken. Such proof is difficult to obtain and is not relevant to the purpose of the statute to protect the public. We urge the Congress to clarify its original intent that the mails may not be used to convey material misstatements of fact which are relied upon by the recipient to his detriment.

STATEMENT OF HARDING de C. WILLIAMS, ASSISTANT SECRETARY-COUNSEL, REALTORS' WASHINGTON COMMITTEE, NATIONAL ASSOCIATION OF REAL ESTATE BOARDS

Mr. WILLIAMS. Thank you, Mr. Chairman.

My name is Harding de C. Williams, assistant secretary-counsel of the Washington Committee of the National Association of Real Estate Boards.

We are in support of this legislation as our statement points out. Our interest in this bill stems from our longstanding concern with the fraudulent sale of lands. Our members have been active at the State level in drafting model legislation and seeing that that legislation is enacted in the legislatures of their States. We have also studied at the national level a number of proposals to deal with the problem by the Federal Government.

We think that the amendments to the civil fraud statute, which would be accomplished by H.R. 6102, would be a valuable tool in the enforcement of civil fraud against fraudulent land promoters. Our statement discusses in some measure the problems raised by the *Reilly* case, but you have had excellent testimony on that point from the Post Office Department. We are merely appearing here today to give our support to the bill and to urge that it be favorably acted on by the subcommittee.

Mr. DANIELS. Thank you very much, Mr. Williams.

Mr. WILLIAMS. Thank you, Mr. Chairman.

Mr. DANIELS. That concludes today's hearing and the subcommittee will adjourn subject to the call of the Chair.

(Whereupon, at 11:35 a.m., the subcommittee adjourned subject to the call of the Chair.)





