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HEARINGS

BEFORE THE

CONSUMER SUBCOMMITTEE

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

S. 986

TO PROVIDE MINIMUM DISCLOSURE STANDARDS FOR WRITTEN CONSUMER PRODUCT WARRANTIES AGAINST DEFECT OR MALFUNCTION; TO DEFINE MINIMUM FEDERAL CONTENT STANDARDS FOR SUCH WARRANTIES; TO AMEND THE FEDERAL TRADE COMMISSION ACT IN ORDER TO IMPROVE ITS CONSUMER PROTECTION ACTIVITIES; AND FOR OTHER PURPOSES

MARCH 9, 15, 16, AND 22, 1971

Serial No. 92–8

Printed for the use of the Committee on Commerce

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CONSUMER PRODUCTS WARRANTIES AND IMPROVEMENT ACT, 1971

TUESDAY, MARCH 9, 1971

U.S. SENATE,
COMMITTEE ON COMMERCE,
CONSUMER SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 10:15 a.m. in room 5110, New Senate Office Building, Hon. Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Moss, Hart, and Cook.

Senator Moss. The subcommittee will come to order.

OPENING STATEMENT BY THE CHAIRMAN

Today the Consumer Subcommittee of the Senate Commerce Committee will receive testimony on S. 986, the Consumer Products Warranties and Federal Trade Commission Improvements Act of 1971.

The purpose of the bill considered here today is twofold:

(1) To bring fairness, rationality, and minimum standards to warranty practices; and

(2) To sharpen the tools of the Federal Trade Commission so that they can better referee warranty and other business practices which have profound effects on consumers in the United States.

Title I of the bill sets forth minimum disclosures standards for warranties on consumer products, defines minimum content standards for warranties, and provides meaningful consumer remedies for the breach of any warranty or service contract obligation.

Title II of the legislation improves the Federal Trade Commission's ability to deal with unfair consumer acts and practices "affecting" commerce by providing the Commission with the power to seek preliminary injunctions, to order specific consumer redress, and to seek civil penalties for initial knowing violations of the Federal Trade Commission Act or violations of Commission orders.

The warranty provisions of S. 986 have been carefully forged after long deliberation by the Consumer Subcommittee. The 276-page hearing record in the 91st Congress disclosed that warranties confuse, mislead, and frequently anger consumers. Through extensive hearings the committee has learned that a warranty is a complicated legal document whose full essence often lies buried in century-old legal decisions or complicated State codes or commercial law so that consumer under-

standing of what a warranty on a particular product means may not always coincide with its legal meaning. For example, a consumer's warranty may cover a 25-cent part but not the $100 labor charge necessary to install the part. Or the consumer may receive a full labor and parts warranty only to learn later that the fine print requires him to ship his piano to the factory in order to have it repaired "free of charge."

Title I of the bill, then, is designed to meet the warranty needs of American consumers and legitimate businessmen. The bill is designed to promote consumer understanding, to provide minimum warranties for consumers, to assure performance of any warranties given, and to encourage the manufacturer of reliable products by promoting full warranty competition.

Title II of this bill improves the Federal Trade Commission's ability to serve as a viable consumer protection agency. At the present time the Commission is shedding its image as the "sleeping lady of Pennsylvania Avenue." It is awakening to its consumer protection responsibilities, but finds itself without proper tools to police the marketplace. This bill would give the Commission the tools it needs—power to issue preliminary injunctions, the authority to seek realistic penalties against suppliers who commit unfair or deceptive acts, and the authority to provide specific remedial relief to the consumers injured by those suppliers.

Before receiving the testimony of Chairman Kirkpatrick, I would like to review the legislative history of the bill being considered here today. Title I of the bill which sets forth certain rules of the warranty game was the subject of 5 days of hearings before this subcommittee in 1970. An additional 3 days of hearings on this bill were held in the House. Title II of the bill was the subject of 8 days of hearings by this subcommittee in 1970. A bill almost identical to title I of the legislation being considered here today passed without a dissenting vote in the Senate on July 1, 1970. Legislation substantially similar to title II of this bill was reported to the Senate floor by the Commerce Committee in the fall of 1970.

I understand that the President has sent to the Congress his own warranty and Federal Trade Commission improvement recommendations and administration witnesses inform us of their desire to testify. Therefore, further hearings have been scheduled for March 15, 1971, to receive again the views of Mrs. Knauer and Mr. McClaren. The minority members of this committee have also asked for a day of hearings to call witnesses selected by them. Those hearings will also be held next week on Tuesday, March 16, beginning at 10 a.m., in 5110 of the New Senate Office Building. I am confident that all members of this committee are desirous of moving ahead to executive consideration of legislation which has been publicly debated in hearings and fully considered in previous executive sessions of the Senate Commerce Committee.

(The bill and agency comments follow:)

92D CONGRESS
1ST SESSION

S. 986

IN THE SENATE OF THE UNITED STATES

FEBRUARY 25, (legislative day, FEBRUARY 17), 1971

Mr. MAGNUSON (for himself, Mr. MOSS, Mr. HART, Mr. INOUYE, Mr. KENNEDY, Mr. MCINTYRE, Mr. PASTORE, and Mr. PEARSON) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971."

TITLE I—CONSUMER PRODUCT WARRANTIES

DEFINITIONS

SEC. 101. For the purposes of this Act—

(1) The term "consumer product" means any tangible personal property, normally used for personal, family, or household purposes, including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed. However, the provisions affecting consumer products in sections 102, 103 and 104 (d) (2) of this Act apply only to consumer products actually costing more than $5.

(2) An "express warranty" is created as follows:

(a) Any affirmation of fact or promise made by a supplier to the purchaser which relates to a consumer product or service and becomes part of the basis of the bargain creates an express warranty that the consumer product or service shall conform to the affirmation or promise.

(b) Any description of a consumer product which is made part of the bargain creates an express warranty that the consumer product shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty

that the consumer product shall conform to the sample or model.

It is not necessary to the creation of an express warranty that the supplier use formal words such as "warranty" or "guaranty" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the consumer product or service or a statement purporting to be merely the supplier's opinion or commendation of the consumer product or service does not create a warranty.

(3) "Purchaser" means the first buyer at retail of any consumer product or service to whom a warranty is offered or given, and any other person who is entitled by the terms of such warranty to enforce against the warrantor the obligations of the warranty.

(4) "Reasonable and necessary maintenance" consists of those operations which the person guaranteed reasonably can be expected to perform or have performed which are necessary to keep any consumer product operating in a predetermined manner and performing its intended function.

(5) The term "repair" may at the option of the warrantor include replacement with a new, identical, or equivalent consumer product.

(6) The term "replacement" shall include the refunding of the actual purchase price of the consumer product less

reasonable depreciation based upon actual use if the warrantor is unable to effect replacement and repair is not possible or cannot be timely made, or if the person guaranteed is willing to accept such refund in lieu of repair or replacement.

(7) "Supplier" means any person (including any partnership, corporation, or association) engaged in the business of making a consumer product available to consumers, either directly or indirectly.

(8) "Warrantor" means any supplier or other third party who gives or offers to give an express warranty (guaranty).

(9) The term "warranty" includes guaranty, and to warrant is to guarantee.

(10) The term "without charge" means that the warrantor(s) cannot assess the person guaranteed for any costs the warrantor or his representatives incur in connection with the required repair or replacement of a warranted consumer product. The term does not mean that the warrantor must necessarily compensate the person guaranteed for incidental expenses. However, if any incidental expenses are incurred because the repair or replacement is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the person guaranteed as a condition of securing repair or replacement, then the person guaranteed

shall be entitled to recover such reasonable incidental expenses in any action against the warrantor.

DISCLOSURE REQUIREMENTS

SEC. 102. (a) In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any supplier warranting a consumer product in writing against defect or malfunction shall fully and conspicuously disclose in simple and readily understood language the terms and conditions of said warranty pursuant to any regulations issued by the Federal Trade Commission under procedures specified in subsection (b) of this section. Such regulations may require inclusion in the written warranty of any of the followings items among others:

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

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

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of defect or malfunction—at whose expense—and for what period of time.

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

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

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

(8) The availability of any informal dispute settlement procedure for any warranty dispute.

(9) A recital that legal remedies are available to any person guaranteed if the warrantor has not complied with the provisions of the warranty.

(10) A recital that any person guaranteed who successfully pursues his legal remedies may recover the reasonable costs incurred, including reasonable attorneys' fees.

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

(12) The period of time within which, after notice of malfunction or defect, the warrantor will repair, replace, or otherwise perform any obligations under the warranty.

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

(14) The elements of the warranty in words or phrases which would not mislead reasonable men as to the nature or scope of the warranty.

(b) The Federal Trade Commission is authorized to determine in accordance with section 553, title 5, United States Code, upon a public record after opportunity for an agency hearing structured so as to proceed as expeditiously as practicable, the manner and form in which information with respect to any written warranty against defect or malfunction of a consumer product or service shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average purchaser, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing. Nothing in this Act shall be deemed to authorize the Commission to prescribe the duration of warranties given or to require that a product or any of its components be warranted.

DESIGNATION OF WARRANTIES

SEC. 103. (a) Any supplier warranting or guaranteeing a consumer product in writing against defect or malfunction shall clearly and conspicuously designate such warranty in the following manner unless exempted from doing so by the Federal Trade Commission pursuant to section 109 of this Act:

(1) If the written warranty incorporates the Federal

minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "full (statement of duration)" warranty, guaranty, or word of similar meaning.

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

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

FEDERAL MINIMUM STANDARDS FOR WARRANTY (GUARANTY)

SEC. 104. (a) Any supplier warranting consumer products in writing against defect or malfunction must undertake at a minimum the following duties in order to be deemed to have incorporated the Federal minimum standards for warranty:

The duties—

(1) to repair, or replace if repair is not possible or

cannot be timely made, any malfunctioning or defective warranted product;

(2) within a reasonable time; and

(3) without charge.

In fulfilling the above duties the warrantor shall not impose any duty other than notification upon any person guaranteed as a condition of securing repair or replacement of any malfunctioning or defective consumer product unless the warrantor can demonstrate that such a duty is reasonable. In a determination of whether or not any such additional duty or duties are reasonable, the magnitude of the economic burden necessarily imposed upon the warrantor (including costs passed on to the purchaser) shall be weighed against the magnitude of the burdens of inconvenience and expense failure to provide reasonable and necessary maintenance)

(b) The above duties extend from the warrantor to the purchaser.

(c) The performance of the duties enumerated in subsection (a) of this section shall not be required of the warrantor if he can show that damage while in the possession of the person guaranteed or unreasonable use (including failure to provide reasonable and necessary maintenance) caused any warranted product to malfunction or become defective.

(d) Disclosure requirements—

(1) When making a warranty in writing against defect or malfunction which incorporates Federal minimum standards, the warrantor shall cause it to be labeled a "full (statement of duration)" warranty, guaranty, or word of similar meaning.

(2) The disclosure requirements and Commission authorization in section 102 of this Act shall apply to any warranty in writing against defect or malfunction of a consumer product which incorporates Federal minimum standards: *Provided, however,* That it shall be mandatory for the warrantor issuing written warranty in compliance with Federal minimum standards to cause the disclosure of the duration of the warranty period measured either by time or by some relevant measure of usage such as mileage to the purchaser prior to the time of purchase.

FULL AND PARTIAL WARRANTING OF A CONSUMER PRODUCT

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

SERVICE CONTRACTS

SEC. 106. Nothing in this Act shall be construed to prevent a supplier from selling a service contract to the pur-

chaser in addition to or in lieu of a warranty if such contract fully and conspicuously discloses in simple and readily understood language the terms and conditions.

DESIGNATION OF REPRESENTATIVES

SEC. 107. Nothing in this Act shall be construed to prevent any warrantor from designating representatives to perform duties under the warranty: *Provided,* That such warrantor equitably compensates such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the person guaranteed or make the representative a cowarrantor.

LIMITATION ON DISCLAIMER OF IMPLIED WARRANTIES

SEC. 108. (a) There shall be no express disclaimer of implied warranties to a purchaser if any express warranty of a consumer product against defect or malfunction is made by a supplier to a purchaser in writing.

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

FEDERAL TRADE COMMISSION

SEC. 109. In addition to the authority given in sections 102 and 104 of this Act pertaining to disclosure, the Federal Trade Commission is authorized to establish rules pursuant

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to section 553, title 5, United States Code upon a public record after an opportunity for an agency hearing structured so as to proceed as expeditiously as practicable, to define in detail the duties set forth in subsection (a) of section 104 of this Act and their applicability to warrantors of different categories of consumer products with "full" warranties and to determine when a warranty in writing against defect or malfunction does not have to be designated either "full (statement of duration)" or "partial" in accordance with section 103 of this Act.

REMEDIES

SEC. 110. (a) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. Such informal dispute settlement procedures should be created by suppliers in cooperation with independent and governmental entities and should be supervised by some governmental or other impartial body.

(b) It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) for any person (including any partnership, corporation, or association) subject to the provisions of this Act to fail to comply with any requirement imposed on such person by or pursuant

to this Act or to violate any prohibition contained in this Act.

(c) (1) The district courts of the United States shall have jurisdiction to restrain any supplier from making a deceptive warranty with respect to a consumer product or service in an action by the Attorney General or by the Commissioner by any of its attorneys designated by it for such purpose. The court may, pursuant to the general standards governing the issuance of injunctions in civil actions, at any time grant such injunctive relief as it deems appropriate. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, a "deceptive warranty" means: (i) a guaranty or warranty that contains an affirmation, promise, description, or representation that is either false or fraudulent, or that, in the light of all of the circumstances, would mislead a reasonable man exercising due care; or fails to contain information that is necessary, in light of all of the circumstances, to make the guaranty or warranty not misleading to a reasonable man exercising due care; and (ii) a guaranty or warranty created by the use of such terms as "guaranty" or warranty", if the terms and

conditions of such guaranty or warranty so limit its scope and application as to deceive a reasonable man.

(d) If any person guaranteed or protected by a service contract shall finally prevail in any suit or proceeding for breach of an express or implied warranty or service contract obligation on a consumer product, he shall be allowed by the court of competent jurisdiction to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by such person guaranteed or protected by a service contract for or in connection with the institution and prosecution of such suit or proceeding unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate: *Provided,* That any person guaranteed, in a suit for breach of warranty, must have afforded the maker (s) of that warranty a reasonable opportunity to cure the breach to be eligible for such cost and expenses.

(e) Any person damaged by the failure of a supplier to comply with any obligations assumed under an express or implied warranty or service contract subject to this Act may bring suit in an appropriate district court of the United States subject to the juridictional requirements of section 1331, title 28, United States Code, or in any State or District of Columbia court of competent jurisdiction.

SAVING PROVISION

SEC. 111. Nothing contained in this Act shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or any statute defined therein as an antitrust Act.

SCOPE

SEC. 112. (a) The provisions of this Act and the powers granted hereunder to the Federal Trade Commission and Attorney General shall extend to all sales of consumer products and services affecting interstate commerce.

(b) Labeling, disclosure, or other requirements of a State with respect to written warranties against defect or malfunction of a consumer product inconsistent with those set forth in sections 102, 103, or 104 of this Act shall not be applicable to warranties complying with any of those provisions.

SEPARABILITY

SEC. 113. If any provision of this Act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 114. (a) Except for the limitations in subsection (b) of this section, this Act shall take effect six months after the date of its enactment but shall not apply to con-

sumer products in the stream of commerce prior to such date.

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

(c) The Federal Trade Commission shall promulgate rules implementing this Act as soon as possible after enactment but in no event later than six months after the date of enactment.

TITLE II—FEDERAL TRADE COMMISSION IMPROVEMENTS

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

SEC. 202. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) is amended by inserting after paragraph (6) thereof the following new paragraphs:

"(7) The Commission is further empowered and directed to order such persons, partnerships, or corporations engaged in any act or practice which is unfair or

deceptive to a consumer and is prohibited by subsection (a) (1) of this section, to take any other action necessary to redress the injury caused by such acts or practices to consumers.

"(8) The Commission shall initiate civil actions in the district courts of the United States against persons, partnerships, or corporations engaged with actual knowledge or knowledge fairly implied on the basis of objective circumstances in any act or practice which is unfair or deceptive to a consumer and is prohibited by subsection (a) (1) of this section, including any rule or regulation promulgated by the Commission under section 6(g) of this act, in addition to any other action ordered under this section, to obtain a civil penalty of not more than $10,000 for each such violation. In seeking such penalty, the Commission shall give considerations to the appropriateness of the penalty, to the size of the business of the person charged, to the gravity of the violation, and to the history of previous violations. The Commission may compromise, mitigate or settle any civil penalty if that action is accompanied by a public statement of its reasons following a public hearing at which interested parties may be heard."

SEC. 204. Section 5(c) of the Federal Trade Commis-

sion Act (15 U.S.C. 45(c)) is amended by inserting after period after the second and fifth sentences of subsection (b) and adding the following: ", or requiring such person, partnership, or corporation to take such other action as may be authorized by this Act and determined by the Commission to be necessary in order to remedy the violation or violations of authorized by this Act."

SEC. 204. Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)) is amended by inserting after the word "practice" in the first sentence of subsection (c) the following: "or to take any other such action as may be authorized by this Act."

SEC. 205. Section 5(g) of the Federal Trade Commission Act (15 U.S.C. 45(g)) is amended by deleting the words "to cease and desist" after the word "Commission."

SEC. 206. Section 5(l) of the Federal Trade Commission Act (15 U.S.C. 45(l)) is amended by striking subsection (l) and inserting in lieu thereof the following new paragraph:

"(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United

States or the Commission in its own name by any of its attorneys designated by it for such purpose. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission."

SEC. 207. Section 6 of the Federal Trade Commission Act (15 U.S.C. 46) is amended by striking out the words "in commerce" wherever they appear and inserting in lieu thereof "in or whose business affects commerce."

SEC. 208. Section 6(g) of the Federal Trade Commission Act (15 U.S.C. 46(g)) is amended by striking subsection (6) and inserting in lieu thereof the following:

"(g) From time to time to classify corporations and to make substantive and procedural rules and regulations for the purpose of carrying out the provisions of this Act. Whenever it appears to the Commission to be in the public interest, the Commission shall promulgate rules and regulations defining unfair or deceptive acts or practices in a manner sufficiently specific to reasonably inform affected persons of the acts or practices prohibited. Such rules and regulations

shall be promulgated in accordance with section 553 of title 5, United States Code, after reasonable notice, an opportunity for interested persons to participate in the rule making through submission of written data, views, or arguments, and, if requested, the Commission shall hold a hearing in which interested persons shall have reasonable opportunity to present the same orally in an appropriate manner. The testimony in any such hearing shall be reduced to writing, shall be filed in the office of the Commission, and together with written submissions, shall constitute the record. Such record shall be open to public inspection. After consideration of all relevant matter presented upon such record, the Commission shall incorporate in any rule adopted a concise general statement of its basis and purpose. When any such trade regulation rule is promulgated and becomes final, a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of Section 5(a)(1) of this Act. Such rules and regulations shall be reviewable in the Court of Appeals for the District of Columbia in accordance with chapter 7 of title 5, United States Code. In addition the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be unsupported by substantial evidence upon the record as herein defined."

SEC. 209. Section 9 of the Federal Trade Commission Act (15 U.S.C. 49) is amended by—

(a) deleting the word "corporation" in the first sentence of the first unnumbered paragraph and inserting in lieu thereof the word "party."

(b) deleting "; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation" following the word "against" in the first sentence of the first unnumbered paragraph and inserting in lieu thereof, "The Commission shall also have the power to require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation";

(c) inserting after the word "Commission" in the second sentence of the second unnumbered paragraph the phrase "acting through any of its attorneys designated by it for such purpose";

(d) deleting the fourth unnumbered paragraph and inserting in lieu thereof the following:

"Upon application of the Attorney General of the United States or the Commission, acting through any of its attorneys designated by it for such purpose, the district courts

of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any rule, regulation, or order of the Commission made in pursuance thereof."

SEC. 210. Section 10 of the Federal Trade Commission Act (15 U.S.C. 50) is amended by deleting the third unnumbered paragraph and inserting in lieu thereof the following:

"If any corporation required by this Act to file any annual or special report shall fail to do so within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure which forfeiture shall be payable into the Treasury of the United States and shall be recoverable in a civil suit brought by the United States or by the Commission, acting through any of its attorneys designated by it for such purpose, in the district where the corporation has its principal office or in any district in which it shall do business."

SEC. 211. Section 12 of the Federal Trade Commission Act (15 U.S.C. 52) is amended by striking out the words "in commerce" wherever they appear and inserting in lieu thereof "in or having an affect upon commerce."

SEC. 212. Section 13 of the Federal Trade Commission

Act (15 U.S.C. 53) is amended by redesignating "(b)" as "(c)" and inserting the following new subsection:

"(b) Whenever the Commission has reason to believe—

"(1) that any person, partnership, or corporation is engaged in, or is about to engage in, any act or practice which is unfair or deceptive to a consumer, and is prohibited by section 5, and

"(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission made thereon has become final within the meaning of section 5, would be to the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon proper showing a preliminary injunction may be granted without bond under the same conditions and principles as injunctive relief against conduct or threatened conduct that will cause loss or damage is granted by courts of equity. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business."

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., May 19, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your invitation of March 8, 1971, to comment on certain proposed legislation referred to your Committee for consideration, among which is S. 986, a bill "to provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes," to be cited as the "Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971."

While the Department of Commerce supports the objectives of S. 986 to provide increased warranty protection to consumers and to expand the authority of the Federal Trade Commission, we oppose enactment of the bill. Instead, we strongly support enactment of the Administration's proposed "Fair Warranty Disclosure Act of 1971" (S. 1221) and "Federal Trade Commission Act Amendments of 1971" (S. 1219). S. 1221 would prevent deception in warranties and require full disclosure of important information to consumers. Full and accurate disclosure will permit consumers to make more informed decisions in the market, and competition among businessmen will lead to the satisfaction of consumer demands with respect to warranty protection. S. 1219 would provide the Commission with expanded authority to take prompt and meaningful action on behalf of consumers.

Since S. 986 covers two distinct subjects, warranty regulation (Title I) and increased Federal Trade Commission (FTC) authority (Title II), our comment on each will be treated separately below. The comments are addressed to the text of Committee Print No. 1 of S. 986, dated April 13, 1971.

I. WARRANTY REGULATION

Title I of S. 986 (Committee Print No. 1) would regulate warranties on consumer products by: Imposing disclosure requirements on warrantors; establishing substantive terms of "full" warranties; restricting warrantors' rights under state law to disclaim implied warranties; authorizing the FTC and the Attorney General to restrain deceptive warranties; authorizing the FTC to enforce the remaining requirements of Title I; providing for recovery of plaintiffs' attorneys' fees in successful private actions for breach of warranty or service contract; providing that Federal District Courts shall have jurisdiction over private actions for breach of warranty or service contract obligations where $10,000 or more is in controversy.

(1) Federal warranty standards

Aside from the question whether it is desirable at all to prescribe "Federal standards" for warranty, a feature of the blll that we oppose, the following substantive problems should be noted in connection with the criteria enumerated in S. 104.

First, the primary obligation of a supplier under these criteria is repair of the product, with replacement permitted only if repair is not "possible" or cannot be timely made. This imposes a higher standard of obligation than is derived from the definition of "repair" in S. 101(4), *viz.*, "The term 'repair' may at the option of the warrantor include replacement sith a new, identical, or equivalent consumer product." To permit replacement rather than repair only if the latter is not possible or cannot be timely made could impose an enormous burden on suppliers. The cost of repair of an item can easily be many times its replacement worth. The provision as written will assure the absence of any full warranties on many products. It would seem preferable to condition replacement at the option of the supplier for purposes of the Federal standards upon whether repair is commercially practicable (a test that would embrace considerations of both possibility and timeliness).

Second, there are two very objectionable features of the provision for replacement itself, one inherent in the basic definition (S 101(6)) and the other resulting from wording of the section here under consideration (S 104(a)). Section 101(6) states that the term "replacement" includes refund of the depreciated purchase price, but only if (a) replacement in kind is not possible and repair is not possible or cannot be timely made or (b) if the consumer is willing to accept such refund. We most emphatically believe that equity and the interest of the marketplace

would better be served by elimination of these conditions precedent to refund, and to permit refund by the supplier as a matter of right based upon a reasonable proration of the retail price over the useful life of the product. Apart from this very important definitional question, the option of replacement under the Federal standards for warranty would appear not to permit refund even under the limited circumstances embodied in S 101(6) as now written. Under S 104(a)(1), a warrantor has the express duty to replace the product in kind if repair is not possible or cannot be timely made, thereby precluding, under the *expressio unius* rule of construction, the alternative of refunding the actual purchase price less reasonable depreciation if the person warranted is willing to accept such a refund, as contemplated in the present definition of "replacement" in S 101(6).

Each of the foregoing substantive questions could readily be resolved if (a) the Federal standards were to require only "repair or replacement of any malfunctioning or defective warranted product," and (b) subparagraphs (1) and (2) of S 101(6) were deleted. Absent this latter action, which we strongly urge, the condition of S 101(6)(1) should, at the very least, be amended to permit refund if ". . . repair is not commercially practicable, ..."

In this connection we also believe that the word "reasonably" should be placed before the word "equivalent" in subsections (5) and (6) of Section 101.

We believe that there are also fundamental problems in the implicit objective of the bill to encourage suppliers to give "full" warranties meeting Federal standards. S. 986 proceeds on the unstated assumption that greater warranty protection is always in the best interests of consumers. If, in fact, the bill has the effect of inducing suppliers to give "full" warranties, it could well result in restricting consumer choice. either by driving "non-competitive" products into a peripheral limbo of market acceptability or by increasing the price of "full warranty" products to cover the cost of meeting the necessary standards to maintain market position or to "lay off" on consumers the contingent liability of the supplier. The ultimate effect of this approach may be to put a premium of market acceptability on products with "full" warranties. Although this approach might be defensible if the price of the products covered was raised so that only "big ticket" items were covered, we do not think it is sound when applied to small dollar purchases. The cost of the warranty protection is bound to be a substantial cost factor in the price of these smaller items. The alternative might then be that warranties will disappear for items under the "big ticket" category in order to be competitive in price.

The Federal warranty standards approach also will have unfortunate effects on small business. We do not suggest that small manufacturers are any less able than large domestic businesses to provide consumers with high-quality goods. However, under the bill national, integrated firms with their own service and repair centers will clearly be more able to meet the requirements of "full" warranties. We believe the result of the bill will thus be anti-competitive and lead to concentration of consumer products business.

(2) Deceptive warranties; injunctive actions; attorneys' fees

The average consumer's notion of a warranty generally comprehends only a written promise by the warrantor to repair or replace a defective or malfunctioning product under states circumstances within a stated period of time, or make a price adjustment based upon usage. Certain provisions of the bill are confined to regulation of such agreements (*i.e.*, §§ 102, 103, 104, and 108). However, the remedial provisions of the bill addressed to deceptive warranties (§ 110(c)-(e)) encompass any affirmation or promise that becomes a part of the bargain of sale. Thus, the FTC and the Attorney General are severally authorized to bring actions in the U.S. District Courts to enjoin any deceptive warranties, whether or not written, relating either to consumer products or to services to consumers, and whether or not they consist of promises to repair or replace defective or malfunctioning consumer products. (Section 110(c)). Similarly, the bill creates Federal rights of action (that, incidentally, could lead to forum-shopping for class actions in State courts) and authorizes the award of attorneys' fees to successful plaintiffs in actions for breach of such broadly-defined warranties. (Section 110(d) and (e)). In our judgment, the scope of the entire bill should be limited to written documents conventionally regarded by the public as warranties or guarantees. Also, we believe the definition of "deceptive warranty" (§ 110(c)(b)) should reach only to written warranties against defect or malfunction, that the word "material" should precede the word "affirmation" in such definition (Committee Print No. 1,

p. 17, l. 24) and that the words "known to the warrantor or reasonably should have been known to the warrantor at the time the guaranty or warranty is made" should be inserted following the word "circumstances" (*id.*, at p. 18, l. 1).

(*3*) *Attorneys' fees versus State law*

Section 110(d) of S. 986 would preempt State law regarding attorneys' fees in private breach of warranty cases. It provides that persons protected by a guaranty (warranty) or by a service contract shall be entitled to recover "attorneys' fees based on actual time expended" in successful suits for breach of obligation. However, successful defendants would not be entitled to recover their attorneys' fees. We think that this inequality of treatment of parties to a lawsuit could lead to substantial unfairness. The prospect of attorneys' fees for the plaintiff will encourage the institution of more lawsuits. Conversely, denying such fees to successful defendants will discourage the litigation of rightful defenses, especially by small businessmen who cannot afford and could not recover the costs of their own attorneys. Taken together, the effect could be to encourage bad claims, and further, encourage capitulation to them. We think that if attorneys' fees are to be provided for they should be awarded to the prevailing party, whether plaintiff or defendant, and that they should be predicated upon reasonable fees taking into account the subject matter of the litigation, not upon actual time expended. The bill should be amended either to require such attribution as a matter of course in any private breach of warranty proceeding or, in the alternative, to provide that a plaintiff *may* seek reimbursement of attorneys' fees, in which event the court shall award attorneys' fees to the prevailing party. Such a regime, as scholars have pointed out, would discourage unfounded suits, encourage voluntary settlements and compromises, and afford complete relief for losses suffered in connection with an alleged wrong. See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75 (1963); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 Vanderbilt L. Rev. 1216 (1967).

(*4*) *Disclaimer of implied warranties under State law*

We believe that it would be appropriate to limit disclaimers of State-created implied warranties (S. 108) to circumstances where consumer might otherwise be misled into believing that they are receiving greater warranty protection than they are. This may occur under present law where the supplier calls his agreement a "warranty" or "guarantee" and then invokes disclaimers of implied warranties. The Administration's bill (S. 1221) would prohibit such practices. However, S. 986 precludes disclaimers where there is *any* written warranty against defect or malfunction, whether or not the words "warranty" or "guarantee" are used. This formulation is both narrower and broader than the Administration's bill, and in our view it bears no rational relationship to the evil (i.e., misrepresentation) to be arrested.

(*5*) *Additional comments*

(*a*) *Definitions.*—Section 101(3) defines "purchaser" or "consumer" to include "any . . . person who is entitled by *any warranty* which is offered or given . . ." [emphasis added]. As previously noted, we strongly believe the scope of the bill should be limited to written undertakings conventionally understood by the public to constitute warranties or guarantees.

In §101(4), we suggest substituting the words "the specific" for the word "any" (Committee Print No. 1, p. 4, 1.6).

In §§ 101(5) and 101(6), we suggest inserting the word "reasonably" before the word "equivalent" (*i.e.*, at 11.9, 12). Also, with regard to § 101(6), the words "commercially practicable" for the words "possible or cannot be timely made" (*id.*, at 1. 16).

In § 101(8), "warrantor" is defined to include "any supplier or *other party* . . ." [emphasis added]. By doing so, the bill may extend regulation to persons making casual sales who are not engaged in business. We recommend deletion of the underscored words.

(*b*) *Dollar limits on warranty coverage.*—S. 986, in some (but not other) sections, limits coverage to consumer products actually costing the purchaser more than $5.00. We concur in the apparent assumption underlying this dollar limitation that Federal attention and resources should concentrate on consumer products that involve significant (and not *de minimis*) consumer investments. We believe,

however, that the $10.00 limitation embodied in S. 1221 would be more appropriate, and we urge that the limitation be inserted in the definition of "warranty" so that it will qualify the entire bill and not simply certain aspects of it.

(c) *Remedies.*—Section 110(a) of S. 986 expresses a legislative intent to encourage informal dispute settlement mechanisms but requires the procedures developed to be approved by the FTC. We believe the requirement for FTC approval would be cumbersome, time-consuming, costly and inherently inconsistent with the concept of informal procedures sought to be encouraged. Also, as previously noted, § 110 (c)–(e) depart from the carefully delineated "warranty in writing against defect or malfunction" to which other provisions of Title I are addressed. In our view, § 110(c)(1) should permit injunctive actions only with respect to warranties of that character, the definition of "deceptive warranty" in § 110(c)(3) should be amended accordingly, and the "express warranty" referred to in § 110 (d) and (e) should likewise be so circumscribed.

II. INCREASED FEDERAL TRADE COMMISSION AUTHORITY

Title II of S. 986 makes various revisions in FTC authority. In particular, it would: Enlarge the jurisdiction of the FTC from matters "in commerce" to include those "affecting commerce;" authorize the FTC to seek and obtain temporary injuctions to halt unfair or deceptive practices to consumers; increase the penalty for violation of an FTC order from $5,000 to $10,000; authorize the FTC to order respondents to pay damages or otherwise redress injuries caused by unfair or deceptive acts or practices to consumers; permit the FTC to file suits in Federal courts to recover civil penalties of $10,000 for each act or practice which is unfair or deceptive to a consumer and which is knowingly committed; permit the FTC to enforce its orders without resort to the Attorney General; confer authority on the FTC to make rules with the force and effect of law defining unfair or deceptive acts or practices; and authorize the FTC to enforce its own subpoenas in court.

This Department endorses legislation to increase the jurisdiction of the FTC to half unfair or deceptive acts or practices "affecting commerce" as well as those that are "in commerce." This increased authority will allow the FTC to successfully attack local fraud which is often the most pernicious. We also support legislation to give the Commission authority to seek and obtain preliminary injunctions. This authority will greatly improve the effectiveness of the Commission and give added force and effect to trade regulation rules and trade guides. Finally, we approve of the proposal to increase the penalty for violation of an FTC order. This change will properly increase the deterrent to improper conduct.

There are other aspects to Title II which we believe are unwarranted and undesirable, *viz.*,

(*1*) *Authority to require respondents to pay damages or otherwise redress injuries*

We oppose § 203 of Title II, granting the Commission the authority to order the payment of damages or issue other remedial orders for "unfair or deceptive" acts or practices. In our view, the standard for liability is too vague for any relief other than purely prospective relief in the form of cease and desist orders and injunctions. Moreover, the procedural safeguards attendant to FTC proceedings are not adequate for adjudication of liability that could involve huge sums of money.

(*2*) *Civil penalties for knowingly committing unfair or deceptive acts or practices*

Although the provision in § 202 of Title II for the FTC to bring actions in Federal District Courts for imposition of penalties is limited to cases where the respondent acts with actual knowledge fairly implied on the basis of objective circumstances, the standard for liability ("unfair or deceptive acts or practices") is, in our view, far too vague for sanctions applicable to prior acts. Moreover, the imposition of a monetary "penalty" is a criminal type sanction which we do not believe should be litigated by an administrative body.

(*3*) *Authority to promulgate rules with the force and effect of law*

This Department opposes the provision of § 206(g)(2) conferring authority on the FTC to make substantive legislative rules defining unfair or deceptive acts or practices. We believe that interpretative rules, promulgated pursuant to § 206(g)(1), coupled with the preliminary injunction authority would be sufficiently effective in halting unlawful acts. At the same time, such rules would not preclude a respondent from showing not only that he had not violated the rule but also that he had not committed an unfair or deceptive act or practice.

(4) *FTC authority to represent itself in court proceedings*

The provisions of the bill in authorizing the FTC to appear in court to enforce its orders and subpoenas and to seek civil penalties departs from the long-standing practice of having the Attorney General represent the United States in all court proceedings. This Department defers to the Justice Department as to the desirability of deviation from the well-established approach.

CONCLUSION

In view of the foregoing comments, we oppose enactment of S. 986, and instead support enactment of the Administration's bills, S. 1221 and S. 1219. We have been advised by the Office of Management and Budget that there would be no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

WILLIAM N. LETSON,
General Counsel.

Senator Moss. It is now my pleasure to call as a witness Hon. Miles W. Kirkpatrick, Chairman of the Federal Trade Commission, whose timely appearance before this subcommittee is very much appreciated.

I wish to also acknowledge the presence of other members of the Federal Trade Commission who are here this morning and we are pleased, indeed, that they could come to these hearings. If there is any occasion to hear from other members of the Commission, we know they are at hand and we can make inquiries of them. But we seek to get the testimony now of the Chairman, Hon. Miles W. Kirkpatrick.

Before we begin, Senator Cook has some opening remarks.

OPENING STATEMENT BY SENATOR COOK

Senator COOK. Mr. Chairman, I thank the chairman and I appreciate the opportunity to make a few observations at the beginning of today's hearings.

First, I believe we should recognize that, as is frequently the case with consumer measures, we are riding two horses—the one, reasonable and adequate protection of the consumer in the marketplace; the other, our national policy against restraints of trade and monopoly under our antitrust laws. We must, therefore, be careful that we are not so overzealous in the former as to create a clash with the other.

Second, I feel we should be mindful of the fact that we could, in the name of protecting the consumer, diminish, if not destroy, that same consumer's interest in freedom of choice in the marketplace. Secretary of Commerce Stans pointed to this danger in the following manner when speaking before the University of Michigan School of Business Administration last November 12. I repeat what he said:

* * * I recognize, of course, that there is always room for improvement in the quality and safety of products and services. Perfect quality is, or should be, the endless quest of the seller as well as they buyer. That is fundamental to sound—and I should say, successful—business.

I am also well aware that there are instances where this is not true. Cases where product inferiority and misrepresentation constitute normal business practice. There is no question that these cases need attention and correction.

. . . all I am saying here is that there ought to be a caveat on penalizing the many because of the few and heaping so many regulations and restrictions on

industry that "product development is stifled and a freedom of choice denied the consumer." Such a situation could ironically tarnish the quality we are now so proud of. * * *

Mr. Chairman, I feel that Secretary Stans' warning is particularly appropriate commencing as we do today consideration of the bill, S. 986. Section 108 of this bill, for example, provides that:

(a) There shall be no express disclaimer of implied warranties to a purchaser if any express warranty of a consumer product against defect or malfunction is made by a supplier to a purchaser in writing.

Query, does this mean that a manufacturer can be bound by the unauthorized representations of a retailer? I frankly do not know with any degree of certainty at this point. However, I simply cite this as an example of the potential impact of the legislation now under consideration. I might also add that I understand that some members of the business community are fearful that under the bill as now drafted only a small number of manufacturers or large retailers will be able to meet its requirements and provide a warranty on consumer products. We, therefore, may unwittingly be nuturing monopolistic practices, driving out the small businessman and thereby denying to the consumer the very freedom of choice referred to by Secretary Stans. I, personally, feel that we should fully explore this potential impact.

Third, and lastly, it was in recognition of this potential effect that I and my colleagues on the minority requested, pursuant to the provisions of the Legislative Reorganization Act of 1970, that we be allowed to call witnesses on at least one day of the current hearings. As you already have announced, Mr. Chairman, that day will be Tuesday, March 16, with administration witnesses scheduled to appear on the preceding day, Monday, March 15.[1] I trust that our staff will be able to make the necessary arrangements in order to develop a meaningful hearing record.

In conclusion, Mr. Chairman, I feel that the hearing which begins today is of particular significance and importance. Paraphrasing the age-old admonition of the marketplace of "Buyer beware," I felt that we, as members of this subcommittee, should be guided by a similar caveat of "Legislator beware" in order that we avoid through inadvertence unduly disrupting the American marketplace.

Thank you.

Senator Moss. Thank you, Senator Cook, we appreciate your opening statement. The stage is now set for us to begin with our testimony this morning.

Chairman Kirkpatrick, you may proceed, sir.

STATEMENT OF HON. MILES W. KIRKPATRICK, CHAIRMAN OF THE FEDERAL TRADE COMMISSION

Mr. KIRKPATRICK. Thank you, Mr. Chairman. I am particularly grateful for the opportunity to appear before this subcommittee to express the views of the entire Federal Trade Commission on the Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971 (S. 986).

[1] These hearings were subsequently rescheduled for March 15 and 16 for industry witnesses and March 22 for Administration witnesses.

Both title I of S. 986 dealing with what might be called truth in warranties and title II containing amendments which would vitalize the Federal Trade Commission's enforcement machinery, are of paramount concern to the Commission, and both have the Commission's strongest support.

Taking up first title I, I find that it is almost identical to S. 3074 of the 91st Congress, to which the chairman referred, on which I testified last September. The Commission favored the enactment of S. 3074 and is solidly behind title I of the present bill.

Title I: Consumer Product Warranties

The general purpose of title I is to insure that consumers receive complete disclosure of the terms and conditions of any guaranty of merchandise or services and to insure the elimination of deceptive guarantees employed in the marketing of products and services. It is directed at one of the most serious consumer problems of today—product reliability and warranties of service contracts.

Consumers have a right to be assured that the product purchased today will continue to operate tomorrow. Consumers are concerned with the adequacy of guarantees and warranties on the goods and services they buy. We must strive to promote product integrity and create a market environment in which the consumer can have confidence.

Such an environment will be of benefit not only to the consumer but to the businessman as well. Consumerism and the interests of business are not separate, I believe, or in opposition to one another. It is as important to one as to the other that business provide quality goods and quality services.

Consumerism in the seventies has come to mean that we have adopted the concept of "buyer's rights"; and the President focused attention on the need for legislation dealing with warranties and guarantees in his recent consumer message to Congress.

It is now generally recognized that the underlying and basic problem which must be solved is how to persuade or compel a manufacturer and the retailer to provide the purchaser with a meaningful guarantee which will be honored in both letter and spirit subsequent to the sale. It is apparent that there has been some effort by industry to improve warranties and service, but all problems associated with warranty performance have not been resolved. It appears unlikely that collective voluntary action will provide an effective solution to warranty abuses.

Certainly consumers are entitled to a complete and clear disclosure of the terms and conditions of all warranties on merchandise or service. The failure of the guarantee to set forth in clear understandable language the nature and extent of the gurantee is a common complaint. Buyer confidence in the seller's integrity suffers when the seller unfairly leads the buyer to believe he is getting more than he in fact is. The consumer should be given information which will enable him to make an intelligent, informed judgment as to his prospective purchases.

Consumer warranty problems are not confined solely to deceptive terminology. Consumers are concerned as well with the adequacy and fairness of warranties on goods that they buy. Thus it is important that warranties say what they mean, and it is just as important that they afford some meaningful assurance of product reliability.

The terms "guarantee" and "warranty" themselves lead a customer to believe that the guarantor stands behind his product. Too often, however, the guarantee has not been used as a vehicle to provide customer assurance of product reliability. In some instances the guarantee is used more as a device to limit the responsibility of the seller—often negating altogether the implied warranties of fitness and merchantability.

Another basic cause of consumer dissatisfaction with service provided under a guarantee or warranty is the failure of some guarantors to fulfill the obligations set forth in the guarantee to the extent and in the manner expected by the consumer. In this connection the extent to which warranties are actually honored is reflected in the Federal Trade Commission's report on automobile warranties published in February of last year.

In that report, the Commission concluded that the quality control of automobiles was unsatisfactory, that the warranty coverage provided by manufacturers was inadequate, and that the industry response to the problem, at least until the present time, had been insufficient to protect the public.

The Commission believes that informative, accurate, clear and fairly written warranties, backed up by warrantors who deliver what they promise, are essential to our free market economy, and that legislation to insure these consumer rights is necessary.

It is the purpose of S. 986 to provide for full disclosure of warranty terms, to prevent the sale of consumer products and services by the use of deceptive guarantees that affect commerce and to permit the Federal Trade Commission to institute injunction proceedings to bring to an immediate halt practices which violate the act. The Commission endorses those objectives and believes that it will provide substantial protection to the public.

The Commission suggests, however, that consideration be given to certain modifications which would, in its opinion, serve to strengthen and clarify the bill's provisions. Sections 102(b) and 109 of the bill authorize the Commission to issue regulations implementing provisions of the act. Such regulations are to be promulgated pursuant to the Administrative Procedure Act and are to be based upon a public record after opportunity for a public hearing.

We would suggest that the formal rulemaking procedure prescribed by those sections of the legislation may prove to be unnecessarily cumbersome and time-consuming. The problem may be accentuated by the requirement of section 114(c) that the rules be promulgated no later than 6 months after the date of enactment of S. 986.

We submit that the informal rulemaking procedure used by the Commission for its Trade Regulation Rules would be more efficient and appropriate.

Having mentioned section 114(c), I must point out that this section as presently drafted may pose substantial problems. Literally construed, it could be interpreted to mean that the Commission's power to make rules expires at the end of the 6-month period. I believe that it was intended to give the Commission continued power to make and amend rules and to issue exemptions and that section 114(c) was only to provide a deadline for the initial rules promulgated under the act. I suggest that section 114(c) might be appropriately modified.

Section 110(a) expressed Congress's intention to encourage the establishment of private, informal dispute procedures. The Commission shares that desire. In view, however, of the possible antitrust and other problems inherent in that subject, the Commission believes that such procedures might be subject to rules that may be adopted from time to time by the Commission. I fear that section 104(b) and section 109 may be read in a manner which would not grant the Commission rulemaking power over this subject and suggest that the act be modified to eliminate any possible doubt on this point.

I would like to point out that the provisions of section 104(a) providing that any warrantor must make repairs "without charge" may have a possible anticompetitive effect. Only a large, well financed supplier may be able to bear this burden, thus forcing his smaller competitor to abandon giving any warranties at all.

This would clearly put the smaller supplier at a competitive disadvantage. Similarly, the presence of this possible economic burden may discourage suppliers from giving the type of informative product description contemplated by section 101(2)(b). As a result, the type of information which consumers need may be diminished rather than increased.

The proposed legislation would provide in section 108 that there shall be no express disclaimer of implied warranties to a purchaser if a written, express warranty is given. One unfortunate result of this provision might be the discontinuance of the giving of such written warranties by some manufacturers. This possibility should, of course, be kept under close surveillance and study after the passage of the bill.

One further comment—the provisions of section 104(d)(2) may have the unintended result of limiting the disclosures that may be required by the Commission pursuant to section 102 to those situations involving only warranties which incorporate "Federal minimum standards"—full warranties.

We also note that the bill does not provide for the transfer of warranty protection to subsequent purchasers. The Commission is of the opinion that any warranty should go with the product and that transfer of warranty protection should be mandatory.

The foregoing comments should not be taken to indicate that the Commission has any reservations in its support of the overall provisions of the act and the objectives of the proposed legislation. We unanimously believe that it is imperative to establish a comprehensive standard for warranting all goods which move in interstate commerce.

Title II: Federal Trade Commission Improvements

Taking up title II, the Commission welcomes these amendments to the Federal Trade Commission Act as the answer to its long felt and

continuously voiced need to clarify and overhaul the Commission's enforcement machinery.

I believe that doubts as to the extent of our remedial powers have too frequently required us to stop short of completely fulfilling our responsibility to the consumer. Needless to say, the Federal Trade Commission fully supports title II and urges its enactment as soon as possible.

EXPANSION OF THE COMMISSION'S JURISDICTION

Sections 201, 207, and 211 of the bill would expand the Commission's geographic jurisdiction under the Federal Trade Commission Act to practices affecting commerce. The Commission supports this enlargement of the geographic scope of its jurisdiction as it will enable the Commission to attack selected areas of significant hard-core fraud and deception where particular considerations, such as guidance to local authorities or pilot programs affecting the inner city and ghetto consumer, prompt such enforcement.

I might say that Commissioner Dixon intends to file a separate statement giving his views on this proposed expansion of the Commission's jurisdiction.

(The letter referred to follows:)

FEDERAL TRADE COMMISSION,
Washington, D.C., March 11, 1971.

Hon. FRANK E. MOSS,
Chairman, Subcommittee on Consumers Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In his March 9, 1971, statement before your Subcommittee concerning the Consumer Product Warranties and Federal Trade Commission Improvement Act of 1971 (S. 986), Chairman Kirkpatrick stated that I would file a separate statement giving my views on those sections of the bill which would expand the Commission's geographic jurisdiction under the Federal Trade Commission Act to practices "affecting" commerce. Due to my absence from the city, I was unable to draft and present my views concurrently with Chairman Kirkpatrick's statement.

At the outset, I wish to state that I fully support Title I and Title II of the bill except as hereafter stated.

Amending the Federal Trade Commission Act by inserting the words "affecting commerce" for "in commerce" would give the Commission jurisdiction over myriads of local business if their activities affect interstate commerce. I believe that this would involve the Commission too deeply in local consumer problems—problems which should be coped with by local leaders in State, City and County governments.

Since 1965, the Commission has continuously engaged in a program of cooperation with the states with the view to encouraging local governments to solve local consumer problems. As a result, thirty-one states have adopted laws generally similar to the Federal Trade Commission Act. Additional states have set up a consumer fraud bureau or a consumer complaints clearinghouse. Thus, it can be seen that practically all of the states have taken decisive action toward protecting consumers from deception and preventing unfair practices in the marketplace. I might add that the Commission is also engaged in a program of cooperation and coordination with local governments in the major metropolitan trading areas.

I believe that our goal should be to continue our programs of encouraging local leaders to solve their local problems while restricting the Commission's activity to that of a Federal agency coping with Federal problems.

I am vitally concerned with the substantially increased burden which would be placed upon the staff by enlarging our jurisdiction to include local law violations. I realize that, as indicated in the Chairman's statement, we could use our discretion and not act as a giant neighborhood law office. However, should this amendment be adopted, it is obvious that with the increasing number and activity of consumer groups, our enlarged jurisdiction will be well known. Undoubtedly, pressure to act in each instance of an alleged law violation brought to our attention will increase. Certainly, we could not deny that we have the responsibility. I strongly

believe that we should leave this responsibility with local governments and continue our programs of cooperation with those governments.

Since the amendment would substantially increase our responsibility, I must add one further comment. It would indeed be tragic if our jurisdiction were expanded to practices "affecting" commerce without a concurrent increase in funds to enable us to assume the added responsibility. With our limited funds, I am convinced that we could not begin to reach even the most flagrant of those practices coming within our expanded authority. Frankly, to provide the Commission with this authority without increased funds for enforcement is to hold out false hope to the consumer. There would be increasing pressure to act and no funds to perform. I strongly urge that, if this amendment is adopted, additional funds be immediately provided to enable the Commission to carry out its *full* responsibility.

Sincerely yours,

PAUL RAND DIXON, *Commissioner.*

Mr. KIRKPATRICK. I must note, however, that the Commission does not plan, as a result of any change in jurisdiction, to act as a giant neighborhood law office for dealing with each individual consumer grievance. That function must continue to be handled by State, local, and private instrumentalities.

REMEDIAL POWERS: DAMAGES, REDRESS, AND OTHER RELIEF

The Commission supports sections 202 through 205, which would allow the Commission to initiate suits in the district courts to obtain penalties for violations, engaged in with actual knowledge or with knowledge fairly implied, of practices prohibited by section 5(a)(1) or by any rule promulgated under section 6(g) of the Federal Trade Commission Act.

The Federal Trade Commission, as the agency which over the years has developed a special expertise in identifying fraudulent and deceptive practices and which always has had primary responsibility for dealing with such practices, should have a complete array of weapons and discretion to select the more appropriate sanction for use in a particular case.

I would like to recommend, however, a slight change in the language of proposed section 5(a)(8) of the Federal Trade Commission Act which is found in section 202 of the bill. The draft language reads:

(8) The Commission *shall* initiate civil action . . . against persons engaged with actual knowledge . . . in any act or practice which is unfair or deceptive to a consumer. . . .

This may be interpreted to place a positive obligation on the Commission to bring an action in every situation where such an act has occurred. Coupled with the proposed expansion of the Commission's jurisdiction to cover acts "affecting" commerce, such an unqualified obligation might place an intolerable burden on our resources.

We assume that Congress wishes to continue to give the Commission discretion to act only in such cases that are determined to be in the public interest. I believe that the substitution of the word "may" for the word "shall" in the quoted language may more accurately express the intention of Congress on this point.

COMMISSION ENFORCEMENT OF SUBPENAS AND CIVIL PENALTIES: INCREASE IN CIVIL PENALTIES

The amendments made by sections 206, 209, 210 of the bill, among other things, raise the penalty for violation of a final Commission

order from $5,000 to $10,000 for each violation and authorize the Commission's own attorneys to recover the penalty through a civil action instead of relying solely on Justice Department lawyers as at present. The possibility of a higher penalty, particularly when coupled with more efficient and effective Commission enforcement should serve, I believe, as a stronger deterrent.

The Commission supports the proposed amendments enabling the Commission to act through its own attorneys. This proposal will not only save substantial time and expense, but will permit the Commission independently to enforce the statutes entrusted to it, as originally, we believe, intended by Congress.

Similarly, the Commission must now apply to the Attorney General for enforcement of its own subpenas. In the recent case of *Federal Trade Commission* v. *Guignon*, 390 F. 2d 323 (8th Cir. 1968), the court held that the Commission has no authority to enforce in the courts its own subpenas. The Solicitor General declined to submit this question to the Supreme Court for final resolution.

As a result, challenges to Commission subpenas have increased substantially. Delay between the time when a matter is sent to the Department of Justice and the date it is fillled has become a serious and vexing problem.

It is important that the Commission avoid delays and conserve both Commission and Justice attorney man-hours. It is even more important that the Commission's own attorneys who are experienced in these matters be placed in a position to present the Commission's position directly to the court without delay.

To make the proposed amendments applicable also to the Commission's enforcement responsibilities under the Clayton Act, we would recommend that section 11(1) of that act also be amended to increase its civil penalty provisions from $5,000 to $10,000 per violation.

It is also desirable to provide that the Commission may initiate court action in its own name with respect to the violation or enforcement of any final order issued by the Commission pursuant to the Clayton Act and in the manner provided by section 5(1) of the Federal Trade Commission Act.

RULEMAKING

The proposed amendment in section 208 will make more definite the authority of the Commission to promulgate substantive trade regulation rules defining unfair or deceptive acts or practices. Violation of any such rule is implicitly made an unfair or deceptive practice in violation of section 5(a)(1) of the act. Although the Commission is confident that if challenged it will be upheld in exercising its rulemaking powers, it nonetheless strongly urges that Congress remove all doubt and make explicit the Commission's rulemaking authority.

PRELIMINARY INJUNCTIONS

The Commission is unanimous in its support of this provision in section 212, making explicit the power to seek preliminary injunctions aimed at bringing to an immediate halt unfair fraudulent, or deceptive practices in violation of section 5 of the Federal Trade Commission Act.

Section 212 of the bill would facilitate the performance of Commission's obligation of protecting the rights of the consumer without impinging upon the defendant's procedural rights. The very existence of this explicit authority should deter the fraudulent operators who now deliberately stretch the maximum periods of grace afforded by exercising their procedural rights in an adjudicative hearing before the Commission.

Moreover, the issuance of the injunction will have the salutary effect of expediting the adjudicative process by discouraging unnecessary procedural delays.

The proposed amendment does not grant the Commission unrestrained powers. The bill requires that the Commission can secure a temporary injunction or restraining order from a Federal district court, only after a proper showing to the court that the Commission has reason to believe that an act or practice is unfair or deceptive to a consumer and that the enjoining thereof would be to the interest of the public. With this safeguard of court action, the public interest in protecting consumers from alleged frauds and deceptions is weighed against the right of a businessman to continue to engage in the practice in question.

In closing, let me say again that in the Commission's view the earliest enactment of S. 986 would accomplish more to achieve consumer protection in the marketplace than any other possible action which could be taken.

Thank you, sir.

Senator Moss. Thank you very much, Mr. Chairman. That is a very fine statement and it contains a lot of material that we must consider here in the subcommittee.

We do appreciate the overall concurrence of the Commission in the provisions of the bill and the intent that we have for it. You have suggested some areas where perhaps there should be some clarification; we appreciate those suggestions.

For example, I understand the point you make regarding the implementation requirements of the bill. There was certainly as far as I know no intention to cut off the rulemaking power of the Commission after 6 months.

So I can assure you we will clarify that provision in reporting the bill. We are glad to have had you address yourself to it.

In your statement you ask the committee to give you authority to supervise the establishment of private informal dispute settlement procedures. Is the Commission presently working with any group to foster the development of informal dispute settlement mechanisms?

Mr KIRKPATRICK. We are working informally, sir, with a number of groups looking to that end.

As a matter of fact, I have here an address I gave to the New York Bar Association which sets forth as part of it the criteria which the Commission, in my view—this is of course not an expression of a commission position—but it is an analysis of the decisions that relate to the whole problem of voluntary regulation of this kind.

I would be very happy to make this available to the subcommittee should that be desirable, sir.

Senator Moss. Thank you. We would like to have that for the record.

(The statement follows:)

The Federal Trade Commission and Antitrust Enforcement

REMARKS OF MILES W. KIRKPATRICK, CHAIRMAN, FEDERAL TRADE COMMISSION, BEFORE THE ANTITRUST LAW SECTION OF THE NEW YORK STATE BAR ASSOCIATION

It is a pleasure and honor for me to have this opportunity to address the Antitrust Law Section of the New York State Bar Association. I know that I am among many friends on this occasion, many of whom I have known and respected throughout my career in private practice.

I must admit to a feeling of some uneasiness in addressing you for the first time from the "Government" side of the table, but I must also admit to a feeling of great delight in being on that side at this particular moment in the FTC's history. The task that lies ahead for the Federal Trade Commission in the field of antitrust will be an exciting challenge, and the prospects for success and progress have never been brighter. I intend to substantiate this optimism in the next few minutes, and the best starting point is a report on some changes in our personnel.

The key staff position in our antitrust enforcement program is, of course, the Director of the Bureau of Competition. Since his appointment to that post less than three months ago, Mr. Alan Ward has brought to the Commission, in addition to his well-known skill and experience, a sense of dedication, imagination, and enthusiasm which is spreading throughout the rank and file of his entire Bureau. With Alan Ward at the helm, you can expect to be hearing from the Bureau of Competition.

As you all know, the Bureau of Economics provides vital insight and expert economic analysis to support the enforcement activities of the Bureau of Competition. I am delighted that Dr. Michael Mann, who is presently Chairman of the Department of Economics at Boston College, has agreed to join us as our new Director of this vital Bureau. Our economists are enthusiastic over the opportunity to work under Dr. Mann's supervision, and all of us at the Commission are awaiting his arrival with very high expectations.

We have undertaken a vigorous law school recruitment plan and have had remarkably fine results. Last year only 25% of those who were offered positions at the Commission accepted and were added to the staff. This acceptance ratio, as well as the general caliber of student applicants, has now been drastically changed. The rate of acceptance thus far among June '71 graduates has been 58%; many of these young men are top honor students and editors of their law reviews. This is indicative of the tremendous new interest in the present work of the Federal Trade Commission. These young attorneys are the future of the Commission.

One source of criticism in the past has been the Commission's failure to plan adequately so that it cold allocate its limited funds to those areas in the business community which might produce a maximum enforcement return. We have responded to that criticism by creating and staffing with top flight talent an Office of Policy Planning and Evaluation. Although this office is still in its infancy, it has already had considerable impact on Commission policy. The Bureau of Competition is in constant contact with this new office and there is day-to-day consultation at the policy planning level.

The Commission's field offices will, I believe, be increasingly assuming a major new role in antitrust enforcement with their new responsibility for the investigation and prosecution of important antitrust cases of a regional nature. While I am on the subject of field office changes, I am most delighted to report on the very recent appointment of Richard Givens to head our New York Field Office. He is a former Assistant United States Attorney with a wide background and broad experience in criminal litigation and consumer affairs. Mr. Givens is ideally suited to head the New York Office, and I have every reason to expect innovation and progress under his direction.

Much has been said concerning the crippling delays in procedure involving antitrust matters pending before the Federal Trade Commission. This criticism has not escaped our attention and, as many of you know, there is now a high ranking committee of experienced practitioners and law professors (including former Commissioner Elman) working jointly with Commission personnel in studying our rules of practice and procedure. I am certain that this study group will recommend rule changes which will have the effect of expediting matters before the Commission, while at the same time insuring respondents of maximum fairness and procedural due process.

A brief review of the principal antitrust problems to which our resources are currently devoted will further substantiate the optimism expressed at the beginning of my remarks. First let me say that I have no intention, of course, of prejudging, or expressing any view on, any issue involved in any pending or future case in which I may participate in an adjudicatory capacity.

I know it will come as no surprise to anyone if I say that Section 7 will continue to receive high priority. Nor will it be astonishing if I say that reciprocity continues to be a major concern, and in that regard, we announced in September that we will no longer accept assurances of voluntary compliance with respect to these practices.

We are also engaged in a broad scale investigation of franchising. This form of business organization has been growing at a rapid rate and is estimated by some to account for 10% of the gross national product. The apparent pervasiveness of certain franchising problems has made an overall approach to franchising necessary. These problems include franchisor control of franchisees' pricing, purchasing, and selling decisions; franchisor acquisition of franchisees; acquisition of franchisors by conglomerates; franchisor interference with the right of franchisees to sell their operations as going businesses; and unjustified terminations of franchisee agreements. The Commission expects within a short time to receive the staff's report on these problems, along with recommendations for our enforcement policy in this area.

While the principal thrust of our enforcement efforts in the immediate future will be directed at the prevention of anticompetitive practices, we do not intend to ignore existing market structure. The Commission has begun a broad-scale study of concentrated industries in order to ascertain the competitive effects of industry structure, the conduct of industry members, and the interplay of these two factors. Our initial inquiry will be in the cereal industry. To the extent that our resources permit, we intend to conduct similar studies of other industries. I believe these studies will set a pattern for a comprehensive and systematic program of legal and economic inquiry that will serve as the foundation of enforcement activity.

I know you would all be concerned if I neglected to mention the Robinson-Patman Act; so I will now emphasize, with due solemnity, that the Robinson-Patman Act will not be neglected, and I firmly believe that its enforcement is essential as a deterrent to unfair and predatory pricing practices. There is no disagreement among us at the Commission about the need to protect the small businessman against systematic discriminations that flow from the abuse of large buying power in the hands of giant rivals.

However, we do not intend to ignore the mounting criticism of past R-P enforcement, which is said to have encouraged price rigidity and discouraged aggressive competition. The Commission is committed to undertaken a study of its previous Robinson-Patman orders. It will focus on ascertaining whether our orders have achieved their stated objectives, and determining their total impact on the competitive process—whether they have enhanced or diminshed competition, encouraged or deterred new marketing techniques and innovations. From this study should come a blueprint for future Commission action in the enforcement of the Robinson-Patman Act.

Finally, I want to emphasize the variety of activities presently undertaken by the Commission staff. We are not neglecting the per se illegality of price maintenance schemes, customer restrictions, tie-ins, and territorial restraints, and our files in such matters will, of course, be made available to the Department of Justice for criminal prosecution in appropriate cases. However, our future efforts will lie to a great extent in the exploration of new kinds of problems, new business arrangements which involve competitive dangers of a type not yet recognized, or fully appreciated, in court cases or established principles. Section 5 of the Federal Trade Commission Act has been likened to a slumbering giant. Our authority extends to all "unfair methods of competition", and this is one of the broadest mandates granted to any government enforcement agency. The Commission intends to use this authority to its fullest extent, to reach all practices with anticompetitive impact.

It has been my intent in the past few minutes to give you assurances that the Federal Trade Commission is today alive and well; that we are moving into "high gear" in the task of preserving and promoting competition throughout the American economy; and that we fully intend to be in the vanguard of exploration of the new frontiers and antitrust law.

However, I think it is important to keep in mind the fact that our boundless enthusiasm in the administration of our enforcement program is properly tempered by our very limited manpower resources. Sensible policy planning and resource allocation demands a recognition that "All the King's Horses and All the King's Men", of the FTC and the Antitrust Division combined, are simply not sufficient to deal with every competitive defect existing in every industry throughout the economy. Because of this limitation, I have become increasingly interested in the potentialities of industry self-regulation as a useful supplement to government regulation. Of course, it is widely recognized that industry self-regulation can create as many or more antitrust problems as it might solve. But I am particularly intrigued with certain types of industry self-regulation which, if abused, become devices for excluding new entrants, boycotting competitors, and otherwise undermining the competitive vitality of entire industries, but which, if properly structured, could contribute substantially to the goal of consumer protection, in terms of product safety, integrity of advertising, and greater availability of product information.

For example, the concept of self-regulation with respect to advertising practices is nothing new; trade associations have sought to perform this function. The advertising agencies have also expressed interest, and advertising media have become involved. Perhaps the most far-reaching proposal thus far is the one put forward in September of 1970 by Victor Elting, Chairman of the American Advertising Federation. His proposal calls for the creation of an independent advertising review council, "not a creature of industry, government, media, or any other interest, but a body that combines the broad knowledge and judgment of all concerned".* The council would have representatives of the public as well as of industry. When the council determines that advertising abuses exist and persist, it would take action to bring about compliance with its own standards of proper advertising.

The promulgation of standards and standards certification are also not new, but it is the subject of increasing concern and interest. While trade associations participate to some extent, the bulk of this activity is conducted by presumably "independent" standards organizations working with testing laboratories. Certification is generally based on a licensing system, whereby manufacturers pay a fee for the use of a certification mark on products which have passed the licensor's various standards. It is important to recognize the distinction between "specification" or "design" standards, on the one hand, and "performance" standards on the other: the former define materials and forms, while the latter tell what a product should do, no matter how it is made. Either type may be used to measure product safety, durability, or other indicia or product quality.

The Commission is dedicated to consumer protection in the broadest sense; thus, we have an interest, it seems to me, in encouraging the development of industry self-regulation of the kind just described, But because of the potential for anticompetitive practices inherent in such schemes, the Commission is unable to give an unqualified blessing to activities of this nature. Nor is the Commission likely to be able to give firm advice or fully satisfactory assurances, in the form of advisory opinions or otherwise, regarding the legality of any particular industry proposal, because of the many variables affecting such a judgment. We recognize that this uncertainty introduces an element of grave risk and peril into the development of potentially beneficial programs of self-regulation, and clearly this is unfortunate in its tendency to deter or impede the planning of such programs. Much thought and study is being devoted to this situation, and hoepfully a "solution" of some kind will eventually emerge, in the form of clear guidance in determining the line of demarcation between the legal and illegal aspects of self-regulation.

There is, of course, a considerable body of case law dealing with this question in the broadest terms, and it provides the starting point for thinking in this area. The case law needs refinement and further development for the sake of providing greater clarity and giving practical *guidance,* Hopefully the Commission will play a role in this process. I have neither the desire nor ability to predict at this point the course that will be pursued by the Com nission or the courts in future litigation. But I would like to offer a few thoughts on some of the implications and some of the guiding principles that emerge from the present state of the law on this subject.

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*Victor C. Elting, speech before Chicago Advertising Club, Sept. 17, 1970.

Our point of departure is a case of great popularity among antitrust defendants: *Chicago Board of Trade* v. *United States*.[1] That case articulated a broad rule of reason to govern self-regulation in situations involving potential competitive dangers:

"The true test of legality . . . is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

However, the law has evolved, and I believe properly, away from the rather lenient approach of that case to a point where virtually *any* trade restraint imposed by self-regulation is at least suspect and deserving of close scrutiny. The Supreme Court has taken what may fairly be described as an increasingly negative attitude toward restraints imposed in the name of business ethics or public interest, in a long line of cases from *Paramount Famous Lasky*[2] and *Sugar Institute*[3] in the 1930's to *Fashion Originators' Guild of America*,[4] *Radiant burners*,[5] and *Silver* v. *New York Stock Exchange*.[6]

However, some have suggested that all of these cases involved situations in which self-regulation was thought to be a cover for clearly anticompetitive purposes or practices, and thus do not indicate a hostility to *legitimate* schemes of self-regulation. Further, some lower courts have been notably more sympathetic than some people might deem wise, and such recent cases as *Structural Laminates* v. *Douglas Fir Plywood Association*[7] and *Marjorie Webster Jr. College* v. *Middle States Association of Colleges and Secondary Schools*[8] (both of which were denied certiorari by the Supreme Court) have fostered great uncertainty as to the state of the law in this area. The Commission has attempted to narrow this uncertainty and to provide some guidance in the form of advisory opinions over the past several years, but much remains unclear and surely unsatisfactory in terms of the attainment of some proper balance between the competing interests involved in these questions.

But on the basis of existing legal analysis, I would think that anyone who desires to organize or sponsor the kinds of self-regulation to which I have referred would be wise, as a minimum, to consider the following precautions:

1. While commendable motives may at times be relevant to the question of legality, the actual or likely *effect* of a particular program will usually be determinative, and the best of intentions will not suffice to legitimize a means of self-regulation which has a dampening impact upon competition.

2. Due process requirements, including the right to notice, hearings, and an appeal or review process, should be scrupulously observed before making any decision or taking any action which adversely affects any interested party, and when I say "interested party", I include consumers.

3. The program should avoid exclusionary or coercive tactics or effects, and any reliance upon practices of that nature would be subject to a severe burden of justification. Any lawyer advising his client as to the propriety of any enforcement mechanism in connection with self-regulation would do well to consider the lesson of *Fashion Originators' Guild* and *Radiant Burners* concerning the use of sanctions or imposition of injury on offending industry members. The vice of all such tactics is that they are, in effect, the private assumption of public power, the extra-judicial imposition of punishment and a dangerous entrenchment upon the legislative authority of the Federal Government.

4. The program should be based on clearly defined standards that give adequate notice of the line of demarcation between what is considered "proper" and what is considered "improper".

5. The standards should be "reasonable" in terms of being related to the legitimate purposes for which the program exists; they should be sufficiently general to avoid unessential restraints on the individual businessman's imagination and freedom; but sufficiently precise to insure objectivity in their application and impartiality in their enforcement. Needless to say, the arbitrary administration or manipulation of otherwise "reasonable" standards or regulations would invite action by the Federal Trade Commission.

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[1] 246 U.S. 231 (1918).
[2] 282 U.S. 30 (1930).
[3] 297 U.S. 553 (1936).
[4] 312 U.S. 457 (1941).
[5] 364 U.S. 656 (1961).
[6] 373 U.S. 341.
[7] 261 F. Supp. 154 (D. Ore. 1966), *aff'd per curiam*, 399 F. 2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).
[8] 1970 Trade Cases Para. 73, 252 (D.C. Cir. June 30, 1970), *cert. denied*, ——— U.S. ——— (1971).

6. While the legitimate scope of this self-regulation may extend beyond a concern with deception, any such program which goes beyond that point in an effort to prohibit or discourage other presumed "abuses" or "unfair" practices should proceed with extreme caution, to insure that such additional restraints on business activity do not result or contribute to restraints on desirable forms of competition.

With particular reference to standards certification, I heartily recommend that careful thought be given to the views of Assistant Attorney General Richard W. McLaren, given in response to questions put to him by the National Commission on Product Safety. Mr. McLaren's views are summarized in the Safety Commission's Report of June, 1970,* and although they were directed at *safety* standards only, the rationale behind them would seem to apply to standards generally, including performance and quality.

Mr. McLaren's first point was that compliance must be *voluntary*, and I have already discussed my own view on the dangers of any use of coercion.

The second point was that a wide cross-section of interested parties should be invited to participate in developing the standards, and I am sure he would agree that this includes *consumers* as well as other parties.

The third point was that discrimination must be avoided. Testing procedures and certification should be made available on an equal basis to all competitors, and the organization administering the whole standards program should be truly *independent* (including *financially* independent, if possible) of the manufacturers whose products are in issue.

The fourth point was that undue restrictions on freedom of design should be avoided. Hence, performance standards are preferable to material or design specifications. A related point is that a single-standard, pass-fail system has a dampening impact upon competition with respect to product quality and technical improvements. Hence, multi-grading systems are preferable.

If I may be so bold as to add to Mr. McLaren's very careful listing of the relevant considerations, I would add two points:

First, the organization sponsoring, adopting, administering, or enforcing such standards should make every effort to insure that its standards reflect existing technology; to insure that they are kept current and adequately up-graded to allow for technological innovation.

Second, unless clearly required by considerations of safety, the program should not be used to reduce, restrict, or limit in any manner the kind, quantities, sizes, styles, or qualities of products.

As I have suggested, I am becoming increasingly interested in the success of self-regulation, because of the great potential offered for benefits to the consumer, in terms of reliability and availability of product information.

I believe the Commission could perform an important service in facilitating and encouraging the development of desirable programs of self-regulation, by providing more guidance in the structuring of such programs in a manner that will avoid the antitrust dangers to which they are subject. The Commission is the foremost federal agency in the field of consumer protection, and one of two agencies having broad antitrust responsibility. This dual function suggests that the Commission is in a unique position to take the leading role in the reconciliation of self-regulation to the ultimate best interests of the consumer. I invite suggestions from any and all sources as to the best policy or procedure for us to follow in the fulfillment of this new mission. But let there be no mistake about our intentions or enforcement policy: The Commission will not condone any plan or scheme of self-regulation or certification which, because of defects in its structure or organization, poses any danger to competitive vitality in the affected industry.

Mr. KIRKPATRICK. I have in a number of public utterances made it clear, speaking for myself, not necessarily for the Commission, that I view with great interest the efforts, particularly of the advertising fraternity, to set up some means of satisfactory voluntary regulation, short, of course, of the antitrust problems that one comes upon in trying to work out such a scheme.

Senator Moss. In your statement you argue for the authority to establish rules in accordance with the informal rulemaking procedures of the Administrative Procedure Act.

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*National Commission on Product Safety, Final Report June 1970, p. 59.

Did the ABA study on the Federal Trade Commission suggest the use of informal rulemaking as a way of making the Commission a more effective agency?

Mr. KIRKPATRICK. I believe the ABA Commission, of which I was chairman, did exactly that, sir. On pages 57 and 58 of the published printed document which comprises the report, our thinking on that matter as to an increased use of the trade regulation powers is set forth.

We have ongoing now, I might say, in the last 6 months, a number of trade regulation rule proceedings. We have a proposed holder in due course proceeding that is onstream. And I believe, Mr. Chairman, that you presented a statement on the door-to-door sales trade regulation rule that we had hearings on yesterday.

We have a negative option proceeding. We have also our pricing trade regulation rule proceeding. In addition we have adopted an octane trade regulation, a rule requiring the statement of the octane ratings of various motor fuels.

Senator Moss. In your statement you say it appears unlikely that collective voluntary action will provide for effective solution of the warranty abuses. Is this because competition often forces warrantors to seek the lowest common denominator?

Mr. KIRKPATRICK. I would suggest, Mr. Chairman, that the matter of a warranty or guarantee is a matter of competition, as any other similiar kind of fringe benefit, if you like, that sellers compete in respect of in the marketplace. And as in every other such matter, there are deceptive operators and there are those who compell others, perhaps, to seek a lower common denominator than otherwise would be the case if there were proper regulations.

Senator Moss. By saying the warranty is often used as a selling tool, you recognize, of course, that this Act does not require the giving of a warranty, that a seller may sell without any warranty or guarantee. But if he chooses to give it, then it must meet certain standards and mean what it says.

Mr. KIRKPATRICK. Exactly, sir.

Senator Moss. Do you support the provisions of the bill which allow the consumer to go to court to obtain redress and secure court costs and reasonable attorney's fees if he is successful?

Mr. KIRKPATRICK. Yes indeed, sir; as indicated in my statement, I think that is a very appropriate provision.

Senator Moss. And you also support the provisions of the bill that allow the Commission to order specific redress for consumers who have been victimized by unfair or deceptive practices?

Mr. KIRKPATRICK. That seems to me to be a very keystone portion of the act, sir.

Senator Moss. So there are really two avenues of enforcement available if this act becomes law?

Mr. KIRKPATRICK. Yes, sir.

Senator Moss. In your opinion will these formal dispute settlement mechanisms encourage industry to develop workable informal settlement procedures?

Mr. KIRKPATRICK. I would think the result would be as you suggest. When the industry is faced with the realistic possibility of Commis-

sion action, where there is fraud or deception and with the possibility of court action by the consumer, I would think that a wholly appropriate and wholly expectable reaction on the part of the industry and manufacturers would be a disposition to try to create a method of voluntary settling of disputes of this sort, rather than permitting the matter to go into the courts.

Senator Moss. In your testimony you state that the prohibition against disclaimer of implied warranties might cause some suppliers to refrain from giving express warranties.

Wouldn't this be advantageous to consumers, because implied warranties are sometimes stronger than express warranties, and they would still be available even if express warranties were not given?

Mr. KIRKPATRICK. I am a little puzzled by that provision in the act, sir.

I think, as I suggested in my statement, I do have some question as to just what the intended effect, if you please, of that particular provision in the legislation is.

Senator Moss. In my opinion, the rationale here is to prevent a supplier or retailer who gives an express warranty from downgrading or taking away from the consumer what he would normally have through an implied warranty, that the product was suitable and safe for the purpose for which it was sold to him in the first place.

And I think it is an attempt by drafting to say you really can't any more derrogate from what any buyer is entitled to through the implied warranty.

Mr. KIRKPATRICK. If I may just comment on that, sir, as I recall the law, in some States it was to the effect that implied warranties could be totally removed by any express warranty. And of course that makes for a rather deceptive situation. A seller can make a rather inconsequential warranty of little dimension or worth, and thereby completely negate, as you suggest, sir, the implied warranties of fitness and merchantability.

If the provision 108 is directed to that, and is intended simply to state that the making of an express warranty does not negate the existence of implied warranties, then I would be whole heartedly in favor of it, sir.

Senator Moss. Thank you. We will look at that very carefully.

Did the American Bar Association study of the Commission recommend that the Commission's jurisdiction be expanded to cover matters affecting interstate commerce?

Mr. KIRKPATRICK. I think implicit in our report, sir—I cannot tell you as I sit here that such a recommendation in so many words was made—but implicit in it was the recognition that the expanded jurisdiction was desirable; yes, sir.

Senator Moss. Has the Commission already taken some steps to attack hard core fraud, as you characterize it in your statement?

Mr. KIRKPATRICK. We have moved, I would say, sir, on 11 fronts. We have 11 field offices, and in each instance the field offices have been beefed up with additional personnel, new job classifications. They have increased responsibilities in the matter of bringing complaints and trying cases in the field.

In addition, in some of the offices there have been consumer hearings in inner city and ghetto situations. I would say we have not had the opportunity to take, on all fronts, the kind of action that I look forward to.

Senator Moss. Do you accept the use of the preliminary injunction as an unusual power for a consumer protection agency, or do some States now provide their consumer protection representatives with such authority?

Mr. KIRKPATRICK. As the chairman may recall, the Commission, in I think 1966 adopted—didn't adopt, but it drafted a model State "Little FTC Act." We were instrumental in urging upon many of the State legislatures the adoption of those acts. Some 31 States, I believe, sir, now have adopted the so-called little FTC Acts. And in a substantial number of cases—I have no count—the agency that enforces the act may seek a preliminary injunction before the courts.

Senator Moss. This is limited to a fairly narrow sort of event, where a preliminary injunction is sought. Would it be your purpose to have the Commission use that rather sparingly, the preliminary injunction? Or how widely do you expect it will be used?

Mr. KIRKPATRICK. That is I think a very difficult question for me to answer. It would obviously I think not be used in the run of the mill case, where the additional time that it might take for the Commission to reach final disposition of the matter before it would be of no consequence. Whereas if it is a matter of serious injury to the public and to the consumer, and we can't get any voluntary agreement to bring it to a conclusion, I would say the public interest would demand we seek a preliminary injunction in those instances.

Senator Moss. I would assume that we could expect the court to order, it it granted a preliminary injunction, to require the Commission to file its complaint and proceed with the action within a reasonably short time, so that we wouldn't have a long injunction hanging on without having the matter fully heard and finally adjudicated by the court.

Mr. KIRKPATRICK. I would be surprised if many district judges would enter an order without such a terminal point, sir.

Senator Moss. The President's Advisory Council on Executive Organization recently proposed that the Federal Trade Commission's dual role as formulator of competition policy and protector of consumers be eliminated. Instead the Ash council proposed the creation of a Federal Trade Practices Agency and a separate Federal antitrust board.

As Chairman of the Commission, do you think such a division of the Commission is appropriate, or do you think the present duality of responsibility is necessary if American consumers are to be protected?

Mr. KIRKPATRICK. Mr. Chairman, I believe that having antitrust and consumer protection law enforcement responsibilities—I might say I have here this statement, because I gave some preliminary thoughts on this in an address to the bar association in Philadelphia recently, so I think this accurately sets forth my, at least, then thinking and present thinking on the matter.

I believe that having an antitrust and consumer protection law enforcement responsibility under one roof is important in the over-all protection of the American consumers' interests.

There are many aspects of the Commission's work which involve a cross input as between antitrust and consumer-protection considerations.

For example, there come before the Commission questions concerning the adoption of trade regulation rules designed to eliminate deception in advertising or pricing. There is always the real possibility that a rule, although well designed to eradicate a deceptive practice, does so only at the expense of dampening competitive conditions. Frequently rules that are generated by the consumer protection side of the Commission are referred to the Bureau of Economics of the Commission, and the Bureau of Competition also, whose comments may be crucial in the adoption of the rule.

As another example, we are considering proposing a trade regulation rule covering franchising. Questions for resolution in proposing such a rule would include limitations to be placed on anticompetitive covenants.

The same blending of consumer protection and anticompetitive considerations arise in considering, for example, a rule involving fictitious pricing. A proper limit should be placed on price representations to avoid deception, while at the same time avoiding any chilling effect on price competition.

I think the joining, therefore, under one roof of the two, the consumer protection and antitrust activities is a proper efficient and wholly—well, they just belong under one roof, sir, in my judgment.

Senator Moss. Would your inclination to support the existing framework of the Commission with the added enforcement tools provided in this bill, enable you to carry out that function better than if the two agencies were created?

Mr. KIRKPATRICK. Yes, sir; I believe that in addition to what I have said, the consumer protection movement may slowly but steadily be moving toward an increase in the structural market considerations being central to certain kinds of consumer abuses. As a result the Federal Trade Commission, which has trained personnel in both disciplines, along with the supporting economic staff, is particularly well equipped to deal with the many and most important consumer protection and anti-trust competition likely to arise in the next decade, sir.

Senator Moss. I appreciate your response. When this subcommittee held hearings last year on advertising practices of certain dry breakfast cereal manufacturers, it was suggested that the anti-nutritional advertising assault was fostered by the existence of an oligopoly in that section of the industry.

This suggests to me the relationship between the market structure and the trade practices may be mutually dependent and may require an agency such as the existing Federal Trade Commission to appropriately deal with these problems.

Is that part of what you have said?

Mr. KIRKPATRICK. Yes, sir; that was a part of that which I just stated, that I think the two may be moving together inevitably as a

structure and the behavioral part of it is really one aspect of the same problem.

Senator Moss. We certainly appreciate your statement and appreciate the support you have expressed for S. 986.

Senator Cook may have some questions.

Senator Cook?

Senator Cook. Thank you, Mr. Chairman.

As you know, Mr. Kirkpatrick, many things you said this morning you and I agree on, on some of them we disagree. I recall, as a matter of fact, when you and I first met and you were under consideration for the post you now hold, that we discussed the rather cumbersome problem that the Commission has in coordinating its legal actions with the Justice Department.

And I felt then as I feel now that the FTC ought to be given substantial authority to move ahead in this direction.

Mr. Kirkpatrick. Yes, sir.

Senator Cook. Thus on this I really have no disagreement with you. One thing that does bother me, however, is in regard to the remarks in your statement concerning rulemaking, "We submit the informal rulemaking procedure," used by the Commission for its trade regulation rules would be more efficient and appropriate. You wish to adopt rules from time to time according to the informal procedure. Do you think a procedure should be this informal, when it gives to the Commission the authority to impose $10,000 fines on each and every violation?

Mr. Kirkpatrick. Perhaps the term "informal" sir, is a bit misleading. Our rulemaking procedures now I think give substantial guarantees to anybody who wishes to be heard to be heard by us on a record that is a public record in a public hearing. We do not have nor do I think indeed, sir, that we should have the complete right of cross-examination, or the complete right of discovery.

In my own view, the Commission can adopt fair rules without the delays, the unending delays and interruptions that I am fearful would really break down our rulemaking proceeding were full cross-examination and discovery as a matter of due process to be compulsory. I would be very apprehensive that it would be a month of Sundays and much longer before we could adopt a rule that was going to be unpopular to those who would be governed by it, and by and large rules are not always the most popular thing, people have to change their ways because of the existence of a rule and the longer they can fend it off, the happier they are. That is my problem.

Senator Cook. I am not sure you can have your cake and eat it too. I am not sure you can want the authority to proceed in court on your own, want the authority to determine your own violations, want the authority to recommend civil penalties up to $10,000 per violation, without also having to assume the responsibility for devising a better procedure for establishing rules than the procedure set forth in the bill under consideration.

As you well know, I fought with the Chairman last year in regard to that very section and insisted that the right of cross-examination be afforded to those affected by the regulations. I very strongly feel that if you are to be extended the authority to initiate legal actions,

the authority to adopt your own procedures, and the authority to levy penalties, I don't think it can be on an informal basis. I think the procedure has to give to both the aggrieved and to the defendants the right to be participants in the rulemaking authority.

Mr. KIRKPATRICK. Of course, that right, as you understand, sir, does exist now, the right to be heard is certainly offered to all who have any concern about the rules.

Senator COOK. I might say to you that without a record in regard to proposed hearings, I am afraid judicial review would be practically meaningless. I think you have to establish that record. I think you would agree to that.

Mr. KIRKPATRICK. We have a record, of course, sir.

Senator COOK. Let me ask you one other thing. One thing that bothers me throughout this legislation is the oft-used phrase, "A reasonable man exercising due care." I really can't quote all of the cases to you, but I went to Words and Phrases and came back with a mountainous stack of books that gave vastly different definitions of what a reasonable man exercising due care means.

I think you can find this throughout the judicial system. I wonder if we shouldn't be more specific in the manner in which we define a consumer, and if we should not set forth the legal relationship between a consumer and a supplier, for the purposes of this legislation.

Mr. KIRKPATRICK. Senator, could you be a bit more explicit as to just in what portions of the bill?

Senator COOK. It is in here on many occasions. Section 2 of 110, page 13:

> For the purposes of this subsection, a deceptive warranty (guaranty) means: a guarantee or warranty that contains an affirmation, promise, description or representation that is either false or fraudulent, or that, in the light of all circumstances, would mislead a reasonable man exercising due care; or fails to contain information that is necessary, in light of all of the circumstances.

Now, does not "in light of all of the circumstances" actually mean that each sale would really modify the term, "reasonableness."

Mr. KIRKPATRICK. Yes, sir.

Senator COOK. Do you agree with this?

Mr. KIRKPATRICK. I would think "in light of all circumstances" would imply that; yes, sir.

Senator COOK. Do you think a distinction should be made in regard to the amount of liability of the manfuacturer and that of the supplier? In this bill there is no distinction; it merely says the right of recovery to a consumer is his purchase price. This does not take into consideration the differentiation between the sale price of a manufacturer to a supplier, the sale price of the supplier to a retailer, and the sale price from a retailer to a purchaser.

There is no distinction in this bill whatsoever.

Mr. KIRKPATRICK. Well, I suppose that the distinction—I haven't thought about this, but let me address myself to it—from the consumer points of view, the consumer, let's say, has spent $10 and he spent that on a misrepresentation and has got shoddy merchandise that either should be replaced or his price should be replaced.

I would think the one who is responsible for the expenditure of that amount of money, which didn't get what the consumer had every

right to believe he was getting, should replace the $10 or the particular item that is defective or is malfunctioning.

Senator COOK. I agree; this is the very point that this bill misses, because in effect what this bill would do is to force the manufacturer to operate its own retail outlets, because it is not going to be able to recover the price differentiations, and therefore will have to cut off its retail suppliers in small communities. Consequently, we may find that the only manufacturers who can live under this bill would be General Electric, or Sears, Roebuck, or Montgomery Ward.

Mr. KIRKPATRICK. Or indeed the manufacturer might produce merchandise that is consistent with the guarantee or warranty, sir.

Senator COOK. But you can't deny the consumer his right to the marketplace by imposing this obligation in the wrong direction.

Don't you agree? You are writing a bill that says we are going to see to it the manufacturer supplies a better product. At the same time, you will be imposing an obligation that will result in the purchaser paying a greater amount for a product. Therefore, you are either denying him the right to purchase, because of the increased price, or you are denying the manufacturer the right to a competitive market.

Mr. KIRKPATRICK. Of course, there is no obligation under this act, sir, that anybody would give a warranty or guarantee. That is a matter of option. It is a matter of the competitive marketplace, whether or not the manufacturer can indeed sell their products with a full warranty or partial warranty. All of those competitive matters must shake down before we see how this act will work.

Senator COOK. I am afraid you may be chasing every manufacturer out of the warranty business. Have you found in the instances of "hard core fraud" that you mentioned, that this fraud is more predominantly perpetrated by suppliers or manufacturers?

Mr. KIRKPATRICK. I would guess that my knowledge is not sufficient, but I think, probably, the suppliers are the most guilty in such experiences as I have had in the matter, sir.

Senator COOK. Mr. Kirkpatrick, just one last question. Would the Commission be able to comment for the record on the administration's proposal within the next few days or so, in order that these views will also be before the members of the subcommittee and also be a part of the record?

Mr. KIRKPATRICK. We would be very happy to, indeed.

Senator COOK. Thank you very much.

Mr. KIRKPATRICK. Thank you, Mr. Chairman.

Senator MOSS. The Senator from Michigan, Mr. Hart.

Senator HART. I apologize for getting here late. I have not yet finished reading your statement, but I have enjoyed the exchange.

As appropriate for somebody who came in late, let me ask if I understand correctly, the bill doesn't require anybody to do anything in terms of giving a warranty; is that right?

Mr. KIRKPATRICK. That is substantially correct.

Senator HART. What it seeks to do is say if you give a warranty, speak the truth?

Mr. KIRKPATRICK. Yes, sir.

Senator HART. Do you think this has anticompetitive consequences.

Mr. KIRKPATRICK. Except with respect to the very few points that I mentioned in my statement, I do not think it will have those consequences, sir.

Senator HART. Nor do I. Did my inquiry oversimply the purpose of the bill?

Mr. KIRPATRICK. No; I do not believe it did, sir.

Senator HART. Thank you very much.

Senator MOSS. Thank you, Senator Hart.

We do appreciate your testimony and these suggestions that you have made. As I indicated in some of my questioning, I see the merits of some of those recommendations rather quickly, and others we want to study and discuss.

I appreciate the questions propounded by my colleague, Senator Cook, and recognize that this is a considerable step forward, although we discussed it so fully and completely last year, that I sort of feel we are along the way a bit and we don't need to prolong too much our hearings this time, except to get the expert point of view of the Commission, and you as the Chairman have come here today to give those views to us.

Mr. Kirkpatrick, I would appreciate it if you would furnish for the record an analysis of two points raised in my mind by this legislation:

1. The role of cross-examination in proceedings to adopt trade regulation rules; and

2. The extent to which State laws are preempted by FTC regulations.

Mr. KIRKPATRICK. Certainly, Mr. Chairman.

Senator MOSS. We are going to have 2 additional days of hearings next week, as I announced. But hopefully after that we will be able to get into executive session and try to get the bill in shape, so that we can report it and get it on the floor of the Senate without much delay.

This is the only witness that we have scheduled for this morning, and so we will now stand in recess until Monday of next week when we will meet here at 10 a.m.

(Whereupon, at 11:15 a.m., the hearing was adjourned, to reconvene at 10 a.m., Monday, March 15, 1971.)

(The following information was subsequently received for inclusion in the record:)

FEDERAL TRADE COMMISSION MEMORANDUM

MARCH 12, 1971.

To: Chairman.
From: General Counsel.
Subject: Cross-examination in trade regulation rules.

PURPOSE

It has been suggested that the Commission must, or should, permit cross-examination and other judicial accouterments in its trade regulation rule proceeding.[1] The purpose of this memorandum is to examine first, whether the Commission is required by the Constitution or by Congress to permit cross-examination; and and second, if not required, whether the Commission should permit cross-examination as an improvement to the rulemaking procedure.

[1] *See, e.g.,* statement of William Simon, Hearing on the Federal Trade Commission's Proposal Trade Regulation Rule on Unsolicited Credit Cards, September 10, 1969; Statement of Gilbert H. Weil, Hearing before the Committee on the Judiciary, United States Senate, August 31, 1970.

WHAT IS RULEMAKING?

Generally, rulemaking is any agency action, which resembles the actions of legislatures, for developing facts and for issuing interpretations of law which affect the rights of individuals in the abstract only, but may be applied, along with accumulated data, in a subsequent adjudicative proceeding. Section 2 of the Administrative Procedure Act defines rulemaking as the "process for formulating, amending, or repealing a rule," and a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *"

The Commission presently has two procedures for rulemaking as defined by the APA. These are "industry guides" and "trade regulation rules." However, the Commission distinguishes these two procedures by the effect it accords each. "Guides" merely announce, in substance, an intent to prosecute under certain circumstances in the hope that voluntary adjustment of proscribed practices will be forthcoming. Trade regulation rules go further by also announcing the Commission's intention to "rely-on" the findings made in the rulemaking. In effect, a trade regulation rule becomes a vehicle for marshalling specific facts and drawing certain conclusions from these facts which will be used in a subsequent adjudication in the same way as official notice of findings in a prior case.

The difference between "guides" and "rules" is one of degree.[2] The ramifications of this difference for the purpose of the APA are unclear. It could be that "guides" should be considered "interpretive rulings" under Section 4, and, hence, they would be exempt from the notice and effective date provisions. However, it seems that "guides" and "trade regulation rules" are in the same class, and, hence, should meet the same minimum procedural requirements.

CONSTITUTIONAL REQUISITES FOR RULEMAKING

The first, and perhaps easiest, question is whether the Constitution requires cross-examination in a rulemaking proceeding. In *Hannah* v. *Larche*,[3] the Supreme Court discussed at great length the due process criteria for agency factfinding proceedings. It suggested that the procedures followed by administrative agencies were the best examples of proper investigative procedure. Even though many of the agencies used the results of the investigation either to initiate adjudication or in the adjudicative proceeding itself, the Court found that "when these agencies are conducting nonadjudicative, factfinding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain." [4] The Court cited the FTC as a typical example. It found that the Commission quite properly avoids certain adjudicative rights in its investigative hearing procedure. The Court indicated that using efficient methods of obtaining information are of primary importance in such proceedings. In holding that the Civil Rights Commission need not provide for cross-examination, the Court distinguished its decision in *Greene* v. *McElroy* [5] as involving adjudicative, not investigative proceedings.

In *Jenkins* v. *McKeithen*,[6] the Court explicitly reaffirmed the decision in *Hannah*.[7] Although it upheld the right to cross-examination in the case before it, it distinguished that proceeding "from the Civil Rights Commission and the other examples cited by the Court in *Hannah*" (including the FTC). It found that, in the case before it, the administrative body "exercised a function very akin to making an official adjudication of criminal culpability." [8]

It is well established that there is no constitutional right to judicial procedures when an agency is involved in an investigative proceeding for the purpose of promulgating a rule.[9] In *Willapoint Oysters, Inc.* v. *Ewing*,[10] the Court rejected

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[2] Statement of Basis and Purpose, Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, at 143.
[3] 363 U.S. 420 (1960).
[4] *Id.* at 445–446.
[5] 360 U.S. 474 (1959).
[6] 395 U.S. 411 (1969).
[7] *Id.* at 427.
[8] *Id.* at 427.
[9] Forte, *Fair Hearing in Administrative Rulemaking: A Recent Experience Under the Federal Food, Drug, and Cosmetic and Fair Packaging and Labeling Acts.* 1968 Duke L. J. 1, 3.
[10] 174 F.2d 676 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949); *reh. denied*, 339 U.S. 945 (1950).

respondent's argument that the agency must provide a "fair hearing" in rulemaking. In so doing, the Court stated: "[I]n legislation, or rulemaking, there is no constitutional right to any hearing whatsoever. . . . Thus the requirements of any hearing are to be tested solely by the statute so providing, which may or may not import constitutional concepts." [11] The Court found the applicable statute to be the APA. Finding no violation of that Act, the Court concluded that no constitutional or statutory rights had been violated.

STATUTORY REQUIREMENTS

Thus, since there is no constitutional requisite for permitting cross-examination, it is necessary to examine the congressional prescription for cross-examination in rulemaking. The statutes which the Commission enforces with rules do not establish any procedure for rulemaking. Therefore, the APA must be the guide to proper rulemaking procedure.

Section 4 of the APA establishes two types of rulemaking procedure: an informal procedure in most rulemaking and a formal procedure if rules are "required by statute to be on the record after opportunity for an agency hearing." [12] The informal rulemaking procedure must provide only notice, opportunity for participation, 30-day hiatus after announcement, and opportunity to petition for modification or repeal. If the statute requires a hearing, however, then Section 4 incorporates the formal procedure of Sections 7 and 8 of the Act. This procedure is the same as that required for agency adjudication and requires, among other things, cross-examination.

It has been urged that, if the Commission can promulgate rules at all, it must do so under the formal procedure.[13] This argument runs from the statutory requirement that Commission decisions must be based on a record after opportunity for a hearing. It is argued that if a hearing is required in adjudication then denial by rulemaking is contrary to the Act. Therefore, the Act requires a hearing, and the APA requires formal rulemaking with cross-examination. Consequently, in order to determine which procedure the Commission must follow, it is necessary to examine the Commission's authority to promulgate rules.

AUTHORITY TO ISSUE RULES

First, the validity of the Commission's exercise of a rulemaking function cannot be denied by anyone who believes that analogy has a place in judicial decisionmaking. The Supreme Court has found informal rulemaking authority in the most important Federal administrative agencies. In *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), the Supreme Court explicitly found "quasi-legislative" authority had been given to the SEC. In *American Trucking Assns, Inc.* v. *U.S.*, 344 U.S. 298 (1953), the Supreme Court found that, although the ICC did not have explicit power to promulgate the regulation, it had implicit authority to carry on informal rulemaking. In *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), the Court found that the FCC had implicit authority to promulgate rules through informal procedure. In *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964), the Court found that the FPC had implicit authority to carry on informal rulemaking. In *American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (1964), *cert. denied*, 385 U.S. 843 (1966), the Circuit Court for the District of Columbia found Section 4 of the APA to be the proper provision to be used under the CAB's implicit authority to promulgate rules. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Supreme Court rebuked the Board for never using its rulemaking authority. For one to prevail against this flow, it would be necessary to prove that the Supreme Court has some special grudge against the FTC. It is clear that the general authority of the Commission to promulgate rules would be upheld by the Supreme Court.

Yet, in order to determine whether formal procedure is a statutory requirement, it is necessary to examine the basis for that authority. Two basis for rulemaking authority have been proposed.[14] The Commission may be able to rely on Section 6(g) of the FTC Act, which appears to specifically grant authority to promulgate rules. Or the Commission may base its authority on the broad direction of Section 5(a)(6) to prevent the use of unfair methods of competition and unfair or deceptive practices.

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[11] *Id.* at 694.
[12] 5 U.S.C. § 553(c).
[13] *See, e.g., supra* note 1.
[14] *Supra* note 2, at 140–141.

Section 6(g) seems explicitly to empower the Commisson to promulgate rules and regulations. If this section does constitute a valid grant of authority, then there can be no doubt that Section 4 of the APA applies and that cross-examination would not be required. However, very strong arguments have been made, based principally on legislative history, for the proposition that Section 6(g) was never intended to grant substantive rulemaking authority, but rather was intended as a housekeeping provision.[15]

Thus, it may be necessary to rely on the implicit grant of authority of Section 5 or of the Act as a whole. Should the Commission find it necessary to rely on this implicit authority, the argument for judicialized rulemaking would seem to have some foundation. However, it does not necessarily follow that the Commission's reliance on implicit authority would mandate formal rulemaking. In two instances, the Supreme Court has been presented with the proposition, discussed above, that a statutorily ordered adjudicative hearing could not be denied by an agency through the exercise of informal rulemaking procedure. In both cases the Court denied this contention.

USE OF INFORMAL RULEMAKING

The first such case, *U.S.* v. *Storer Broadcasting Co.*,[16] involved a FCC rule which limited the number of stations that could be held under common ownership. The FCC rejected Storer's petition for a license because the company already owned the maximum number of stations permitted by the rule. Storer challenged this rejection. Storer argued principally that the new rule deprived it of the right to have the "full hearing" which the Communications Act makes a prerequisite to the denial of any application. It contended that the denial of a statutorily ordered hearing constitutes the denial of due process.[17] The Supreme Court reversed the Court of Appeals and found instead that the FCC's rulemaking procedure was a proper exercise of agency authority. The Court agreed that a "full hearing" under the Act required such things as cross-examination. But it did not agree that a "full hearing" was required for rulemaking. "We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business." [18] "The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation." [19] The Court found that the Act "read as a whole" required only that a full hearing be granted when adequate reasons are given by an applicant for waiving or amending the rules.

In the second of this line of cases, *FPC* v. *Texaco, Inc.*,[20] the Supreme Court again upheld the agency's rulemaking, even though the agency denied adjudication of issues the statute seemed to require to be adjudicated. In this case, the respondents did not argue that the FPC could not promulgate rules. Rather, respondents urged that the Natural Gas Act required decisions to be made after hearing; therefore, rulemaking must be done under the formal procedure of Sections 7 and 8 of the APA.

This case has most of the elements of the controversy regarding the FTC rulemaking. The FPC based its authority on two grounds: the explicit authority of Section 16 of the Act and the implicit authority of the Act "read as a whole." Section 16 reads:

"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations, as it may find necessary or appropriate to carry out the provisions for this chapter. . . . For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters."

The similarity between this provision and Section 6(g) of the FTC Act is readily apparent. The arguments for denying its clear language are also similar.

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[15] Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 960 (1965). Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. Bar J. 570, 584 (1964): "It is difficult to see how any objective reader of the legislative history of the FTC Act could reach the conclusion that Congress gave the FTC any 'legislative' rulemaking power back in 1914."

[16] 351 U.S. 192 (1956).

[17] Brief for Storer Broadcasting Co., at 9.

[18] 351 U.S. at 202.

[19] 351 U.S. at 203.

[20] 377 U.S. 33 (1964).

Texaco suggested that Section 16 was merely a housekeeping provision and not a grant of authority to make substantive rules.[21] Since there was no grant and all the provisions relied upon for implicit authority require a decision "on the record," the respondents argued that the FPC must promulgate rules under the formal rulemaking provisions of the APA.

Besides making it perfectly clear that *Storer* was not confined to the FCC,[22] the Court reenforced the proposition that informal rulemaking under the APA could be used even where an act required a hearing in individual adjudications.

"The main issue in the case is whether the 'hearing' granted under Section 4 of the Administrative Procedure Act is adequate, so far as the price clauses are concerned, for purposes of Section 7 of the Natural Gas Act. We think the Court of Appeals erred, that the present case is governed by the pricieple of *United States* v. *Storer Broadcasting Co.*, . . . and that the staturory requirement for a hearing under Section 7 [of the Natural Gas Act] does not preclude the Commission from particularizing statutory standards through the rulemaking process. . . ." [23]

It is interesting to note that Bristol-Myers in its appellate brief attempted to distinguish these two cases from the Commission's trade regulation rule proceedings. It suggested that the rules in *Texaco* and *Storer* represented policy judgments rather than an attempt to resolve issues of "objective fact." [24] Both Storer and Texaco would disagree with that observation. After all, Storer was unable to obtain a license solely because it had reached the maximum number of stations prescribed by the rule; a rule based on finding in the course of the rulemaking that the industry was too concentrated. In the summary of its arguments, Storer points out that: "The Commission by those rules has ordered, in effect, that one evidentiary fact—the number of licenses held by the applicant—shall be conclusive evidence, irrespective of all other facts and circumstances, of the ultimate fact of 'public interest' which the Act requires the Commission to determine." [25] Similarly, Texaco was denied a "certificate of convenience and necessity" solely because the FPC found in a rulemaking proceeding that certain price clauses were not in the public interest. If these rules are not resolution of issues of "objective fact" then it is difficult to understand what might be. Indeed, the very speciousness of this "distinction" indicates the strength of these two precedents as applied to Commission rulemaking and the lack of substantive argument against Commission authority to issue rules under Section 4 of the APA.

LEGISLATIVE HISTORY OF APA

The Supreme Court's holding in these two cases is clearly aligned with the congressional findings in promulgating the informal rulemaking procedure of Section 4 of the APA. The legislative history of the APA strongly supports the notion that Congress did not wish to burden rulemaking with judicialized procedure. The Senate Committee Report indicates that procedural freedom was intentionally accorded agency rulemaking.[26] In commenting on Section 4, the Committee said that the section will leave ". . . [an] agency free to choose from the several common types of informal public rulemaking procedures, the simplest of which is to permit interested persons to submit written views or data. . . ." [27] The Committee goes on to say that "it is better to have some public procedure in most cases than to have rigorous procedure in a few cases." [28] The House Committee Report reiterates the above determinations.[29] It is clear that Congress preferred simple nonadjudicative rulemaking, and, hence, it did not wish adjudicative procedures to be imposed unless it explicitly designated such procedure.[30]

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[21] Brief for Texaco Oil Co., at 11: "No Commission action under Section 16, a *general housekeeping and ordering authority*, is appropriate to the Natural Gas Act if it frustrates and circumvents the Congressional requirement of a hearing coupled with the possibility of full judicial review as provided by other specific directives of that Act." [Emphasis added.]

[22] Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 489 (1970).

[23] 377 U.S. at 39.

[24] Brief for Bristol-Myers Co., at 20.

[25] *Supra* note 17.

[26] *Administrative Procedure Act, Legislative History of 1946*, at 19–20.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] This predilection was so strong that even in the provision which prescribed formal procedure for certain rulemaking, Congress did not require unlimited cross-examination in all instances. Thus, Section 7 of the APA tempers the requirement of cross-examination: "In rulemaking . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

THEORETICAL CONSIDERATIONS

The right of cross-examination is highly valued in jurisprudence. Prof. Wigmore states that it is the greatest contribution of the Anglo-American System. He believes that "it is beyond any doubt the greatest legal engine ever invented for the discovery of truth." [31] He finds that all testimony should be tested by cross-examination. However, Prof. Wigmore does not suggest that it does not have its faults. He notes that cross-examination is difficult for layman and scientist, and that a skilled attorney using it "may make truth appear like falsehood." [32]

In the Gellhorn and Byse administrative law text,[33] the point is made that several things distinguish administrative proceedings from others. These distinctions are relevant to a consideration of the jurisprudential value of cross-examination in rulemaking. First of these is the different nature of the factfinding bodies. It is pointed out that jurors are inexperienced as triers of fact; whereas, triers of fact in administrative proceedings are skilled and knowledgeable. Furthermore it is suggested that the questions of fact differ: a jury must decide whether the defendent *did* it; but the FTC must decide only whether the practice *might* mislead the public. "They [rules of evidence] are based on a possibility of error rather than an assurance of error. Nonobservance of the rules does not mean that the search for truth has been abandoned. It means merely that the search goes forward by a different route." [34] For this reason, procedures can vary according to the needs of the agency. And they suggest that investigative, rather than trial-type, hearings are better suited for getting to the type of facts sought by administrative bodies. Even though people such as Wigmore exult the virtues of cross-examination, these two commentators caution that "cross-examination is a means of getting at the truth; it is not the truth itself." Hence, the decision to permit it should be made according to whether it is necessary to the search for the truth in any particular situation.

FUNCTIONAL CONSIDERATIONS

This opinion leads us to a discussion of functional efficacy. Is cross-examination in rulemaking hearings the best route to the truth? Most administrative agencies do not provide for it in such proceedings. The discussion above indicates that neither Congress nor the Courts believe it necessary or desirable in rulemaking proceedings.

Prof. Davis, in his treatise on administrative law, is extrenely critical of the use of trial-type hearings in rulemaking.[35] His opinion appears to be based on the efficancy of such hearings in gathering the facts necessary for proper decision-making. "In rulemaking, the method of trial has no place except when specific facts are at issue, and even then it should seldom be used when the disputed facts are legislative." [36]

As an example of the failure of trial-type hearings in rulemaking, he cites the experience of the FDA with the Food, Drug, and Cosmetic Act of 1938. He suggests that better results might be obtained more efficiently through written and oral argument than through testimony, cross-examination, and a decision on a formal record. "Unlimited cross-examination, by adversaries seem as inappropriate in these cases as in an argument before an appellate court." [37] He quotes from an article by Assistant General Counsel for Food & Drug, HEW, W.W. Goodrich: "experience with the 1938 Act has shown that formalism in rulemaking is costly, time-consuming and not too well adapted for the job to be done. Excessive delays, protracted proceedings and mountainous records have resulted." [38] Mr. Goodrich has clearly not changed his mind, for in a 1968 article, he wrote that "it [the major problem of procedure] is the problem of protracted, trial-type proceedings in which the administrative process have been strained almost to the breaking point by delay and by great financial expense." [39] Mr. Goodrich cites with favor Prof. Davis' opinion on cross-examination in FDA rulemaking proceedings.

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[31] 5 *Wigmore on Evidence* § 1367.
[32] "But abuse of its power is able to be remedied by proper control." *Id.*
[33] W. Gellhorn and C. Byse, *Administrative Law Cases and Comments* (4th ed. 1960).
[34] *Id.* at 867.
[35] 1 K. Davis, *Administrative Law Treatise* § 6.06 (1958).
[36] *Id.* at 379.
[37] *Id.* at 382.
[38] *Id.* at 382.
[39] Goodrich, *The Food and Drug Administration's View on Procedural Rules*, 23 Food Drug Cosm. L. J. 481, 485 (1968).

SHOULD THE COMMISSION PERMIT CROSS-EXAMINATION?

Since it is clear that the Commission is not required either by the Constitution or statute to grant cross-examination, the question becomes whether the Commission should permit cross-examination gratuitously. This question must be examined under two criteria: traditional legal philosophy and functional efficiency.

It is true that not everyone is critical of cross-examination in FDA proceedings. Private counsel practicing before that agency feel that is is necessary to proper decisionmaking.[40] One such attorney has taken issue with the statements of Mr. Goodrich.[41] His opinion is that delay is caused by agency inaction. He cites the history of the "peanut butter" rule as proof of this position. However true it may be that the FDA caused the delay in promulgating this rule, it is also true that the rulemaking procedure required 30 days of hearings. Would the FTC be acting in the public interest by holding 30 days of hearings to promulgate a "peanut butter" rule or its equivalent?

Another example used by Prof. Davis is the rulemaking procedure of the ICC. Testimony was taken under oath and subject to cross-examination. Prof. Davis is extremely critical of this procedure, and the Commission's insistence on voluntarily employing it.[42]

It should be noted that Prof. Davis is extremely impressed with the Federal Trade Commission's rulemaking. He did not seem inclined to see any procedural faults in the cigarette proceeding. And he clearly felt that the rights of adversely affected industry members had been protected. He suggested that trial-type proceeding is not appropriate for Commission rulemaking: "The Commission seems clearly right when it says . . . that legislative facts are not required to be determined adjudicatively." [43]

LIMITED CROSS-EXAMINATION

It is generally conceded that the procedural freedom in rulemaking permits efficient decisionmaking.[44] However, the question is sometimes raised as to whether such efficiency is worth the complete vitiation of all traditional procedural safeguards. It is suggested that a degree of judicialization may have little detrimental effect on efficiency and yet provide significant improvement in the due process of rulemaking.[45]

It is contended that the problem of delay is not necessarily the result of cross-examination and other testimonial procedures. And the problem of large and diffuse records is independent of the nature of the procedure.[46] It has, therefore, been recommended that agencies formulate, based on pragmatic determinations, rulemaking procedures which limit to some extent the problems caused by judicialized proceeding and yet afford parties necessary procedural rights.[47]

Assuming the Commission found that it should permit cross-examination in trade regulation rule proceedings, the right should not be unlimited. It is not seriously suggested, even by those who have a proprietary interest in preserving dilatory tactics, that unlimited cross-examination is desirable. Perhaps, restrictive cross-examination could be injected into the trade regulation rule procedure without totally destroying its effectiveness. For example, the Commission could permit cross-examination of expert witnesses. This right would be a two-edged sword: industry, as well as consumer and government, experts could be questioned. Another alternative, and one proposed even in adjudicative administrative proceedings,[48] is to permit cross-examination but with absolute authority in the presiding officer to limit or deny the right.

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[40] Pendergast, *Have the FDA Hearing Regulations Failed US?* 23 Food Drug Cosm. L. J. 524 (1968); *See also*, Forte, *supra* note 9.

[41] Pendergast, *supra*.

[42] Mr. Davis cites *American Trucking Assns., Inc.* v. *U.S.*, 344 U.S. 298, 318–320 (1953), as holding that the "ICC need not follow the method of trial when the problem is one of determining the content of rules." Davis, at 381.

[43] Davis, 1 65 Pocket Part § 504.

[44] *See, e.g.*, Fisher, *Rulemaking Activities in Federal Administrative Agencies*, 17 Ad. L. Rev. 252, 259 (1965).

[45] *American Airlines, Inc.* v. *CAB*, 359 F. 2d 624, 632 (D.C. Cir. 1966).

[46] Robinson, *supra* note 22, at 523: "A recent congressional survey of the major federal agencies indicated, for example, that testimonial procedures, and cross-examination in particular, were regarded by agency personnel and practitioners before the agencies as only a minor cause of significant delay."

[47] Robinson, *supra* note 22.

[48] Westwood, *Administrative Proceedings: Technique of Presiding*, 50 A.B.A.J. 659 (1964).

Of course, as surely as the Commission can deny cross-examination altogether, it can deny a broad grant of cross-examination and provide instead for whatever limited cross-examination it finds helpful. Even in the *American Airlines, Inc.* v. *CAB*,[49] where the Court suggested that it might find under some circumstances a requirement of cross-examination in a rule proceeding, it did not suggest that cross-examination would be unlimited. "If additional procedural safeguards are to be imposed as a requirement, it would be more salutory to incorporate them into a rulemaking procedure than to adopt a blanket requirement of an adjudicatory procedure." [50]

CONCLUSION

It appears that, to a large extent, the cry over cross-examination in rulemaking proceedings is a cry over the alleged death of a sacred cow. But are we really eating our ancestors? The Supreme Court obviously does not believe this right is constitutionally necessary to due process in rulemaking. The APA does not make it a statutory imperative in most rulemaking. And any question of a statutory requirement in Commission Rules can only be raised by a strained, and already discredited, reading of a provision for adjudicative hearing in individual cases.

Despite the absence of any constitutional or statutory imperatives, some consideration must be given to whether cross-examination should be granted as a necessary tool in the search for truth. In this consideration, one must bear in mind the significant difference between a judicial proceeding and a rulemaking proceeding. Unlike a judicial proceeding, rebuttal of testimony given in a rulemaking hearing is possible through written statements. In a Commission rulemaking proceeding, the "record" is always left open for 30 days and extensions are granted on request. This should be ample time to muster relevant information and opinion to refute adverse testimony.

Furthermore, since the APA requires a statement of basis for final rules, the data upon which the Commission based its decision is known and can be questioned by the respondent in the adjudicative enforcement of the rule. The adversely affected party has a right more substantial then mere cross-examination of witnesses, the party may "cross-examine" the Commission itself as to the evidence it relied on.[51] Thus, the party may challenge not merely the facts introduced but the facts actually relied on.

All things considered, the best possible approach would be to continue to deny cross-examination in rulemaking.

Respectfully submitted.

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March 10, 1971.

MEMORANDUM OF LAW

THE FEDERAL TRADE COMMISSION ACT AND THE NATURE AND EXTENT OF FEDERAL PREEMPTION

I. SUPREMACY OF FEDERAL LAW; THE DOCTRINE OF PREEMPTION

Our Constitution places certain restrictions on state power. For example, in particular fields, such as entering into treaties with foreign nations, states are prohibited from acting to any extent while in others, like the due process and equal protection clauses of the 14th amendment, individual rights are protected against state infringement.

The Supreme Court has ruled that, under the Constitution, certain powers are validly exercisable either by the federal government or by the states, until "Congress shall see fit to act upon the subject." *Ex parte McNeil*, 80 U.S. 236 240, (1871).

Article VI, clause 2 of the Constitution of the United States, which gives rise to the doctrine of the supremacy of federal law, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be found thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[49] *Supra* note 45.
[50] *Id.* at 632.
[51] The APA grants the right to rebut official notice. Since Trade Regulation Rules are considered in the nature of official notice, the right to rebut the findings in rulemaking is assured under the APA.

Article VI, clause 2, makes it quite clear that state action which contravenes the Federal Constitution is invalid. The Supreme Court decides, in cases brought before it, whether particular state action conflicts with the Federal Constitution and the laws enacted in accordance therewith. It is this conflict which has given use to the Doctrine of Preemption. The doctrine is often misapplied and misunderstood. For purposes of this memorandum, however, it will be interpreted to encompass those terms or expressions (*i.e.*, occupying the field; repugnance irreconcilability, inconsistency; interference) used by the courts in considering the validity of state laws in light of federal laws touching the same subject. This study will not focus upon those acts in which Congress has *expressly* manifested its intention to preclude *any* state activity over the subject matter. *See, e.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 234 (1947); *Southern Pacific Co.* v. *Arizona*, 329 U.S. 761, 769 (1945).

The supremacy of federal law over state law under the supremacy clause has been judicially developed and established over a period of many decades. Ever since *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), the Courts have been testing the validity of state laws under the supremacy clause on the basis of whether they actually encroach upon subjects of federal power and not upon the presence or absence of express declaration by Congress.

In the early case of the *Ex parte McNeil*, 13 Wall. 236 (1871), the Supreme Court set out the rules to govern the complex distribution of government power under the Constitution. In its decision, the court viewed the powers of government as being divided into four classes: (a) those which belong exclusively to the states; (b) those which belong exclusively to the national government; (c) those which may be exercised concurrently and independently by both; and (d) those which may be exercised by the states, but only until Congress shall see fit to act upon the subject. The application on these general rules to the myriad of cases to come before the court has given birth to a number of subordinate principles. It is of course, impossible to review all the Supreme Court decisions giving rise to each principle. In addition, it must be recognized that questions of federal supremacy and preemption are seldom decided on one principle alone. At best, the general principles the court has set forth can only be summarized, with some citation of landmark cases illustrating those principles. These principles can be summarized generally as follows:

A. Federal act supreme in field of exclusive Federal power

In those fields in which the Constitution has granted exclusive power to Congress, it is settled that the states may not act within such areas even though Congress may not have exercised its authority, *Legal Tender Case*, 12 Wall. 457 (1871); *Chirac* v. *Chirac*, 2 Wheat. 259 (1817). Thus, in those areas of inherent federal sovereignty the states are precluded entirely from enacting legislation. These areas generally include such matters as foreign relations, war, coinage, and naturalization. It also follows that any state legislation in a field in which the states have been constitutionally denied power to act is void. Thus, the Supreme Court has said that when a governmental power "was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive," *Legal Tender Case, supra*, at p. 546.

B. Federal supremacy in areas of national interest and concern

There are also areas in which the federal supremacy has been upheld even though the particular subject matter is not exclusively granted to the federal government by the Constitution. Thus, the court has ruled that in those fields where the national interest is paramount and there may be inherent dangers in state action on the subject, our system of government requires that federal power be left entirely free from local interference. In fields of supreme national importance, therefore, the court has created a presumption of congressional intent to "preempt" the field. In those cases the court has generally required little, if any, legislative intent to preempt the field or actual repugnance or conflict between the federal and state legislation, to find that the states have been excluded from enforcing their legislation. These principles are best illustrated in the Supreme Court's decision in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), wherein it was held that by the enactment of the Federal Alien Registration Act of 1940, Congress had closed the field to state alien registration laws. The Court stated (at p. 66):

"Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the National Government that where it acts, and the

State also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.' And where the Federal Government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the Federal law, or enforce additional or auxiliary regulations."

This principle was also used by the Supreme Court in *Commonwealth* v. *Nelson*, 350 U.S. 245 (1956) *reh. denied*, 351 U.S. 934 (1956), in holding that sedition involves a subject in which the national interest is paramount. The enactment of the Smith Act by Congress, which defined sedition and prescribed punishment therefor, the court held, occupied (or preempted) the field to the exclusion of any parallel state legislation.

C. Federal legislation prevails in those areas requiring a uniform national system of regulation

Even in those areas of authority in which exclusive power has not been authorized in Congress or denied to the states, nor where the subject is of such national interest as to make the enactment of federal legislation supreme, the Supreme Court has recognized that the regulation of certain subject matters, particularly under the commerce clause, requires a uniform national system. In such instances, the court has held that the state statute must give way to federal control. *See Cooley* v. *Board of Wardens*, 12 How. (53 U.S.) 299, 318–319 (1851). As an example, the Supreme Court, in striking down the Arizona "train limit law" in the case of *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 781 (1945), stated:

"Here we conclude that the State does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a serious adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nationwide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The State interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern."

Congress has undoubted power to define the distribution of power over interstate commerce. Congress may either permit the states to regulate commerce in a manner which would otherwise not be permissible or exclude state regulation even of matters of peculiarly local concern which nevertheless affects interstate commerce. *Southern Pacific Co., supra*, at 769. Even though the commerce clause confers the power to regulate commerce on the national government, its possession of the power does not exclude all state power of regulation. Recent Supreme Court decisions have emphasized that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained." *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963); *see also, Head* v. *New Mexico Board*, 374 U.S. 424 (1963).

D. Federal legislation supreme over State legislation repugnant or in conflict with it

In this area, the principles enunciated by the court are clear. Under the supremacy clause of the Constitution, the state law must yield if there is a "direct and positive" conflict between a state law and a federal act.

It was in the early landmark case of *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), that a state statute was first struck down as being in conflict with a federal statute. In that case, the New York Legislature granted to Robert Livingston and Robert Fulton, for a term of years, the exclusive right to navigate steamboats on the waters within the jurisdiction of the State of New York. Ogden obtained an assignment of so much of the Livingston-Fulton grant as authorized steamboat navigation between New York City and Elizabethtown, New Jersey. By the authority of this grant, Ogden sought an injunction against the operation by Gibbons of any steamboats between the same towns or elsewhere within the State of New York, although Gibbons' boats had been duly licensed by the federal government. Gibbons maintained that, because of this federal license, he had the right to navigate between Elizabethtown and New York City in spite of the prohibition of the New York statute.

The Supreme Court, in reversing the New York Court decision enjoining the use by Gibbons of his ships between those ports, held that in an area of power such as interstate and foreign commerce, in which the federal government had a constitutional grant of authority, the exercise of that authority automatically excluded any authority over such commerce which the individual states might have had without federal intervention. Mr. Chief Justice Marshall, in his detailed analysis of the law, noted:

"In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State though enacted in the exercise of powers not controverted, must yield to it" (at 92–93).

In a later case the court further explained (*Sinnot* v. *Davenport*, 22 How. (63 U.S.) 227, 242 (1959)):

"We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. . . ."

The difficult problem, however, is to determine whether there exists an actual conflict between the federal and state statutes. The decisions of the Court do not indicate a hard and fast rule that might be applied in all situations. Rather, it has required an examination of the statutes and their legislative history for disclosure of intent and purpose, and whether the enforcement of the state enactment would obstruct or hinder the full accomplishment of the congressional purposes. While there can be no distinctly marked formula for determining the validity of state laws touching the same subject as federal law, recent cases suggest that before the state laws will be deemed superseded, it must be evident such an essential and basic conflict exists between the state and federal laws and regulations that compliance with one is defiance of the other.

For example, in a recent case a packer of frozen stuffed turkeys processed outside the State of New York sought a declaratory judgment affirming their right to sell in New York, turkeys labeled to show only total weight in compliance with United States Department of Agriculture requirements. The State of New York, however, required a label on the turkeys to show the net weight both of the unstuffed and of the stuffed bird. Despite this apparent conflict between the state and federal requirements, the Second Circuit denied the relief sought on the basis of a "strong policy against invalidating state regulatory schemes in the absence of a clear showing of irreconcilable conflict with federal law . . ." *Swift & Company* v. *Wickham*, 364 F. 2d 241, 246 (2d Cir. 1966). The court found no evidence in the history or content of the federal act (Poultry Products Inspection Act) suggesting a determination by Congress to occupy the field or preempt *more detailed* state regulation of the manner in which poultry products are weighed measured and labeled. *See also*, *Chrysler Corporation* v. *Tofany*, 419 F. 2d 499, (2d Cir. 1962); *TF Pix, Inc.* v. *Taylor*, 304 F. Supp. (D. Nev. 1968).

E. Federal legislation supreme where there is congressional intent to supersede

The final principle revealed by decisions of the Supreme Court in the field of federal-state relations indicates that under the supremacy clause Congress may preclude, by design, state action in a particular area. Thus, in areas of concurrent federal and state power, the expression of an intent by Congress to exercise its authority results in "preemption" of state legislation over the same subject matter. The degree to which such federal legislation may and does supersede state action has not been clearly defined by judicial decisions.

Congressional intent is usually manifest from the terms of the act itself. But when such intent is not obvious from the fact of the act, the court will often examine the legislative history to see if such an intent is clearly revealed therein.

The court at times makes a distinction between federal action in national and in local matters. Thus, where the subject to essentially national in character, the court requires less evidence to indicate an intent to occupy the field to the exclusion of the states.

In ascertaining the intent of Congress, the courts will also consider: (1) the specificity with which Congress regulates a subject matter, *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218 (1947); (2) the existence of prior state legislation or a long tradition of state regulation in the field, *Rice* v. *Board of Trade*, 311 U.S. 247 (1947); and (3) whether Congress encouraged complementary state legislation, *Parker* v. *Brown*, 317 U.S. 341 (1943). When it is determined that the Congress intended to preclude parallel state action, then the state regulations are superseded regardless of their consistency or inconsistency with federal policy. *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218 (1947).

F. Conclusion

These principles gleaned from the decisions of the Supreme Court indicate that an act of Congress arising under an exclusive grant of power from the Constitution would preempt all state legislation in that field. Preemption would also take place where the federal legislation covers a field of paramount national interest or where the subject matter requires a single and uniform national system of regulation. In areas where there may be exercised both federal and state regulation, the decisions preclude state legislation only where there is a direct and positive conflict between the statutes to the extent that they cannot be reconciled or stand together, or where there is found a congressional intent to occupy the field to the exclusion of state law on the same subject matter. The courts will not presume such an intent, however, unless its purpose to do so is clearly manifested. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 766 (1945); *Head* v. *New Mexico Board*, 374 U.S. 424, 431 (1963).

II. RULES AND REGULATIONS OF FEDERAL ADMINISTRATIVE AGENCIES: FORCE AND EFFECT OF LAW

Any state law which is in conflict wlth an act of Congress or which "frustrates the purpose of the national legislation or impairs the efficiency of * * * agencies of the Federal government to discharge the duties, for the performance of which they were created" must yield to the federal policy. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 240 (1967). A valid exercise of its power by a federal agency supersedes state law. *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963); *Free* v. *Bland*, 369 U.S. 663, 668 (1962). Agency regulations, therefore, promulgated under express statutory authority have the force and effect of law. *United States* v. *Jones*, 204 F.2d (7th Cir. 1953); *see also*, *Dyer* v. *Securities Exchange Commission*, 266 F.2d 33 (8th Cir. 1959); *United States* v. *Short*, 240 F.2d 292 (9th Cir. 1956); *United States* v. *Clayton*, 198 F. Supp. 18 (W.D. La. 1961).

The laws of a state, therefore, must yield when incompatible with federal legislation as well as rules and regulations issued pursuant to authority delegated by Congress. Thus, the Supreme Court found a Texas statute superseded by a valid regulation of the Treasury Department creating a right of survivorship in joint holders of United States Savings Bonds. The Texas court ruled that under its laws (Texas is a community property state) one half the value of the bonds must pass pursuant to the provisions of the testator's will. Under Treasury regulations, the survivor of jointly held bonds is recognized as the sole and absolute owner. The Supreme Court ruled that the federal survivorship provision, as it applies to federal bonds, is law which must prevail if in conflict with state law. *Free* v. *Bland*, 369 U.S. 663, 668 (1962).

The mere grant by Congress to a federal commission of national power with respect to a certain subject matter does not in itself, and in the absence of action by the federal agency, supersede state law or preclude the state's power to make and enforce regulations on the same subject matter. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 765 (1945); *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 318, 237 (1947); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 773–774 (1946); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141, 143–144 (1963). Once federal regulations take effect they supersede state regulation only to the extent to which they conflict. *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963); *Free* v. *Bland*, 369 U.S. 664, 668 (1962); *United States* v. *Shimer*, 367 U.S. 374, 385 (1961).

A. Federal-State regulation of interstate commerce

As previously noted, Congress has the power, under the Constitution, to define the distribution of power over interstate commerce. Nevertheless, in reviewing an act of Congress regulating interstate commerce, the Supreme Court will not imply an intent to strike down a state statute designed to protect the health and safety of the public, or to prevent deception of consumers (*Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146 (1963)), unless its purpose to do so is clearly manifested or unless the state law, by its terms or in its practical administration, conflicts with the Act of Congress or "plainly and palpably infringes its policy." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 766 (1945); *see also, Schwartz* v. *Texas*, 344 U.S. 199 (1952); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942). In the absence of conflicting legislation by Congress or administrative regulation there is a residuum of power in the state to enact laws governing matters of local concern which in some measure affect interstate commerce, or even, to some extent, regulate it. *Southern Pacific Co.* v. *Arizona*, *supra*, at 767. A holding of federal exclusion of state law is inescapable, however, and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical or legal impossibility for one engaged in interstate commerce.

Thus, the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress or the administrative agency to which Congress has delegated power. The test of whether both federal and state regulations may operate or the state regulation must give way, is whether both can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). In the final analysis, however, there can be no one crystal clear formula in determining the validity of state laws in the light of federal laws or regulations touching the same subject.

III. THE FEDERAL TRADE COMMISSION ACT: THE NATURE AND EXTENT OF FEDERAL PREEMPTION

The Federal Trade Commission Act, by its nature and its purpose, does not lend itself to comprehensive regulations effectively governing the subject matter of the Act in its entirety. The Act declares unlawful, unfair and deceptive acts or practices in interstate commerce. The Commission defines these general standards of illegality with particularity "by the myriad of cases from the field of business." *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 394, 396 (1953). The history of the act clearly demonstrates that Congress did not intend to confine the scope of the act to fixed and unyielding categories. *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1933); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). In view of this broad and imprecise jurisdiction, it cannot be assumed that Congress intended to oust the states of their authority under their police powers to legislate for the protection of their citizens upon subjects which the Commission and the courts *might later* determine to be within the general terms of the federal statute.

Nor have the courts found such preemption; to the contrary, the propriety of state action in the field or unfair trade practices seems to have been unquestioned. For example, the validity of a California statute proscribing unfair business practices was assumed in *Sarkes Tarzian, Inc.* v. *Audio Devices*, 166 F. Supp. 250, 256 (S.D. Cal. 1958), *aff'd*, 283 F. 2d 695 (9th Cir. 1960), *cert. denied*, 365 U.S. 869, and the authority of Oklahoma to legislate against certain "bait" advertising was upheld in *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489–490 (1955). In *Atlantic Refining Co.* v. *Trumbull*, 43 F. 2d 154, 158 (D. Conn. 1930), sections of a state statute regulating motor oil labeling were held "clearly justified in order to guard against deception."

In *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424 (1963), appellant newspaper owners and a radio corporation, had been enjoined from accepting or publishing within the State of New Mexico a Texas optometrist's advertisement found to be in violation of New Mexico law. It was claimed by the appellant-radio corporation that regulation of advertising by radio had been preempted by the Communications Act of 1934. In overruling this contention the Supreme Court stated at page 431:

"The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the

detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.' "

The Court also noted as significant that "the Commission itself has apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it." This same reasoning applies to the Federal Trade Commission and the organic act itself.

As is the case with the Communications Act, no clear statement of congressional intent of uniform federal standards can be found in the Federal Trade Commission Act. There is nothing to indicate in its text or in its legislative history that Congress intended to confer exclusive jurisdiction over the acts or practice subject to the act on the Federal Trade Commission. The nature of conduct to which this act is concerned is not one which admits only to national supervision or exclusive federal regulation. The administration and enforcement of the act does not demand exclusive federal regulation to achieve uniformity necessary to the public interest.

Accordingly, it is reasonable to assume that the Federal Trade Commission Act does not "occupy the field" to the formal, effective, and direct exclusion or concurrent consistent state action. *Double Eagle Lubricants, Inc.* v. *Texas*, 248 F. Supp. 515 (D. Tex. 1966), appeal dismissed, 384 U.S. 434 (1966), *reh. denied*, 385 U.S. 890. In *Double Eagle, supra*, a corporation subject to a Commission order sought to enjoin enforcement of a Texas statute concerning the labeling of re-refined oil. The Commission's order directing the corporation to cease and desist, in connection with its offering for sale of lubricating oil, from advertising, offering for sale or selling reprocessed oil without a clear and conspicuous statement disclosing the prior use of the oil in advertising and promotional material and on the *front* panel of the container. The Texas statute requires that *both* the front and back of the containers of the re-refined oil bear the phrase "Reconditioned Motor Oil." The court found the purpose of both the state regulation and federal order mutually consistent.

State laws, therefore, regulating unfair or deceptive practices in commerce are valid unless they conflict directly with federal regulations. *Cf. Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Chrysler Corporation* v. *Tofany*, 419 F. 2d 499 (2d Cir. 1969); *Swift & Company* v. *Wickham*, 364 F. 2d 241 (2d Cir. 1966).

A. Federal Trade Commission Act: Jurisdiction

The jurisdiction of the Federal Trade Commission, under the FTC Act, is limited to unfair or deceptive acts or practices in interstate commerce. *Federal Trade Commission* v. *Bunte*, 312 U.S. 344 (1941). Clearly, a state may exercise its authority over any unfair act or practice which is of particularly local concern. The Commission itself has recommended and encouraged the enactment of state and local laws, patterned after the Federal Trade Commission Act, to protect the consumer from deceptive and unfair trade practices. Thus, state regulation would control, regardless of the consistency or inconsistency of Commission regulation, over any matter or business beyond the scope of the Commission's jurisdiction. In the event Federal Trade Commission jurisdiction is expanded to "affect" commerce, Commission rules still would be controlling only to the extent of irreconcilable differences between the conflicting state and federal regulation. Of course, even Commission jurisdiction over matters affecting commerce would not reach purely local matters.

B. Federal Trade Commission Act: Enforcement by trade regulation rules

The Federal Trade Commission Act gives the Commission rulemaking power. Although this authority has been challenged on a few occasions this study will not attempt to review the Commission's position with respect to its rulemaking power. The following discussion concerning Commission trade regulation rules, however, is premised upon the assumption that the Commission possesses rulemaking power.

Since it has been concluded that the Congress, in enacting the Federal Trade Commission Act, neither intended to occupy the field to the exclusion of parallel state legislation nor touched a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject, the several states and the Federal Trade Commission exercise *concurrent* power over the acts and practices which are the subject of the Federal Trade Commission Act. It is *only* in the case of actual conflict between

Commission orders and rules and state law or regulations that the state provisions must yield to the federal regulation. *Florida Lime & Avocado Growers, Inc.*, v. *Paul*, 373 U.S. 132 (1963); *United States* v. *Shimer*, 367 U.S. 374 (1961); *Free* v. *Bland*, 369 U.S. 663 (1962); *Sperry* v. *Florida*, 373 U.S. 379 (1963). During the interval pending administrative regulation the states may exercise their concurrent power over unfair trade practices. Further, apparent inconsistency between state and federal regulation does not invariably result in the federal regulation superseding state regulation. Thus, in *Swift & Company* v. *Wickham*, 364 F. 2d 241 (2d Cir. 1966) the court ruled that a federal regulation specifying the labeling requirements on certain poultry products did not preempt a more detailed and stringent New York State regulation of the manner in which poultry products sold in that state should be weighed, measured and labeled. *See also, Florida Lime & Avocado Growers, Inc., supra.*

IV. CONCLUSION

While the question as to whether Commission rules and orders supersede concurrent state action must be answered by a judgment upon the particular case, a Federal Trade Commission trade regulation rule under present law would be the controlling standard over any state regulation of the same subject matter to the extent of the Commission's jurisdiction and to the extent that there is an actual conflict between the two schemes of regulations.

It should be noted that legislation before the 92nd Congress would grant the Commission additional rule-making powers respecting warranties. That legislation would also specifically provide that such rules would be the controlling standard where "labeling, disclosure or other requirements of a State with respect to written warranties against defect or malfunctioning of a consumer product . . ." were inconsistent [§ 112(b) of S. 986, 92nd Cong., 1st Sess., (1971)]. Where consistent, such state laws would remain operative.

JOSEPH MARTIN, Jr.
General Counsel, Federal Trade Commission.

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., April 1, 1971.

Hon. MARLOW W. COOK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR COOK: The attached letter is in response to your request for an analysis of the Administration's legislative proposal entitled "Fair Disclosure Act of 1971" (now introduced as S. 1221). As requested, we have compared the Administration's proposal with S. 986.

The Office of Management and Budget advises that while there is no objection to the submission of this report, the Administration favors the enactment of S. 1221 in lieu of S. 98t for the reasons given in testimony by the Department of Justice before your Committee on March 22, 1971.

Thank you for the opportunity to present these additional views of the Federal Trade Commission on this most important legislation. I hope both this letter and the attached analysis will be helpful to you, and if I can be of further assistance, please feel free to call upon me.

With kind personal regards,
Sincerely.

MILES W. KIRKPATRICK, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C., April 1, 1971.

Hon. MARLOW W. COOK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR COOK: In accordance with your request made during the hearings on S. 986 and your subsequent letters of March 11 and 12, 1971, for an analysis of the Administration's legislative proposal entitled "Fair Warranty Disclosure Act of 1971" (now introduced as S. 1221), there is enclosed a detailed comparison of S. 986 and S. 1221. Additionally, the Commission's comments on some of the broader policy issues which are presented in the two bills are set forth below.

These, of course, must be read in connection with the suggestions I made in my statement to the Subcommittee on Consumers on March 9, 1971, for changes in S. 986.

"Warranty" is defined in section 3(a) of S. 1221 to mean "with respect to consumer products or services, any express *written* statement of guaranty . . ." (emphasis added). The Commission prefers the definition of "warranty" in S. 986 which does not contain a limitation that the warranty be in writing. While the regulatory machinery of both bills is in fact oriented toward express written undertakings, it is believed that the limitation should be removed from S. 1221 to avoid any suggestion that oral misrepresentations concerning written warranties are not actionable. While at present the Commission may proceed under section 5 of the Federal Trade Commission Act against fraudulent oral warranties, it is possible that if S. 1221 is enacted in its present form, the definition of "guaranty" now contained in S. 1221 might be asserted as a defense to a Commission proceeding which we would deem undesirable. I want, however, to refer to my statement before the Subcommittee in which I pointed out the possibility of anticompetitive effects which might arise from the inclusion of oral statements in the definition of "express warranties" (section 101(2)(b) of S. 986) and the obligation of the supplier to repair "without charge" (section 104(3) of S. 986).

The rulemaking procedures of section 102(b) of S. 986 provide that the Commission will determine the necessary regulations for the administration of the warranty program "in accordance with section 553, title 5, United States Code, upon public record after opportunity for an agency hearing structured so as to proceed as expeditiously as practicable." The procedures set forth in section 553 of the Administrative Procedure Act are consistent with the stated requirement in both bills (section 102(b) of S. 986 and section 4(d) of S. 1221) that the agency hearing be "structured so as to proceed expeditiously." S. 1221, on the other hand, would clearly require the use of formal rulemaking procedures under sections 556 and 557 of the Administrative Procedure Act.

The Commission favors the less formal rulemaking procedures of section 553 of the Administrative Procedure Act. These procedures have been most useful in making Trade Regulation Rules under section 6(g) of the Federal Trade Commission Act and have demonstrated that they can be employed to achieve relatively quick action as well as adequate protection of the rights of all interested parties. Other agencies employ such procedures in promulgating rules to implement detailed and comprehensive Congressional statutes (for example: the SEC in connection with the Securities Act and the Federal Reserve Board in connection with the Truth-In-Lending Act).

Lastly, the Commission is concerned about the injunctive remedies offered by these two bills. Section 110(c)(1) of S. 986 would allow either the Commission by its attorneys or the Attorney General to apply to the district courts to restrain suppliers from making a deceptive warranty, and the court would be authorized to grant relief "pursuant to the general standards governing the issuance of injunctions in civil actions." Section 7 of S. 1221, although differently phrased, establishes the same requirement.

In contrast, section 8 of S. 1221 outlines a meaningful procedure which would permit the Attorney General (but not the Commission) to arrest at their incipiency deceptive warranty practices being committed by the dishonest supplier. Under section 8 the Attorney General could apply to the court for a temporary restraint pending the completion of the investigation and trial of the case, and the court would be empowered to grant at any time "such injunctive relief as it deems necessary." The Commission sees no reason for distinguishing between the remedies granted to it from those granted to the Department of Justice. Both enforcement arms should be able to proceed in the same manner. I recommend that the Commission be granted authority similar to that conferred upon the Attorney General by section 8 of S. 1221 and that this authority be substituted for that presently set forth in section 110(c)(1) of S. 986.

I feel that the section 8 procedure is vital to insure timely consumer protection. The supplier's interest will be protected by the action of the court in setting a time limit upon the temporary restraint.

We feel that the preemption provision of section 15 of S. 1221 is not as desirable as section 112(b) of S. 986. The Commission feels that the provisions of the Uniform Commercial Code and State laws that are not inconsistent with the federal warranty act should remain operative. The Commission strongly urges that the preemption provisions of S. 986 be adopted. The Commission also prefers the saving provision contained in section 111 of S. 986 to that of section 15 of S. 1221.

S. 1219 AND TITLE II OF S. 986

A comparison of Title II of S. 986 with S. 1219 reveals that three matters are covered in a substantially similar manner, and that three matters which are included in S. 986 are omitted from S. 1219.

Sections 201, 207, and 211 of S. 986, and section 2 of S. 1219, accomplish the purpose of expanding the Commission's jurisdiction to cover acts "affecting" commerce.

Both bills confer upon the Commission the right to seek preliminary injunctions in consumer matters. (Section 212 of S. 986 and section 3 of S. 1219) Section 3 of S. 1219 would permit the Commission to seek a temporary restraining order after notice. This is not included in section 212 of S. 986. The Commission strongly favors this provision and would urge its inclusion in S. 986. S. 1219 also provided that the Commission must file an administrative complaint within the time set by the judge or the temporary injunction shall be dissolved. The Commission would have no objection to including such a provision in S. 986.

Section 4 of S. 1219 and section 206 of S. 986 both provide for an increase of maximum civil penalties from $5,000 to $10,000. The Commission urges this change.

S. 986 covers three areas not covered by S. 1219. They are (1) the right of the Commission to be represented in court by its own attorneys (sections 206, 209, and 210), (2) an explicit statement of certain powers (sections 202, 203, 204, and 205), and (3) a confirmation of the Commission's rule-making powers (section 208). The Commission's support of the foregoing provisions was set forth in my statement to the Subcommittee on March 9, 1971.

I would like to make a few comments on the subject of the representation of the Commission in the Federal courts by its own attorneys. In my opinion the present system has revealed serious structural flaws over the last twenty years. Despite the sincere desire of the Department of Justice to cooperate with the Commission—and the cordial relationship between the Department and the Commission—in these matters, the results have not been wholly satisfactory for a variety of reasons, some of which are:

(i) At least one additional layer of review is required as a prerequisite for getting into court. This is particularly damaging in cases relating to subpoena enforcement. It is extremely difficult for the Commission attorneys to investigate and try administrative cases unless they have *immediate* access to the courts to compel appearance of witnesses or the production of documents. It is equally frustrating when we experience long delays in enforcing investigative subpoenas. It is inherent in the present process that much time is wasted in review by the Department of Justice, transmittal to the appropriate United States Attorney, further review by the latter, and delays in placing the matters on the court calendars.

(ii) In both civil penalty and subpoena enforcement matters, the Commission attorneys are thoroughly familiar with the facts and law in issue. Being totally involved, they have a greater interest in pressing for an earlier decision. The delays in educating other attorneys are unnecessary.

(iii) The Department of Justice has great difficulty in either controlling or expediting these matters once they have been transmitted to the office of the appropriate United States Attorney. Inasmuch as these matters involve very little drama or interest to an attorney who is not involved in the entire case, they are usually assigned a low priority and are not pressed with vigor.

We are aware of the policy which makes it desirable to coordinate the legal efforts of the Government by concentrating them in the Department of Justice. We feel, however, that the rapid and effective enforcement of the laws enforced by the Federal Trade Commission is of sufficient importance to justify this limited exception. In the long run, the present arrangement is simply bad management and the record of the delays which result when the Commission is required to proceed through the Department of Justice are in possession of the Subcommittee. They form a solid basis for the enactment of sections 206, 209 and 210 of S. 986.

We also believe, as previously stated, that the explicit confirmation of our remedial powers, such as restitution and recision, is a matter of importance to the Commission's discharge of its regulatory responsibilities.

All of the bills of which I speak have a common objective of aiding both the consumer and the Commission. My comments are intended to assist you in evaluating them. The other Commissioners join me in expressing sincere appreciation for the keen interest you have shown in the warranty problem and in the Commission's future; you may be assured of our continued cooperation.

Consistent with your request at the hearings, a copy of this letter is being forwarded to the Chairman and all members of the Subcommittee.

Sincerely yours.

MILES W. KIRKPATRICK, *Chairman.*

ANALYSIS OF DIFFERENCES BETWEEN S. 1221, "FAIR WARRANTY DISCLOSURE ACT OF 1971" AND TITLE I—S. 986, "CONSUMER PRODUCT WARRANTIES"

The two measures will be discussed topically so as to facilitate comparison of related features.

Definitions

The definitions contained in these bills are substantially similar except for the differences noted below. S. 986 contains detailed provisions defining "express warranty" which in general encompass any promise made by a supplier to a purchaser which relates to a consumer product or service, and is made part of the bargain. S. 1221 defines a "warranty" (in contrast to "express warranty") as any express *written* statement connected with a sale of consumer products or services which undertakes to refund, repair, replace, or otherwise remedy a product which fails to meet specifications which are a part of the bargain. The principal difference is the limitation in S. 1221 that "warranty" includes only those which are in writing.

The definition of "consumer product" is very similar in the two measures. The exception is that in S. 986 only consumer products costing less than $5 would not be subject to the disclosure or designation of warranty requirements, while under S. 1221 "consumer products" costing less than $10 would be exempt from all of its provisions.

S. 986 defines a "warrantor" as a supplier who offers an express warranty. S. 1221 is comparable but states that a supplier who has not expressly obligated himself under a warranty may avoid all obligations to warrant by clearly so stating in writing.

"Services" is defined only in S. 1221 and means repair or other work costing more than $10 performed on consumer products.

"Supplier" is defined in both measures as a person engaged in making consumer products available to customers. S. 986 specifically notes that "person" includes any partnership, corporation, or association. While this express provision is lacking in S. 1221, 1 U.S.C. 1 defines "person" in a similar fashion and would be applicable to S. 1221.

"Service contract" is defined only in S. 1221 and means an agreement, distinct from the sale of consumer products or services, to repair defective or malfunctioning consumer products.

"Deceptive guarantee" in both bills means a guarantee containing a false, misleading or fraudulent representation or one that fails of adequate disclosure, all as determined by the "reasonable man" standard. S. 986 in section 110(c)(2) also includes as a deceptive warranty the use of the term "guarantee" in situations where conditions so limit its scope as to be deceptive.

The definitions which follow are used exclusively in S. 986:

"Purchaser" is limited to the first retail buyer of consumer products or services to whom a warranty is given, and any other persons entitled by its terms to enforce it.

"Reasonable and necessary maintenance" means those operations which the person guaranteed may reasonably be expected to perform which are necessary to keep the consumer product performing its intended function.

"Repair" includes replacement at Warrantor's option.

"Replacement" includes refunding the actual purchase price, less reasonable depreciation, if replacement or repair is impossible, or if such refund is acceptable to the person guaranteed.

"Without charge" means that the warrantor may not assess the person guaranteed for any costs incurred in connection with repairs or replacements, but does not cover incidental expenses unless the warrantor acts unreasonably in performing his obligation.

Disclosure of Warranty Requirements

(a) *Scope of Regulations.*—Both bills (section 102 of S. 986 and section 4 of S. 1221) provide for the issuance of regulations by the Federal Trade Commission to require the full and conspicuous disclosure in simple language of the terms

and conditions of warranties; to require disclosure of any disclaimers of express or implied warranties; and to specify the manner and form in which such information, including representations in advertisements, labeling and point of sale information must be presented to the customer. Both bills make it clear that such regulations will not require that any product be guaranteed nor that the duration or scope of any warranty be prescribed by the regulations, S. 1221 provides that such regulations *shall* be clear, *shall* require that the warrantor be adequately identified, and *shall* require specification of the persons who are to perform the warranty obligation; S. 986, on the other hand, uses the word "may" in place of "shall" with regard to these last two requirements. Each bill states that such regulation *may* require the warranty to describe the parts of a product which are covered, the nature of the defect covered, the duration of the obligation, the time limits within which the warrantor must complete his obligation after notice of a defect, the features of the product not covered, the conditions to be fulfilled and expenses to be borne by the person having the warranty, and that the warranty contains no deceptive terms.

(b) *Rulemaking Procedures.*—Section 102(b) of S. 986 provides that the Federal Trade Commission is authorized to determine, in accordance with the rulemaking procedures set forth in section 553 of the Administrative Procedure Act (5 U.S.C. 553), upon a public record, and after opportunity for an agency hearing "structured so as to proceed as expeditiously as possible," the manner and form in which information concerning any warranty is to be displayed so as not to mislead the purchaser. The provisions of S. 1221, section 4(d), on the other hand, provide that the Commission's regulations shall be effective after publication in the Federal Register, reasonable opportunity for comment by interested parties, and on approval on a record after opportunity for a public agency hearing structured to proceed as expeditiously as possible. This provision apparently requires that rulemaking be conducted in an adjudicatory fashion pursuant to sections 556 and 557 of the Administrative Procedure Act.

Designation of Warranties

The following analysis is applicable only to S. 986 as S. 1221 has no comparable provisions. Section 103(a) provides that any supplier who warrants a consumer product *in writing* must clearly designate such warranty as "full" or "partial" unless exempted by the Federal Trade Commission from so doing. A warranty would be designated as "full" if it should incorporate the "Federal minimum standards for warranty" set forth in section 104 of this bill, and a warranty would be designated a partial" warranty if it did not incorporate such Federal minimum standards.

Section 103 also provides that expressions of general policy concerning customer satisfaction are generally not subject to the provisions of this bill, but are nonetheless subject to the Federal Trade Commission Act and to action by the Attorney General under his authority to restrain deceptive warranties under section 110(c) of the bill.

Section 104 defines the duties of a warrantor under the "Federal minimum standards for warranty" to include the repair or replacement of the defective warranted product without charge in a reasonable time. It is also required that in fulfilling these duties the warrantor may not impose any unreasonable duty, other than notification, upon the person warranted. It also provides that the relative burden upon the warrantor and the person warranted must be considered in determining the reasonableness of such conditions. The warrantor would be excused from performing his duties under the warrant if he can show the defect in the warranted product to be due to unreasonable use or failure to provide reasonable maintenance.

In making a written warranty against defects which incorporates "Federal minimum standards" the warrantor is required to designate it as a "full" warranty or terms of similar meaning. The disclosure requirements of section 102 apply to any written warranty which incorporates such minimum standards, and compliance with such standard requires that the warrantor disclose the duration of the warranty in terms of a time period, mileage, or other relevant measure of use. A warrantor would be allowed to use both a "partial" and a "full" warranty in the sale of a product if the warranties are clearly differentiated.

Service contracts are permitted in addition to or instead of warranties if the contract is clear and understandable.

In addition to the rulemaking provisions under section 102(b) dealing with disclosure requirements, section 109 would authorize the Federal Trade Com-

mission to establish rules pursuant to section 553 of the Administrative Procedure Act upon a public record after opportunity for an agency hearing, structured to proceed expeditiously, for the purpose of defining in detail the warrantor's "duties" under section 104 and their application to warranties of different categories of customer products with "full" warranties, and for the further purpose of determining when neither the designation "full" or "partial" need be used in a written warranty in accordance with section 103.

Disclaimer of Implied Warranty

Section 108 of S. 986 provides that tlere can be no express disclaimer of an implied warranty if an express written warranty of a consumer product is made; it would, however, permit implied warranties to be limited to the duration of the express warranty, if the limitation is reasonable and clearly stated. The comparable provision of S. 1221 is section 5, which precludes the use of a disclaimer of implied warranties wherever the supplier uses either the term "guaranty" or the term "warranty" in advertising, labeling, etc., and makes such practice a "deceptive guarantee." This section also requires a supplier who disclaims implied warranties to designate the instrument a "Manufacturer's (or Supplier's) Limited Obligation."

Unlawful Practice

Section 110(b) of S. 986 states that it should be a violation of section 5(a)(1) of the Federal Trade Commission Act for any person to fail to comply with any requirement imposed on such person pursuant to the bill or to violate any of its prohibition. Section 6 of S. 1221 states that it shall be an unfair or deceptive practice within the meaning of section 5 of the Federal Trade Commission Act for any supplier (i) to make any deceptive guarantee, or (ii) to violate any regulation issued under section 4 of the bill.

Remedies

Section 110(c)(1) of S. 986 provides that U.S. district courts will have jurisdiction to restrain suppliers from making deceptive warranties covering consumer products or services, in actions by either the Attorney General or by the Commission's attorneys. The court would issue injunctions in civil actions at any time injunctive relief is deemed appropriate. The court would be empowered to add additional parties as required to serve the ends of justice and to summon such party regardless of the district of their residence. In contrast, section 7 of S. 1221 provides that wherever the Commission believes that a person is engaged or about to engage in making a deceptive guarantee, or violates any regulation under section 4 of the bill, and that injunction thereof pending the issuance of a complaint and its final dismissal or setting aside by judicial review would be in the public interest, the Commission by its attorneys may bring suit in a district court to enjoin the violation. Upon proper showing after notice to the defendant, the court is empowered to issue a temporary restraining order or injunction under the same conditions and principles as injunctive relief is granted by courts of equity to prevent conduct causing loss or damages. This section would permit the restrained party to move for dissolution of the injunction should the Commission fail to file a section 5 complaint within such period as the court should specify. By section 8 of S. 1221 the Attorney General is empowered to seek a temporary injunction to restrain any guarantor from making a deceptive guarantee, and the court may grant such injunctive relief as it deems appropriate. There is no requirement for the showing of public interest or irreparable harm as is required by section 7 dealing with the Federal Trade Commission's injunctive remedies. The court has authority to summon additional parties as in the case of section 6. It should be noted that the Attorney General's action would be limited to the restrain of "deceptive guaranties," while the Federal Trade Commission could also proceed to restrain violation of the regulations made under section 4 of the bill.

Venue

Section 9 of S. 1221 permits an action under the bill to be brought in any U.S. district court in which the defendant resides, is found, has an agent, is licensed to do business, or is doing business. S. 986 has no venue provisions.

ADDITIONAL FEATURES OF S. 986 HAVING NO COUNTERPART IN S. 1221

Civil Investigative Demands

Section 10 of S. 1221 provides that whenever the Attorney General has reason to believe that any person under investigation may be in possession of information,

documents, etc., or has knowledge relevant to the making of a deceptive guarantee, he may, before instituting restraint proceedings under section 8 of the bill, issue in writing, and serve a civil investigative demand (CID) requiring such person to produce such documents or to answer interrogatories concerning such information. Each CID would be required to describe the conduct alleged to constitute the deceptive warranty, describe the material to be produced, propound with certainty the written interrogatories to be answered, prescribe a reasonable return date, and identify the custodian to whom such documents or information is to be furnished. It is further provided that no CID shall contain documentary or informational discovery demands which would be unreasonable or privileged if contained in a subpoena duces tecum issued by a district court under the procedures prescribed in section 8 of the bill. CID would be servable any place within the jurisdiction of any court of the United States. The procedure for serving various types of business organizations and the means of serving the CID and of making return of service are spelled out in detail. Sections 4 and 5 of the Antitrust Civil Process Act (15 U.S.C. 1313–1314) which relate to the powers and duties of CID custodians is incorporated and it provides that any discovery obtained by the CID *may* be made available to representatives of the Commission for the purpose of investigating violations under the bill.

Section 12 of S. 1221 states the bill is not to be construed so as to prevent a supplier from selling a service contract covering parts and/or labor to the first purchaser at the time of sale.

Section 13 of S. 1221 states that remedies for breach of implied warranty may be tailored to conform to State law.

Section 14 of S. 1221 requires the Attorney General and the Commission to make annual reports to the President and the Congress on the effectiveness of the bill. The Commission additionally must inquire into the marketing of performance guarantees, and other past sale obligations, their significant deficiencies, and the most effective means for improvements, and make a report thereon within 2 years after enactment.

Both bills have provisions for effective dates which are intended to allow time for the issuance of necessary regulations.

Consumer Remedies

S. 1221 has no counterpart to the provlsions of section 110(a)(d) and (e) of S. 986. Section 110(a) states that it is intended by Congress that warrantors create informal dispute settlement machinery in which independent and Government entities can participate in a supervisory role. Section 110(e) gives United States district courts jurisdiction, subject to the jurisdictional requirements set forth in 28 U.S.C. 1331, over suits by persons damaged by the failure of a supplier to comply with warranty obligations assumed under an express or implied warranty or service contract which is subject to this bill. Section 110(d) states that if any person who is warranted or protected by a service contract shall prevail in any suit for breach of an express or implied warranty or service contract he will be allowed to recover, as part of the judgment, a sum equal to the aggregate of costs and expenses, incluing attorneys' fees based on expended time and determined by the court to have been reasonably incurred in the prosecution of such suit, subject to the court's determination that an award of attorneys' fees would not be appropriate. It is also provided that the warrantor must have been afforded reasonable opportunity to cure the breach as a condition to the award of such costs and expenses.

Preemption

The preemption provisions of section 15 of S. 1221 are much more stringent than those of section 15 of S. 986. The former may preempt the field now occupied by the Uniform Commercial Code.

CONSUMER PRODUCTS WARRANTIES AND IMPROVEMENT ACT, 1971

MONDAY, MARCH 15, 1971

U.S. SENATE,
COMMITTEE ON COMMERCE,
CONSUMER SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 10:05 a.m. in room 5110, New Senate Office Building, Hon. Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Moss, Pearson, and Cook.

Senator Moss. The hearing will come to order.

OPENING STATEMENT BY THE CHAIRMAN

Today the Consumer Subcommittee of the Senate Commerce Committee resumes hearings on consumer product warranties and Federal Trade Commission improvements legislation. This subcommittee has, beore it, several proposals, but hearings are focused primarily upon the Magnuson-Moss bill, S. 986, and the administration recommendations S. 1219 and S. 1221.

In the 91st Congress numerous hearings were devoted to these subjects. This subcommittee held 5 days of hearings on warranty legislation and 8 days of hearings discussing FTC reforms.

In addition, the House of Representatives held 3 days of hearings on a warranty bill substantially the same as S. 986 before us today. And the Judiciary Committee of the Senate held 5 days of hearings to consider FTC improvements identical to those in title II of S. 986.

Even though an extensive public record on the legislative proposals before this subcommittee has been established, it is with pleasure that we again welcome industry representatives who have requested an opportunity to testify on this important consumer legislation.

The ranking Republican member on the subcommittee, Senator Cook, is with us this morning. I will ask Senator Cook if he has any opening statement he would like to make.

OPENING STATEMENT BY SENATOR COOK

Senator COOK. Mr. Chairman, at the outset I would like to express my appreciation to the witnesses called by the minority for the manner in which they have accommodated the change in their appearances from tomorrow to today on short notice. I am personally mindful of some of the problems that this caused for these witnesses and I believe their cooperation in this manner is commendable.

In this connection, I would like to make two suggestions: First, I believe the change in appearance date constitutes good cause to waive the advance filing requirement of statements of witnesses pursuant to section 113 of the Legislative Reorganization Act of 1970. I understand that Senator Cotton, the ranking member of the committee, shares my views, and I trust, Mr. Chairman, that you will be of a similar mind.

Second, the administration's proposals were introduced only last Friday, March 12, by Senator Magnuson. These bills are 1219 and 1221. Although I am aware that each of the witnesses were sent a copy of the executive communication with the language of each of these bills, I would hope that we could allow each witness, if he so desires, to supplement his testimony today with a written statement on the grounds that he may not have had sufficient opportunity to analyze the administration's proposals.

I offer the suggestion in view of the unusual circumstance and in recognition of the fact that these hearings will not be completed until sometime after Monday, March 22, at which time we are now scheduled to receive testimony from administration witnesses.

Senator Moss. Thank you, Senator Cook. We have already waived the requirement of filing written statements and recognize that this additional hearing was set without any lengthy notice although we did announce it about a week ago. Certainly witnesses will be permitted to file supplementary written statements if they care to do so within the time limit that our record will be open, and it will be open 7 days after the March 22 hearing.

We are anxious to get all of the pertinent information that would contribute to a better understanding of the problem and possible solutions. So we don't want to exclude any testimony; we want to be as inclusive as possible and yet move forward with our task of considering the legislation that is before us. But as I tried to emphasize in my statement, we have already given extensive consideration to these matters in the last session.

Mr. Gilbert H. Weil, the general counsel of the Association of National Advertisers will be our first witness. Following him, we will hear from Mr. Earl W. Kintner. So if you would come forward, sir, and give us your statement, we would appreciate it.

STATEMENT OF GILBERT H. WEIL, OF WEIL, LEE & BERGIN, GENERAL COUNSEL, ASSOCIATION OF NATIONAL ADVERTISERS, AND THE DIRECT MAIL ADVERTISING ASSOCIATION

Mr. WEIL. Thank you very much, Mr. Chairman, Senator Cook, members of the staff. Good morning, and my very deep and sincere gratitude to you all for giving me the opportunity to comment on S. 986.

My name is Gilbert H. Weil, and I am a partner in the law firm of Weil, Lee & Bergin in New York City. I appear here this morning to represent two of my clients, one, the Association of National Advertisers, whose members are companies which use national or regional advertising to promote the sale of their products or services. The membership totals approximately 500 companies representing the broad

spectrum of American business ranging from large- and medium-sized companies down to relatively small ones. They deal in consumer package products, consumer durables, and in services such as insurance, banking, transportation, indeed almost anything in the line of products or services that goes ultimately to consumers.

The other client for whom I speak today is the Direct Mail Advertising Association whose member companies utilize direct mail to promote the sale of their products and services. It also represents suppliers of all materials and services which are used by such companies in the course of that promotional function. The majority of the Direct Mail Advertising Association's 2,500 members, representing some 1,600 individual companies, are users of direct mail, and they include manufacturers, wholesalers, retailers, publishers, mail order houses, insurance companies, fundraisers, public utilities, financial services, and the like.

Those who produce or create direct mail are also members. They would include advertising agencies, letter shops, and printers as an example. Many firms which are suppliers to the medium, such as paper producers, envelope manufacturers, list brokers, and compilers, also belong to the Direct Mail Advertising Association.

So I think it is pretty plain that the interests of these two trade associations are very intimately interrelated to any matters dealing with consumer interests.

I welcome the relaxation of the rule against turning in written statements in advance. Time has simply not permitted me to do that. I have been involved in litigation which is going on at this very minute over at the Federal Trade Commission, so that I simply did not have the time.

Also, I shall confine my remarks entirely to title II of S. 986. I have not had any opportunity nor have I had any instructions from my clients with regard to title I, and the framework of my comments this morning will be to attempt to point out what I see as some of the real—not fanciful—but real potentialities of things that can happen if a bill such as S. 986 should become law.

It would turn topsy-turvey some of the most basic and most cherished principles of our political philosophy, and to me it seems inconceivable that the proponents of this bill are truly aware of the drastic nature of the implications of the bill.

There is some supporting evidence as to this lack of awareness. First of all, there is nothing in the record before this subcommittee to call to its members' attention what some of these potentialities are. Mr. Chairman, you have referred to 8 days of hearings before this subcommittee in the last session, but the point is that the really potent aspects of title II, and by this I refer to the rulemaking powers, the legislative powers that would be conferred upon the Federal Trade Commission, did not in any way enter into those hearings.

They were not discussed during any of those 8 days. They were not discussed during any of 8 hours nor of 8 minutes nor even of 8 seconds. The trade regulation rulemaking powers to be conferred upon the Commission emerged for the first time when the bill came out of executive session. There has been no opportunity for hearings on it before in front of this subcommittee. There were later in front of the Judi-

ciary Committee, but that was a truncated set of hearings because a severe time limitation had been placed upon the Judiciary Committee in giving consideration to what was then S. 3201.

My concern over this lack of awareness is in a way borne out also, Mr. Chairman, by the remarks that you made in your opening statement on the bill. For there you described briefly your concept of what the bill would do in the following language—and I quote:

> This bill would give the Commission the tools it needs, power to issue preliminary injunction, the authority to seek realistic penalties against suppliers who commit unfair or deceptive acts, and the authority to provide specific remedial relief to the consumers injured by those suppliers.

Not one word regarding this tremendously important aspect of conferring virtually supralegislative powers upon the Federal Trade Commission.

When hearings were held last week the sole witness, I believe, in favor of the bill was Chairman Kirkpatrick of the FTC. He, too, in his comments, devoted no more than nine brief lines to this extremely important subject of the delegation of legislative powers and those nine lines were little more than a casual brushoff of that section of title II as being of not very great moment.

He said—and I quote again:

> The proposed amendment in Section 208 will make more definite the authority of the Commission to promulgate trade regulation rules defining unfair or deceptive acts or practices. Violation of any such rule is implicitly made an unfair or deceptive practice in violation of Section 5–A–1 of the Act.
>
> Although the Commission is confident that if challenged, it will be upheld in exercising its rule-making powers, it nonetheless strongly urges that Congress remove all doubt and make explicit the Commission's rule-making authority.

So he too evidently conceived of that portion of title II as being nothing more than a clarification and a codification of what the law presently is anyway, which, of course, if that were true, would not make it anything very drastic by way of a change in our present law.

On that subject, though, may I ask that there be included in the record of this hearing the supplement to the statement which I made before the Senate Judiciary Committee in the last session on S. 3201. That supplement appears in the printed proceedings of those hearings starting at page 222 and going to the top of page 237.[1]

The burden of that is to show that the Federal Trade Commission does not in fact or in law possess such legislative rulemaking powers today, and that legislation conferring them upon the Commission would be a drastic change indeed.

Senator Moss. We have that before us, and it is in print. We will include it by reference in these hearings so that it will be noted that this is the supplement that you refer to.

Mr. Weil. That will be fine, Mr. Chairman. I appreciate that very much.

Now actually what title II would do would be to establish the Federal Trade Commission as a supralegislative power. It could reach with its legislative activities all of the Nation's business and it would be supreme in that reach over all inconsistent State and Federal law, including congressional enactments with the exception of those which would include within them a specific disclaimer of the right of the

[1] See Serial No. 91–48, Senate Commerce Committee hearing, 91st Congress.

Federal Trade Commission to reach into and proceed inconsistenly with such law.

Under the specific remedial relief section of title II the Commission would be put into a position to tell business how to run its business. It could control, contrary to all law existing at the moment, trademark rights and the use of trademarks; then it could reach into profits and pricing; it could even command business to suspend doing business or even to discontinue doing business completely in one or more product lines or in given instances. The powers would be that great as the bill is presently drafted.

In effect, the specific remedial relief provisions would give the Commission powers to impose capital punishment not stopping short of the death sentence.

Senator Moss. Economic death sentence; do you want to put that in there?

Mr. WEIL. It is not so limited in its language. It says "any action." Under the present wording it could order hari-kari. I have purposely stated these potential effects in broad terms hoping that they seem so shocking to you that you are loath to believe me. I hope you do not believe me because if you do not believe me, it means you do not intend to produce those results.

If you believe me and are complacent about it, then I am indeed concerned. To the extent that time will allow, however, I stand ready in response to questions, or I will take it up on my own if we have time enough left, to prove to you out of actions and statements already made by the Federal Trade Commission that nothing I have said up to this moment is an over-statement or exaggeration or an impossibility.

S. 986 would provide the foundation and authority for the Commission to do all of these things which so far it has only been saying it would like to do or is planning to do or getting around to do; subject, however, if it does so, to court review to test its ability and the propriety of its doing so. S. 986 would knock out that ability of courts to review because it would confer that power by act of legislature explicitly upon the Commission.

In reviewing these aspects I am addressing myself to, I think another aspect is important too, and that is what is involved in the operation of the Commission. Mind you, all these far-reaching powers to which I have referred would be administered by an agency of five individuals.

A majority would control; so now we come down to three individuals. In some circumstances it could be two who could establish the law of the land because a quorum is three and a majority of the quorum has the authority to take Commission action. So we could conceivably on occasion come down to a situation where two individuals could establish in these extremely important areas of the Nation's business and affairs the law of the land.

More than that, these individuals are not elected; they are not answerable to nor are they responsible to any constituency and they hold office longer than the President of the United States, longer than any Senator, certainly longer than any representative.

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Yet their mere declaration of that which they desire to be the controlling law of the Nation with regard to anything affecting commerce—because we have to take into account the other provision of 986 which would extend the jurisdiction to activities which affect commerce even though they are not in it. The reach of these individual people to control the business affairs of the Nation would, therefore, go right down into every locality and into every small operation. Nothing could be regional enough, local enough or small enough to escape the argument that its activities at least affect interstate commerce, and these nonelected individuals would have these powers over them.

I see no basis for court review. Once a statute comes on the books which says that the Commission can enact legislative regulations with regard to anything that it might deem to be an unfair practice, I see no ground for a court saying, "No, as a matter of law what you have decided is unfair is not unfair," because unfairness is a highly subjective standard. These powers of the Commission could even reach such matters as wage and price controls.

Suppose, for example, that the Commission should decide in its judgment—and that is all that counts here is the Commission's judgment—that it is unfair to consumers for labor to keep increasing its demands and then for business to keep increasing its prices because this feeds inflation and is unfair to the consumers.

So, despite all the problems that you could conceive of Congress having if it had to wrestle with the problem of wage-price controls, the Federal Trade Commission could cut right through that and simply issue its trade regulation rules saying what shall be done in those respects. They could reach farmers, they could reach laborers and union activities as long as they decide that whatever it is the farmer or the laborer or the union is doing redounds unfairly to the interest of consumers, and one would have to grant that in all of those areas they could find room to address themselves to activities of any of those groups or individuals on that basis.

For example, despite other Federal laws, they could forbid farmers to leave productive acreage unplanted and unharvested on the ground that doing so works adversely to the interest of consumers who would otherwise have the benefit of that produce. They could forbid the use of trademarks. They could forbid brand advertising or any other means of building good will because—and we know this from pronouncements that have been made by at least one present commissioner—there is an interest on the part of the Commission today, under the heading of rational purchase decisions, to look upon anything which would cause or induce a consumer to buy a product for reasons other than price-quality ratios as an unfair means of inducing a purchase based upon false values.

The concept that has been expressed in this respect is that it may constitute an unfair practice to create a reflex action on the part of consumers to automatically reach for a particular brand of product, when they enter a store, rather than compare all the competing brands and reach a purchase decision based upon rational evaluation of their relative price-quality ratios.

Essentially, that comes down simply to good will. That is what good will is about. It is the earning of consumer confidence in, and desire to purchase, a particular brand for its own sake. Yet, there is this visible movement within the Commission toward looking upon such good will as an unfair practice adverse to the interests of consumers.

And if, under the powers of title II of S. 986, the Commission were to promulgate trade regulation rules outlawing efforts designed to build brand consciousness and good will, I would not be optimistic that much room would be left for a court to substitute its views as to what is fair or unfair for those of the agency which has been given such broad authority to impose its own.

The Commission could also, and there has been a good deal of talk on this recently, look upon good will building measures as creative of unfair barriers to entry and bar them on that basis.

In short, there is certainly within the scope of title II the opportunity for the Commission to legislate good will out of existence as a commercial objective or operation.

For those brands for which good will has already been acquired, the Commission, under the specific remedial section, might very well argue, and probably successfully, that in order to give redress—in other words, to get rid of the good will which has already been built and is still operative in the marketplace—that the company must suspend its operations, suspend all further promotion of the product, perhaps even take it off the shelves, until that ill-gotten good will has been dissipated.

So, my death sentence reference is not extreme, Mr. Chairman. Title II would place into the hands of the Commissioners virtually unreviewable authority arbitrarily to make into the law of the land their own personal philosophies in the broad expanse of socioeconomic affairs.

Now, one may say that the things the Commission is trying to do are good; one may agree with them, or one may disagree with them. That is not the point. The point is who should be making the law of this land? Should it be these five, three, two nonelected individuals, or should it be the two Houses of Congress subject to ultimate Presidential review?

We can look at title II another way. For one thing, as I have been mentioning, it would delegate full legislative power over anything and everything that affects commerce that might be adverse to consumer interest to the Commission. That is a delegation of legislative power so broad that I think we might see a revitalization of the old *Schechter* doctrine. It seems to me that this delegation goes far beyond the scope of powers that were involved in *Schechter*.

Secondly, it would leave the Federal Trade Commission where it is today as being the complainant, the investigator, the prosecutor, sometimes the witness, and always the judge and jury to try and to decide its own cases against the people that it charges with violating its laws. We have been told by a respected former Federal Trade Commissioner, in a speech to which I am sure that he gave a great deal of soul searching before he made it in front of the American Bar Association, that unfairness of trials in front of the Commission is a fact

of life, an inescapable fact; and this does not imply any personal impropriety, it simply is inherent in the structure.

I have in the hearings before the Judiciary Committee on S. 3201 appended the pertinent portions of that speech as appendix 1 to my remarks on pages 243 and 244, and I would ask, Mr. Chairman, if that portion of the previous print could also be referred to at this point and by reference made a part of this record.

Senator Moss. It will by reference be made a part of the record at this point.

Mr. WEIL. Thank you very much, Mr. Chairman.

Now, then, to these roles, which are already deplorable, of prosecutor, judge, and jury, sections 202 through 205 of S. 986 would add the only one that remains unadded so far: executioner.

Such a package of broadly delegated powers would seem to me to raise very serious questions of constitutionality. Apart from the problem of undue scope of delegation, the old *Schechter* principle that I have referred to, the redress provisions of the bill would additionally authorize the Commission to make awards to injured consumers after there has been a so-called trial for violating the so-called law. This, it seems to me, is a delegation of judicial powers. I don't know what more a court does than receive a complaint, conduct hearings, hear witnesses, receive the evidence, ultimately decide whether a violation of law has occurred, and if it decides that it has to make an award or order some other form of redress to the injured party.

This is what S. 986 would give the Commission authority to do, and it seems to me that it is plain judicial authority. So, we have two areas of constitutional concern with respect to undue delegation; but apart from that we have the further concept of separation of powers.

In this one agency there would be combined the legislative power, that of promulgating rules setting the law of the land, plus the executive power, investigation, and the initiation of prosecutions, plus the judicial power, to which I have just referred. What has happened to separation of powers? The dividing partitions have been completely ruptured and everything flowed into this one great big stew.

If the subcommittee intends such results, then the only arguments I have to urge are those which are based upon these constitutional questions. To them I would just mention without trying to orchestrate it at all at this point, it is pretty obvious, the additional constitutional problems of due process and of the first amendment, because of the chilling effect of the in terrorem powers that the Federal Trade Commission would have. In other words, business operators would have to be afraid to stand upon their rights because of all that the Commission could eventually do to them if the Commission should decide its own case in its own favor against them.

Thus, no matter how proper a businessman may feel his existing conduct is, if the Commission merely wags its finger at him he probably would have to consider very seriously, and I would say in most cases decide that the risk is too great, that there is too much to be lost, so that he had better change without a trial, without any due process, just because he is afraid of the clout that the Commission would have if he doesn't go along with whatever it tells him it wants him to do.

If, on the other hand, the subcommittee doubts that S. 986 would leave scope for powers as frightening as those I have described—and as I said before, I would welcome that doubt because then I would know that you don't really want that—then I stand ready in response to questions or otherwise to demonstrate that S. 986 in its present form does indeed need to be revised lest it do lead to those very results. If that be the situation, I most respectfully suggest that legislative responsibility requires no less than the use of draftsmanship sufficient to foreclose undesired and drastic results of such a magnitude as those that are involved here.

I think that rather than just continue, if there are any questions, I would like to try to field them.

Senator Moss. We appreciate your statement, Mr. Weil. It is a very sweeping condemnation of title II of S. 986 before us, and as you have indicated you have not yet had time to examine and to testify on 1219 or 1221, which are the administration's versions of this problem.

You were quoting, I believe, a speech that Commissioner Elman made, but he testified on this bill before the subcommittee last year in December of 1969, and one thing that he said, and I am quoting from that text is:

> In addition, the Commission must be given by statute, explicit substantive rule-making power so that violation of a validly issued rule shall without question be deemed a violation of the law.

Isn't that considerably inconsistent with the speech that you referred to that he was making before the American Bar Association?

Mr. WEIL. Well, not necessarily, Mr. Chairman, because first of all, one cannot close his eyes to the thirst for power that any agency possesses, and properly so, they should be trying to do as much as they can do. But that doesn't mean everything they ask for is the correct thing to be given to them. But it is not inconsistent because if the Commission got those powers, you wouldn't have to worry about trials, fair or unfair. There wouldn't be any trials.

The Commission would pass the rule saying this is now unlawful, and in very few instances would there be any question of fact as to whether the party actually performed the act that had been declared unlawful.

So, what former Commissioner Elman would do, and what would happen if these rulemaking powers are granted, would be to make trials or hearings before the Commission virtually a thing of the past.

Senator Moss. Well, the rulemaking power of the Commission under the statute would always be prospective; it wouldn't be retroactive. You don't see that in the legislation, do you, that it would be retroactive?

Mr. WEIL. No, I don't see that in the proposed legislation. However, the point is this: Suppose that the Commission got this power and then decided, just to mention one of the areas I referred to, that the use of brand-name advertising is unfair. It would issue a trade-regulation rule saying that it shall be a violation of section 5 to advertise brand names or to use trademarks. From then on, with respect to any individual company, the only issue would be: Did it use a trademark or didn't it? No trial would be needed for that.

If it did use a trademark, then no trial is needed because it has violated the law, period.

So, the fairness or unfairness of a trial which I have refered to here and which Commissioner Elman referred to in his American Bar Association speech is one thing. That is under the present law, and for past violations if S. 986 became passed. But for the future, anything dealing with trials would virtually become nothing more than theoretical, because there would be no basis for trial.

Senator Moss. It seems to me you have pretty well brushed aside the arbitrary and capricious doctrine that could be applied to rulemaking of the Commission. If it made a rule, forbidding a brand name to be used on a product, I can't imagine a court that would allow that to stand. I just can't believe that would be so.

Mr. WEIL. I would doubt, Mr. Chairman, that a court could say that such a rule is arbitrary or capricous if backed up with the argument that through the use of brand names the companies that use them and advertise them, first of all, erect undesirable barriers of entry—and under past decisions involving the Commission, unfair practices don't have to be of such a magnitude as to violate the Sherman Act—they can be incipient.

Now, just think hypothetically of a rule saying that the advertising of brand names and trademarks and the effort through that to bring about a product differentiation has the incipient effect of raising undue barriers to entry, and that it also has the effect of inducing the consumer to purchase that particular product simply because it has got that brand or trademark on it, although it might be inferior to a purchase that the consumer might have made of a competing product, I think it would be very difficult for the court to say that the Commission's finding that to be unfair it is so arbirtrary, capricious, and unreasonable that as a matter of law it would be invalid.

I simply cannot see much room for judicial application of the arbitrary or capricious doctrine under S. 986—in view of Supreme Court decisions on past activities, the *Colgate Rapid Shave* case, the *Mary Carter* case, where some decisions of the Commission as to what is unfair under the present law are almost shocking, but were nonetheless upheld in the courts. Let me give you one quick example because it makes this point, and this is years ago. It was the *Gelb* case. In those days the hair colorings were temporary, they were rinses, they washed out with the next shampoo, and Gelb came out with one that would not wash out. So, they called it permanent to distinguish it from temporary.

The Commission came along with a complaint saying this means to the consumer that she needed but one application of the product and from then on her hair would be that color; that is what permanent means. The Commission put consumer witnesses on the stand, every one of whom said, no, she didn't believe that; she understood that she would have to redo the roots and so on.

Finally, under virtual cross-examination of one of its own witnesses, it got her to say that she didn't believe that is what the advertising meant, but she supposed that maybe some people would be foolish enough to think so.

Now, based on that, the Commission made a finding of unfairness and deception and issued a cease-and-desist order which was appealed to the court of appeals, and the court of appeals said while this seemed ridiculous, they could not say it was beyond the powers that had been conferred upon the Commission.

So, I think one would find it very difficult to find a situation in which a court could find a rule such as I have referred to even outlawing trademarks to be so arbitrary, so unrelated to unfairness, as to be beyond the Commission's powers under S. 986. What is unfairness? It is what anybody thinks is the wrong thing to do; that is what unfairness is.

I would be very pessimistic on that score.

Senator Moss. I am not familiar with that case. I suspect what Noah Webster had to say in his dictionary on his definition of the word "permanent" might have had a lot to do with it instead of what a parade of witnesses might have said. But I can't argue it, because I haven't delved into the case and I don't know it.

But it seems to me that the whole thrust of consumer legislation up to this point, not the whole thrust but one of the principal lines of thrust, is to give the consumer the greatest leeway possible in making his choice. If he wants to choose a product on brand name, there is nothing to prohibit him from doing it, provided he is given accurate information about the product. If the information given him isn't accurate, why, of course, there will be some regulation.

I appreciate your testimony, and I, of course, have reviewed what you said before the Judiciary Subcommittee last year, and we have included by reference those two sections that you referred to. You will be allowed to file additional written statements if you wish to do so, to amplify in any way your testimony here today, or to, in fact, comment in effect on testimony that may be given by other witnesses. We certainly will consider it very carefully.

My colleagues probably have some questions. Senator Cook?

Senator Cook. Mr. Weil, before I ask you any questions, it appears to me that the proponents of this measure at the Federal Trade Commission frankly are attempting to hide the fact that title II of this proposed legislation would be a drastic change in the nature of the Commission and in the authority it has possessed throughout its 57-year history. The spokesmen for the FTC claim that the Commission has always possessed the authority to engage in legislative-type activities and that the FTC is not asking for any significant alteration of these authorities.

However, if they do possess this authority, I wonder why they are bothering to ask for it now. Although I have numerous objections to both title I and title II, I feel that the danger in these hearings is that, frankly, we may be lulled to sleep and thereby not realize fully the true potential impact of this legislation. I hope that the witnesses who will testify today, and any other days will be cognizant of the fact that title II of this legislation is substantially different from the legislation considered last year in this committee.

Let me give you an example, because after executive session last year, and after the hearings in the Judiciary Committee, section 103

of S. 3201 empowered the Trade Commission to go into the Federal courts, make a determination in the Federal courts; and under title 2 of 202, the Commission is further empowered and directed to order such persons, partnerships or corporations engaged in any act or practice which is unfair or deceptive, and is prohibited by section A–1 of this section, to take any other action necessary to redress the injury caused by such acts or practices to consumers.

Section 204 would amend 15 U.S.C. 45 and add one new section: "Or requiring such person, partnership or corporation to take such other action as may be authorized by this act"—and listen to this—"and determined by the Commission to be necessary in order to remedy the violation or violations authorized by this act."

Let me ask you, Mr. Weil, don't you feel that as a practical matter if this bill were to pass, Congress would be delegating to the Federal Trade Commission the authority to expand the jurisdiction of the Federal courts?

It makes every one of these a violation for which fines can be levied, for which civil penalties can be exacted, and we are giving this authority to the Federal Trade Commission.

Do you agree?

Mr. WEIL. I agree thoroughly, Senator Cook. And I would add to your list, it would also lay the substantive ground for class actions under other bills which are pending.

Senator COOK. Let me ask you something very interesting. Former Commissioner Elman said the Commission ought to have explicit authority. Now, do the words that I have just read you, any other action, any other thing deemed and determined by the Commission to be necessary in order to remedy—is that explicit?

Mr. WEIL. It is explicitly all-inclusive.

Senator COOK. Let me read you another paragraph from his remarks and testimony on S. 3201. I refer to the last paragraph on the bottom of page 60.

> At the same time, the courts, not the Federal Trade Commission, have the facilities and expertise for trials which focus not upon complex and difficult technical and economic issues, but upon such traditional issues as knowledge, intent, and the identity of the culprit.

And he goes on to say:

> Of course, the Federal courts are hardly newcomers to this area.

Would he have testified today on this bill, do you think, after his testimony on S. 3201, and decide to include an all-inclusive list according to the whims and the desires of the Federal Trade Commission as it saw fit?

Mr. WEIL. No, I agree with you, Senator. I don't think he would, although certainly nobody wants to speak for him. It would seem to me that putting the two statements together, his testimony before the subcommittee, and the speech that I have referred to, which the chairman has juxtaposed against each other, that former Commissioner Elman's view was that eventually the Commission should become the legislative and policy-establishing organism and that the trials should take place in a trade court.

Now, of course, I would disagree with him on the former. I don't think that the Federal Trade Commission should be the legislative and policy-establishing entity. I think the Congress of the United States should be that.

Senator Cook. By the way, in regard to your discussion concerning obviating all State commissions and all State regulations, I would like to read a paragraph from Mr. Joseph Martin, Jr., who is General Counsel of the Federal Trade Commission. That was in response to my request of March the 10th, and I will read you one paragraph.

> While the question as to whether Commission rules and orders supersede concurrent state action must be answered by a judgment upon the particular case, a Federal Trade Commission trade regulation rule under present law would be the controlling standard over any state regulation of the same subject matter to the extent of the Commission's jurisdiction and to the extent that there is an actual conflict between the two schemes of regulations.

And doesn't the proposed bill give them a wider degree of jurisdiction than the present regulations under which they were authorized? Is that not correct?

Mr. Weil. Far wider, Senator, and may I add to that an excerpt from the Federal Trade Commission's petition for a writ of certiorari in the *Sperry & Hutchinson* case, and on page 13 it makes the bald statement which I now quote:

> The Commission's broadly creative responsibilities under Section 5 are not restricted by state or common law of unfair competition.

"Broadly creative," I call your attention to that. This is indeed what S. 986 would do.

And coming back to your observations, Mr. Chairman. If it becomes established that that is what Congress wants the Commission to have, then barring constitutional questions, I don't see any room for a court to say that in virtually any specific instance the Commission has exceeded the legislative authority that had been given to it.

Senator Cook. Let me read you part of section 8 of 202, which would authorize the Federal Trade Commission to go into the Federal district courts and initiate civil actions up to $10,000.

Now, a Federal court has authorized an appropriate penalty, let's say; it has issued an order from the orders on the books. The Federal Trade Commission, under this act, can completely ignore the order of the Federal court because it proceeds to say at the bottom of this section:

> The Commission may compromise, mitigate or settle any civil penalty if that action is accompanied by a public statement of its reasons following a public hearing at which interested parties may be heard.

I assume that they are going to hold the public hearing. They can go in and can get a civil penalty against you, proceed to hold hearings on a final order of the Federal court; they can mitigate, they can settle any civil penalty with a public hearing they hold, and in essence tell the Federal court to go to hell, is that not true?

Mr. Weil. That certainly is included in that language. I don't know whether the subcommittee truly intends that to be so, but if it does not, than the language should be revised.

Senator COOK. It is the same language that is in S. 3201, and it is the same language I argued about then. I might state for the benefit of those who will testify, I think an analysis of section 103 on page 12 of S. 3201 and section 202 on page 16 of S. 986 will show you that, in essence, adequate hearings on this proposed carte blanche authority for the Federal Trade Commission have not been held in regard to the language that is in this present bill.

Thank you, Mr. Chairman.

Senator MOSS. I believe Mr. Sutcliffe had one or two points he wanted to make query about.

Mr. SUTCLIFFE. Mr. Weil, I am somewhat confused about your explanation of the way in which the trade regulation rule authority would expand and change drastically the present operations of the Commission.

At the present time, does the Federal Trade Commission have the power to bring cease-and-desist orders against any unfair or deceptive act against consumers or anyone else?

Mr. WEIL. That is correct.

Mr. SUTCLIFFE. Does this then give them the authority under present law to bring a cease-and-desist order in a labor-management dispute, one of the hypotheticals that you posed in discussing the power that the trade regulation rule would bestow upon the Commission.

Mr. WEIL. They could bring it. They could decide their own case any way that they wish, and then it would go up on appeal. That is the point where we reach the parting line between present law and what 986 would do.

Mr. SUTCLIFFE. Would that be retrospective or prospective application? In other words, would a person be held accountable under vague language of unfair or deceptive acts or practices through the cease-and-desist order, or would the person be given notice of what unfair and deceptive act or practice meant before any kind of sanction would be placed upon the participants in a particular dispute?

Mr. WEIL. In my opinion, under the present law, the result would be prospective only. The statute says that upon a finding of a violation, the Commission shall order the person to cease-and-desist continuing that violation. So, that would be prospective only. There would be no retroactive or retrospective redress. But in your final question, you have assumed a very important factor in the equation which cannot necessarily be assumed. You said suppose the person is found guilty, but being found guilty to me means finally after court review.

Mr. SUTCLIFFE. What is the form of that court review on a cease-and-desist order?

Mr. WEIL. One appeals by petition to a court of appeals.

Mr. SUTCLIFFE. What is the basis for review?

Mr. WEIL. The basis for review is twofold. First of all, on the facts, it is extremely limited. It is limited to the court's searching the record to determine whether on the whole record there is any substantial evidence to support the findings of fact which the Commission made. If the court finds that there was substantial evidence, then it is bound to affirm the Commission's decision, even though it might feel that the opposing evidence is preponderant, and that if it had been the trier of the fact, it would have decided otherwise. That is on the facts.

But now we come to "On the law." In a labor-management dispute such as you referred to, the court today would be free to decide whether that is what was meant initially, originally, by Congress as coming within an unfair act or practice.

Mr. SUTCLIFFE. Let me stop you right there to get the juxtaposition between that appeal procedure and the trade regulation rule appeal procedure. Under the Administrative Procedure Act, after rulemaking activity, either formal or informal, there would be a basis for review.

In the legislation being considered today, that basis for review is substantial evidence.

Mr. WEIL. Yes.

Mr. SUTCLIFFE. In that review and under the Administrative Procedure Act, the same analysis of whether or not it was in the legislative scope of the Commission that you just mentioned, as to the law issues, would be subject to judicial review under the Administrative Procedure Act. That is the way I understand it.

Do you have any disagreement with the ability of the court on review of a trade regulation rule to examine the questions of law as you have stated that it would also do under a cease and desist order?

Mr. WEIL. I do indeed, on both points, both on the substantial evidence and fact issue side of the coin and also on the validity or invalidity as a matter of law side of the coin.

Let's take the facts first. Under S. 986, the facts would be determined by the Commission on a record which could be analogized almost to a wastebasket. Anything goes into a record——

Mr. SUTCLIFFE. Excuse me. Under the Administrative Procedure Act as set forth in here, there is an ability to go to the district court and ask for the adducing of additional information if the record is not of a quality to make the substantiality determination.

Mr. WEIL. I am not talking about putting in additional evidence. I think, at least if the Commission continues to operate as it does now, it would be very liberal in allowing anybody to put in anything it wants. But that is the problem. Everything goes in. People can write in letters and never appear in person. They can say whatever they want and state whatever facts they wish. They do not have to attend and take the oath. They do not have to attend and be subjected to cross-examination as they do in a section 5 proceeding now.

The hearing and the type of record which goes up to the court of appeals under the present law in its search for substantial evidence is one in which the people have had to appear in person, take the stand, be sworn and be cross-examined, which is very different from people writing in letters, making statements, or even appearing in person and making any statement they feel like making, no matter what merit it has without having to take the oath first and without fear of being cross-examined.

So, when you are looking at the substantial evidence, what constitutes substantial evidence on one kind of a record, the one that S. 986 would contemplate, and what would constitute substantial evidence under the present existing law are two totally different things.

Now, the next question, if I may come to what you have raised, which is on the law side, the court reviews—and let's get back to our labor-management dispute thing—the court reviews the Commission

decision that the effort of the union or the effort of management to achieve such and such an outcome is an unfair act or practice because it is injurious to consumers.

Under the present law, the court would decide whether the Federal Trade Commission Act does indeed—as written by Congress, whether the Federal Trade Commission Act as written by Congress does indeed make such an activity an unfair one in violation of section 5. But under S. 986, the court's review would be limited to determining whether a trade regulation rule has declared such an activity to be unfair, and if it finds——

Mr. SUTCLIFFE. That would be an application of the rule to a particular person, but I am talking about a review of the rule itself to determine whether the rule itself is constitutional and within the scope of the Federal Trade Commission Act.

Mr. WEIL. Constitutionality we have to leave out. I think what we are really talking about is legislatively, within the scope of the act. Under the present act, the court could well say it is not within the scope of the act. Congress did not embrace any such conduct——

Mr. SUTCLIFFE. Why couldn't they do that in a trade regulation review?

Mr. WEIL. Because under S. 986 once the Commission promulgates a Trade Commission rule, then S. 986 would as a matter of statute make that a violation.

Mr. SUTCLIFFE. I am saying in reviewing whether or not that promulgation of that particular rule is within the authority of the Commission. I am not talking about its application. I am talking about the initial stage of promulgating the rule.

Mr. WEIL. Because under S. 986 the Congress would have authorized the Commission to promulgate such a rule, and having been promulgated, declare that it becomes a violation of the statute.

So, the Congress would then have told the courts, "Look, if the Commission passes a rule, we want that rule to be law." Today the Congress has not yet said that.

Mr. SUTCLIFFE. But in the legislation as drafted, Congress' specific or explicit delegation of authority has not been outside the initial Federal Trade Commission Act and the language of "unfair or deceptive practices." That provision has not been amended in any way or other. I don't want to argue. I simply want to highlight these issues. I would like to cover just one other point.

The American Bar Association study of the Federal Trade Commission, had this to say about the rulemaking authority, and it is talking about the need to create new substantive rights for consumers—

> but new legislation may not be necessary to control all such practices. Imaginative use of Section 5 might bring many of these problems or important aspects of them within the jurisdiction of the Federal Trade Comission. Section 5 of the FTC Act is vastly flexible and the boundaries of the phrase "unfair practices" in terms of consumer protection are still to be judicially determined.

Then it goes on to describe some of the areas where this kind of imaginative use of section 5 might be appropriate, and it says presale disclosures, door-to-door sales, warranty disclaimers and limitation of remedies, deficiency judgments, holder-in-due course, garnishment, and it seems to approve of this type of policing of the marketplace, if you will.

Would you care to comment on the American Bar Association's position?

Mr. WEIL. Yes.

First of all, with all due respect to it, I cannot agree that if certain practices are to be made unlawful and they have such a novel and extensive reach the Federal Trade Commission should be established as the legislating body for the law of our land.

Beyond that, even the ABA report was more specific and hence more delimiting in the particular areas that it was talking about, whereas S. 986 is absolutely all-inclusive.

Mr. SUTCLIFFE. So, in other words, if S. 986 focused on consumer acts and practices, it would be more acceptable?

Mr. WEIL. Well, of course, everybody in the country is a consumer, and anything that is done by anybody affects somebody and hence affects a consumer. I think that S. 986 would have to be even more specific than that. I don't mean that S. 986 should declare these specific practices that ought to be unlawful henceforth, because conditions change so rapidly and one has to have an administrative agency to keep up with the times. There is no question about that. But I think it should be more precise in indicating the limits of the congressional desire of how far the Commission can go in extending the present law.

Mr. SUTCLIFFE. Thank you, sir.

Senator Moss. Thank you very much, Mr. Weil, for your testimony. We appreciate it.

Senator COOK. I just want to add one or two things.

First, I want to point out in regard to the report of the ABA committee study of the Federal Trade Commission, that the chairman of that committee was Mr. Miles W. Kirkpatrick, who is now head of the Federal Trade Commission. Also, in regard to the Administrative Procedures Act, and its review of rulemaking proceedings, there is no requirement that rules be based on substantial evidence.

Substantial evidence is only required where proceedings are on a public record and after an opportunity for a hearing.

This is the main arguments in regard to this act, that it is based upon a public record and an opportunity for a hearing. In S. 986, the FTC has the right to make the record. You have no assurance that anything you may submit to them will be put in that record. Not only that, it puts you in a position that when you ask for review of the rules in the district court, it puts the burden on you to establish not only the unfairness of the rule but the unfairness, under the Administrative Procedures Act, of the Commission to propound the rule in the first place.

So, it puts a double burden on you, doesn't it?

Mr. WEIL. Yes, it does indeed.

Senator COOK. Thank you.

Mr. WEIL. Thank you very much, gentlemen.

Senator Moss. Thank you very much, Mr. Weil.

In response to Senator Cook, you see on page 20 of this bill, it says:

In addition the reviewing court shall hold unlawful and set aside agency actions, findings and conclusions found to be unsupported by substantial evidence upon the record as herein defined.

Senator COOK. If you read how they make that record, you will wonder how you got the word "substantial" in this. No right for cross-

examination, no right of a public hearing, and yet you are going to have substantial evidence.

Mr. WEIL. I don't know what basis a court could use for evaluating whatever is in the four corners of the record as substantial or not. Suppose letters come in—let's say crank letters come in, and if you had the authors on the stand, your cross-examination would be able to show how ill-founded their comments and criticisms are. But you can't do that. How can any court look at one or more of those letters and say these are not substantial? What are the criteria for substantially that a court could pragmatically apply?

Senator MOSS. The same court could rule in the first place on whether that was admissable. I would have faith in it enough to make a decision on substantiality.

Thank you, Mr. Weil, we do appreciate your testimony, and we are glad to consider it. We will consider it very carefully as we discuss the legislation that is before us.

Mr. WEIL. Thank you, Mr. Chairman.

Senator MOSS. Mr. Earl W. Kintner, Special Counsel for the Proprietary Association, will be our next witness.

STATEMENT OF EARL W. KINTNER, ARENT, FOX, KINTNER, PLOTKIM & KAHN, WASHINGTON, D.C.; ACCOMPANIED BY WILLIAM B. SULLIVAN; AND JETHRO K. LIEBERMAN, ASSOCIATES

Mr. KINTNER. Mr. Chairman and members of the subcommittee, I am Earl W. Kintner, a senior partner in the law firm of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C. I appear this morning on behalf of the Proprietary Association and I am accompanied by my associates, William B. Sullivan and Jethro K. Lieberman, who, incidentally, worked the weekend to help brief me on this bill and the administration's bill as far as our testimony applies.

The Proprietary Association is a trade association whose members are engaged in the manufacture and distribution of proprietary medicines. The Proprietary Association and I have been following with interest the legislative proposals for amending the Federal Trade Commission Act of 1914. I commented on S. 3201 during the last Congress and I welcome this opportunity to comment on S. 986.

Title II of S. 986 dealing with Federal Trade Commission improvements and S. 984 dealing with the Consumer Class Action Act of 1971 appear to embody substantially the same proposed legislation as was contained in S. 3201 of the last Congress. Title I of S. 986 pertaining to consumer product warranties deals with subject matter not addressed by S. 3201.

Preliminarily I wish to state that the Proprietary Association continues its strong support for expanding the jurisdiction of the Federal Trade Commission to acts and practices "affecting" commerce.

As expressed by the Proprietary Association in its statement before the Consumer Subcommittee of the Senate Commerce Committee on April 9, 1970, it is very much in the public interest to protect the consumer from deceptive acts and practices which are more or less at the local level.

The association also continues to support with all vigor clarifying amendments to extend the Commission's authority to seek preliminary

injunctions to restrain violations of the Federal Trade Commission Act.

I am pleased to note that S. 986 embodies the provision regarding standards for issuing preliminary injunctions which previously appeared in S. 3065, pased by the Senate in 1968. The Proprietary Association urged this change in its April 9, 1970, statement.

I should like to concentrate by testimony this morning on two major topics embraced by title II of S. 986 of grave concern to the Proprietary Association; namely, the unprecedented delegation of substantive rulemaking power to the FTC proposed in section 208 and the broad expansion of enforcement powers proposed in section 202.

In advancing these comments I have drawn on my experience as General Counsel and Chairman of the Federal Trade Commission during the Eisenhower administration, a period from 1948 to 1953 before I became General Counsel when I was an attorney at the Federal Trade Commission, and as a private practitioner engaged exclusively in the practice of antitrust and trade regulation law.

Turning first to the proposed delegation of rulemaking power to the Commission embodied in section 208 I strongly oppose this provision for reasons substantially similar to those described in my previous statements before the Senate Judiciary Committee in connection with S. 3201 and the amendments to that bill proposed by the Department of Justice.

In the course of opposing the S. 3201 trade regulation rule provision I pointed out that such an extension of rulemaking power was both unwise and unnecessary.

Among the reasons for my position at that time was my concern that such an extension of the Commission's rulemaking power would result in undue concentration of investigative, prosecutorial, judicial, and legislative powers within a single Federal agency. I pointed out that such concentration would raise serious due process constitutional problems.

I also stated that increasing the Commission's rulemaking power would be particularly inappropriate at this crossroads in the Commission's life where the structure and function of the agency is under review.

Since that time the Ash report on the reorganization of administrative agencies was issued. The Ash report may well be the basis of reorganization recommendations by the administration including proposals for substantial restructuring of the power of the Federal Trade Commission.

In view of these developments I question the propriety of vesting, at this time, carte blanche delegation to the Commission of broad and sweeping powers to write rules defining violations of the Federal Trade Commission Act.

My previous statements also emphasized the lack of demonstrated need by the Commission for extended rulemaking power. The Commission presently has ample tools to redress injury from unfair or deceptive acts or practices. This includes the cease-and-desist order and an array of nonadjudicative measures such as industry guides, enforcement statements, and advisory opinions.

Moreover, these present enforcement powers should be augmented by the expansion of Federal Trade Commission power to secure preliminary injunctions.

The ability of the Commission to fulfill its mandate to protect the consumer lies largely in the caliber of its staff, its programs, and appropriations adequate to do the job.

I found this to be true. I was Chairman for a brief 20 months at the end of the Eisenhower administration and I believe the record will show that with the same staff I doubled the productive power of that staff.

Significant in this regard is the statement by FTC Chairman Kirkpatrick on March 9, 1970, before this subcommittee wherein he alluded to a lack of adequate resources to carry out the broad expansion of FTC jurisdiction presently proposed by S. 986.

Finally, in my S. 3201 statements I stressed the serious procedural due process defects both as to the proposed rulemaking proceeding itself and as to judicial review of such rules.

With this background I will now refer to the specific text of the present Senate bill. Section 208 of S. 986 is in material respects identical to the rulemaking proposal in S. 3201 with the following differences: S. 986 speaks of "substantive and procedural rules and regulations," a much broader phraseology than the "trade regulation rule" language of S. 3201, which may encompass rulemaking power with respect to remedies as well as to defining violations of the FTC Act; S. 986 also differs from the earlier Senate proposal in that it does not even provide for a limited right to cross-examine during rulemaking proceedings, thereby exacerbating the procedural due process problems.

In considering the consequences of giving the Commission this power to legislate we must look at section 202 of the bill which would allow the Commission to obtain civil penalties without first obtaining a cease-and-desist order for knowing violations of section 5(a)(1) of the Federal Trade Commission Act "including any rule or regulation" promulgated pursuant to section 208.

Section 202 might also be construed to permit the Commission to "redress the injury" to consumers for violations of its own agency-legislated law.

Also, it is essential to consider the impact of an extended rulemaking power on the companion bill, S. 984, providing for consumer class actions.

Section 101 of that bill would allow consumer class actions for unfair or deceptive acts or practices to consumers prohibited by section 5(a)(1) of the Federal Trade Commission Act. Although it is not clear, it is conceivable that violations of trade regulation rules defining section 5(a)(1) would likewise give rise to consumer class actions.

The Commission, therefore, through this proposed rulemaking power, would be legislating law with no right to cross-examination and with inadequate judicial review. This could expose American business to new penalties and consumer remedies fashioned by the FTC as well as to consumer class actions throughout the United States.

In looking at this power to shape the law of consumer deception in the generations ahead it is essential that the Congress be aware of these far-reaching implications of section 208.

The Commission is given power to make law on the basis of a factual record which it develops in an informal hearing devoid of the usual elements of procedural due process in substantive rulemaking proceedings.

One of the most serious long-run dangers I envision if section 208 is passed is the conversion of the flexible, adaptable language of section 5 of the Federal Trade Commission Act into a rigid, detailed codification of unfair consumer practices. This would run directly counter to the successful experience of the Commission and the courts in functioning for many years under the broad language of section 5.

In legislating the Federal Trade Commission Act Congress deliberately and wisely chose the broad, general language of section 5 because it realized that a specific, detailed code of law could not adapt to changing business practices.

Because delineating section 5 through rulemaking proceedings is much easier administratively than through case-by-case adjudication I am fearful that section 208 would result in the Commission promulgating a raft of rules to cover the entire scope of American business practices in the most detailed respects.

Inflexible rules are not designed, in the nature of things, to deal with dynamic changing industry practices. I am convinced that such rules would lead to unreasonable regulation as business practices emerge which were not envisioned at the time the rules were implemented.

I submit that it is highly unlikely that the Commission will be able to make swift and responsive changes in rules to keep abreast of changing business practices.

One of the advantages of developing the law of unfair and deceptive acts or practices through order proceedings is the ability to focus clearly, in the context of an adjudicative proceeding, on the particular issues at stake.

This is totally unlike a rulemaking proceeding where a multitude of issues are covered in a single rule and interested parties are not aware of or are unable to deal adequately with all such issues.

For example, I foresee that judicial review of such rules by the Court of Appeals for the District of Columbia would concentrate on only those portions of the particular rules which were of immediate and important concern to the parties pressing appeal. In subsequent proceedings by the Commission for violations of the rules the particular respondents would be unable to challenge the rule's validity irrespective of the equities of that rule in the context of the particular facts involved.

A good illustration of the impropriety of section 208 rulemaking power lies within the four corners of S. 296 itself.

Title I deals with consumer product warranties, a topical area embraced by section 5 of the Federal Trade Commission Act. The proponents of S. 286 consider consumer product warranties to be an area where specific, detailed legislation is regarded as necessary to protect the consumer.

In addition, the consumer product warranty legislation in title I provides in section 102(b) and 109 for rulemaking power which is subject to carefully defined standards.

These provisions specify with particularity the areas with which the Commission's rulemaking power may deal, wholly unlike the limitless delegation of authority contained in section 208 of title II.

Title I, therefore, offers a less objectionable approach to substantive rulemaking power for Congress to delegate to the Federal Trade Commission. This comports with what was done in the Wool Products Labeling Act and other clothing identification acts as well as the Fair Packaging and Labeling Act.

In this way Congress has effectively defined the scope of power which it delegates to the administrative agency. Congress and the public thereby have some rough idea of just how far the agency may go.

On the other hand, were the Commission given a broad power to prescribe rules such as that proposed in section 208, and under it the Commission acted in the consumer product warranty area, what reasonable assurance would Congress or the public have that those important standards and safeguards now in title I of the bill would be observed by the Commission? This is policymaking which belongs to the Congress.

I respectfully submit that the opportunities for abuse in the sweeping delegation of rulemaking power embodied in section 208 are not in the public interest and that the effectiveness of the Commission to protect the interest of the consumer is assured by other proposals contained in this legislation such as preliminary injunction powers, power of the Commission to proceed on its own in the courts for violations of Commission orders, power of the Commission to enforce its subpenas, extension of agency jurisdiction to acts or practices "affecting" commerce.

Enactment of these other proposals, coupled with adequate appropriations, imaginative programs, and high caliber staff, will assure that the Federal Trade Commission can effectively fulfill its function as a protector of consumer interests.

I believe that the Commission has such a high powered staff currently and I think it is moving very effectively to do a good day's work for an honest day's pay accorded from the public budget.

To the extent that the Commission over recent years has taken the position that it already has trade regulation rulemaking power, my experience is that the Commission has been somewhat less than successful and flexibly innovative in the trade regulation rules it has promulgated.

For example, the trade regulation rule for games of chance in the food retailing and gasoline industry has been written and construed so stringently as to preclude games where all contestants are winners, or where game pieces are mixed by undeceptive alternative methods to one method prescribed by the rule.

In summary, Mr. Chairman, I urge deletion of section 208 from title II of S. 986 along with dependent language in other sections. The Commission does not need this rulemaking power; it is overly broad and ill-defined; the power is not constrained by adequate administrative procedural safeguards.

Finally, it would unwisely reverse the studied, deliberate position of Congress since 1914 to preserve the flexible language of section 5 of the Federal Trade Commission Act to govern business misconduct in our ever-changing private enterprise system.

Turning now to the new enforcement powers which section 202 of S. 986 would vest in the Commission, I urge this subcommittee to give the closest and most careful scrutiny to the range of sanctions beyond cease and desist orders contemplated by this proposed legislation.

As the law stands today the Commission is empowered to issue orders requiring any person adjudged by the Commission to have committed any unfair method of competition or any unfair or deceptive acts or practices to cease and desist. The cease-and-desist order is a well-established remedy that prevents unlawful acts committed in the pact from being repeated in the future.

Even under present law the Commission has been recently proposing orders requiring companies to pay out money to consumers who have been deceived and to allocate portions of advertising budgets to public confessions of past sins—remedies which have yet to be tested in the courts.

It is important to note what these orders propose for they are but the top of an iceberg as to the kinds of orders which the Commission would have the power to issue were the section 202 provisions of S. 986 enacted into law. In this connection section 202 provides a new pargaraph 7 which specifically states that:

> The Commission is further empowered and directed to order such persons, partnerships or corporations engaged in any act or practice which is unfair or deceptive to a consumer and is prohibited by subsection (a)(1) of this section to take any other action necessary to redress the injury caused by such acts or practices to consumers.

Comparable language appears in section 203.

Mr. Chairman, this is very broad and very vague language, fraught with potential for abuse.

First, nowhere in the bill are acts or practices "unfair or deceptive to a consumer" defined. Presumably all conduct violative of section 5 of the Federal Trade Commission Act is not included within this language. But it is certainly unclear where the line should be drawn.

I submit that the language should be construed to cover only conduct which is violative of section 5 and which is also included within the definitions of "unfair consumer practices" in the administration's proposed Consumer Fraud Prevention Act of 1971.

Second, it is unclear what the nature and extent of Commission remedial power would be under section 202. For example, is more envisioned than assessment of money damages to consumers? Where is the line between remedies and penalties?

Third, it is unclear from the language of section 202 whether each of the broad enforcement powers contained therein could be applied to violations of rules and regulations promulgated by the Commission pursuant to section 208 of the bill.

There is no question about paragraph (8) of section 202 because it specifically would allow penalties for knowing violation of "any rule or regulation promulgated by the Commission." Such language does not appear in paragraph (7) of section 202.

I would hope that this difference in language means that the Commission would have to make out a violation of section 5 of the Federal Trade Commission Act before it could fashion remedies for consumer injury under paragraph (7).

Finally I am concerned over the uncertain meaning of the language in paragraph 8 of section 202 which provides that civil penalties would be restricted to unfair consumer practices done with "actual knowledge or knowledge fairly implied on the basis of objective evidence."

What is the standard for "implied" knowledge where the Commission seeks penalties for a violation of a rule or regulation? Would the holding of a public rulemaking hearing and subsequent publication of the rule in the Federal Register constitute sufficient "objective evidence" without more, to imply knowledge? Is the businessman to be given fair notice under this provision as to his legal vulnerability?

Quite apart from the problems of vagueness and ambiguity in the language of section 202, the Commission should not be given the power to determine and assess damages for injury to consumers. Such power, if added to the powers to define unfair consumer practices by legislative rules and to investigate, prosecute, and judge alleged violations of such rules, would give the Commission unbridled authority.

Injuries to consumers from unfair business practices should assuredly be redressed, but by recourse to the courts.

Mr. Chairman, I suggested that the proposed remedial powers in paragraph 7 of section 202, as well as section 208, might even be unconstitutional in the proper set of facts.

I do not make this statement casually for I am aware that there has not been a successful challenge to the delegation of power by Congress since the *Schechter* case 36 years ago. But that case presented facts and purposes not so dissimilar to the ends contemplated by the consumer bills under consideration of this committee.

Schechter held that Congress could not constitutionally delegate power to the President to prescribe codes of fair competition for an industry upon application of a certain number of representative members of the industry, such codes to be subject only to a few restrictions and the requirement that the President find that the codes tend to effectuate the policies of the National Recovery Act.

The court adverted to section 5(a)(1) in *Schechter* and agreed that "unfair methods of competition" had a more concrete meaning than codes of "fair competition."

In my belief, however, S. 986 would permit the Commission to transmute the power to proscribe unfair and deceptive acts into a power to law down detailed codes of fair competition and detailed codes of behavior that must be adhered to in order to develop a wide and imaginative range of remedies for violation of the trade regulation rules.

In short, I believe that it is not at all improbable that enactment of this legislation carries with it the power to transform the FTC into an NRA-type legal bureaucracy with unlimited powers to regulate and restructure the American economy in its Administrator's image. If this is the public will I would prefer that it be accomplished by the people's elected representatives in the Congress.

In that connection, in rereading the *Schechter* case last night, I noticed this statement from Mr. Justice Cardozo's concurring opinion: "Here in effect is a roving commission to inquire into evils and upon discovery correct them." And this statement: "This is legislative delegation in its most obnoxious form." And I would add this to my statement in relation to what I have said about the Schechter implications of the proposed legislation.

I close this discussion of remedial powers with this thought: to the degree that a governmental agency has the authority to proscribe a wide variety of activities, the latitude to fashion orders remedying violations should be closely restricted by a tightly worded and narrowly drawn statute subject to adequate judicial review.

Today's limitations of cease and desist orders are reasonably clear, but the untrammeled power to order any remedy to redress the violation is limitless with no realistic guidelines for judicial or Commission action.

In conclusion, Mr. Chairman, the Proprietary Association is both aware of the desire for prompt action on S. 986 and of the several meritorious features in it. As stated, we support the expansion of the jurisdiction of the Federal Trade Commission to acts and practices affecting commerce, and we support with all vigor clarifying amendments to extend the Commission's authority to seek preliminary injunctions to restrain violations of the Federal Trade Commission Act in appropriate instances.

However, because of the many serious problems and questions raised by them, we strongly urge the deletion of the enforcement power clause (para. 7 of sec. 202) and of the authority which section 208 would grant the Federal Trade Commission to write the law by substantive trade regulation rules. Furthermore, I have suggested serious deficiencies in paragraph 8 of section 202.

Mr. Chairman, I have attached to my statement copies of my two previous statements before the Senate Judiciary Committee last fall in connection with S. 3201, and I ask that these be made a part of this record.

I thank you for the privilege of appearing here today.

Senator Moss. Thank you very much, Mr. Kintner. The testimony that you gave before the Judiciary Committee, rather than being printed again, will be incorporated in the record by reference, since we have the other hearing records before us and it can be readily obtained there.

We are glad to have you come to testify on this matter. Your objections have been exclusively directed to title II of the act, parts of title II. I take it that title I has not met with your disapproval.

Mr. KINTNER. I have not studied title I in detail. However, I think speaking personally that the objectives of title I make very good sense based upon my past experience.

As I have pointed out, there are safeguards in title I which I do not find in title II.

Senator Moss. In the last session the two titles were actually separate bills and considered separately.

Mr. KINTNER. I would recommend that the Congress in this session consider them separately too.

Senator Moss. I was wondering if that would be your recommendation, and I am glad to note that. It is something that will be considered certainly by the committee, as to whether they are appropriately included in the same legislation or whether they should be severed, since one may require more study than the other.

In the reports that were made on the bills last year, which bore the numbers S. 3074 and S. 3201, there was explanation of the rulemaking provisions of title I and title II, and by reference we would put in those

explanations for consideration of the committee to try to clarify this difference that exists.

Senator Cook, do you have some questions?

Senator COOK. No. As a matter of fact, I think your statement hits at very many of the things that I have finished discussing with Mr. Weil.

Mr. Kintner, because you have spent most of your testimony on title II and very little on title I, may I propose to you several questions by mail, relative to title I, and if you could respond by mail by the time we close the record next week? [1]

Mr. KINTNER. We would be delighted to do so. As I have pointed out, I have not focused in detail on title I. We probably would have suggestions on title I, and we will be glad to promptly answer any questions which the Senator may wish to propound to us.

Senator COOK. One other thing. Under the broad authority of rulemaking that is within the framework of S. 986, do you feel the Federal Trade Commission could determine its own rules and regulations relative to class actions without any other legislation being necessary?

Mr. KINTNER. I think this is very likely under the proposed legislation. Title II would establish by an administrative agency, as I see it, a virtual dictatorship over American business and it could result in the dismantling of many of our corporations, large, small, and medium size.

It would, I think, completely abdicate the authority of the Congress to an administrative authority.

Senator COOK. Don't you feel this would be delegating to the Federal Trade Commission authority to expand the jurisdiction of the Federal courts?

Mr. KINTNER. Probably so. Yes, sir.

Senator COOK. Thank you very much.

Senator MOSS. Thank you, Mr. Kintner, and the written questions and answers that you submit to them will be made a part of the record at the appropriate point.

Senator MOSS. Mr. Dunkelberger, counsel for the National Canners Association.

STATEMENT OF EDWARD DUNKELBERGER, COUNSEL, NATIONAL CANNERS ASSOCIATION

Mr. DUNKELBERGER. Thank you very much. We very much appreciate the opportunity to testify.

My name is Edward Dunkelberger; I am appearing as counsel for the National Canners Association, a nonprofit trade association of about 550 members from all parts of the country.

Senator MOSS. I might add, if any of your—and I have not had time to read it—if any of it is repetitive of what came before and you want to summarize but put in your whole statement, you would have the privilege of so doing.

Mr. DUNKELBERGER. Indeed I will do that. I would like to skip over the first few pages of my testimony in the interest of time.

Senator MOSS. The entire statement will go in the record.

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[1] See p. 282.

Mr. DUNKELBERGER. I will address myself this morning, as the other witnesses have, essentially to title II of the bill. Title I, although we believe it is of concern to the consumers and the Congress, does not generally impinge on the types of products that are manufactured by members of the National Canners Association. Our comments are directed to title II, and most specifically to section 208 thereof.

First, taken together, section 208 and the conversion of a Commission cease and desist order into a sweeping Commission order that may include every type of affirmative requirements that the Commission wishes to add, radically changes the entire concept of the Federal Trade Commission as an administrative agency.

The Commission is not only made into a court, but is given the power to issue sweeping affirmative controls in every instance in which it determines to act as a prosecutor, trial court, jury, and judge. By section 208 it is also given the power by congressional abdication to write the laws under which it desires to act.

We are not suggesting that Congress must make a fortress of history. But it is necessary at the outset to point out that since 1914 when Congress created the Commission, and up to this time, its assignment was to develop and define for future application unfair methods of competition, or unfair or deceptive acts in commerce by a carefully designed and constitutionally proper process.

As this committee knows, the Federal Trade Commission was originally given congressional authority to develop the meaning of unfair competition, which prohibition was later expanded by Congress in 1938 to embrace all "unfair or deceptive acts or practices."

The application of that delegated authority has throughout the Commission's history been cushioned by two important safeguards provided by the Congress.

Mr. Sutcliffe's questions to Mr. Weil began to probe the area of what really is the difference between what here would be granted and what has been the Commission's authority for so many years. I do not think you can say that there is no change in the substantive guideline and let it go at that. "Unfair or deceptive acts or practices" have been in the law since 1938, indeed, but the important point is that the Commission has been required to follow an adjudicatory procedure, offering alleged violators full opportunity, consistent with the precepts of Anglo-Saxon jurisprudence, to demonstrate that their acivities were not within the statutory prohibition.

In short, there was to be a trial in which the facts were tested on the anvil of cross-examination, and the conclusion of the Commission that those acts or practices were to be thereafter considered violations of the Federal Trade Commission Act could be fully reviewed by the courts on a record of sworn testimony to determine whether there was substantial evidence.

Next, because the law is so broad, and any action would not be known to be illegal until it has been so adjudged, Congress has provided that no damages or criminal penalties should attach to an initial transgression. Rather, having now been put on notice that an act or practice is considered violative of the statute, the manufacturer is ordered to cease and desist from its commission. And in 1938 Congress provided that if the cease-and-desist order were violated, and that vio-

lation was established to the satisfaction of a court and jury, a civil penalty of $5,000 could be imposed.

In short, the Commission was required first to issue a complaint. The allegations of its complaint then had to be tried in a hearing in which due process was afforded through cross-examination, required findings of fact, and judicial review of its findings and order in the particular proceeding. Its enforcement powers were limited to issuing a cease-and-desist order operating in the future.

Any later violation of that order could after 1938 be made the subject of a civil penalty action brought by the Government and imposed by a court.

Title II turns all of that around. Section 208 gives the Commission the legislative powers of Congress. It authorizes the Commission to legislate a law of "unfair or deceptive acts or practices." I think you will appreciate—particularly those of you who are members of the Administrative Practices Subcommittee of this committee—that there is no broader grant of delegated lawmaking anywhere in our administrative law statutes. Surely there is no parallel grant of rulemaking authority with so indefinite a standard to be applied. As Mr. Justice Cardoza observed back in the days of the NRS, "This is delegation running riot."

The changes in the other sections authorize the Commission to seek an injunction without any administrative complaint or administrative trial of the charges for any violation of the laws which the Commission itself ordains. It can directly seek penalties for those violations without any intervening administrative procedure. Where it promulgates a trade-regulation rule—in the extraordinarily loose manner which I shall describe in a moment—it can issue a complaint charging violation of that rule.

In that proceeding, the rule cannot be questioned any more than an act of Congress. If the rule has not been obeyed, then the Commission can issue an order containing not simply prohibitory provisions, but any affirmative action it concludes is an appropriate remedy. Perhaps even the hara-kiri that Mr. Weil referred to.

Even more, in the companion bill, S. 984, pending before this committee, it is made plain by section (1) (P) and section 102 that any new law issued as a trade practice rule by the Commission can also become the basis for a consumer class action.

Here again Senator Cook has pointed out that the remedy provision in this bill is so broad that the Commission might well read class action authority into it even without the enactment of S. 984.

the-board sweeping lawmaking authority is not limited to consumer protection activities. Section 208 makes no reference whatsoever to

Second, we ask the committee to note particularly that this across-consumer protection. The power of the Commission to legislate, to make substantive law, can operate on everyone, everywhere, on every business activity it wants to reach.

Under that authority the Federal Trade Commission can regulate the activities of every person and every company operating every kind of business carried on in every State of the Union.

Third, let us look precisely at what a substantive trade regulation rule is and how it comes into being.

The Commission proposes any rule it concludes should be made the law of the land. It permits the submission of written data, views, or arguments. On that paper record alone it may write these specific new laws.

Section 208 does recite that "if requested" the Commission shall hold a hearing. What does that mean?

It does not mean any opportunity is afforded to cross-examine as to the facts on which the Commission desires to legislate. It does not mean sworn testimony. In the typical trade regulation so-called hearing, anybody can come in and make an unsworn speech, present any wild assertion of fact, or submit a written statement that is never subject to answer or checking. Typically, the Commission staff can shovel into the so-called record generalizations and opinions based on unrevealed and necessarily unverified fact.

Indeed, the looseness and potential arbitrary character of the proceedings further is revealed by the fact that the Commission does not have to hear even the vocal rhetoric or speeches at the so-called hearing. It can, and does, delegate that job to one of its staff, usually one of its own lawyers. There is little need to suggest elaborately that a Commission staff lawyer, who probably has participated in formulating the proposal, is hardly receptive to any challenge of the facts or reasonableness of the proposal.

It is no answer to suggest, as sometimes is suggested, that Congress may enact legislation on the basis of congressional public hearings without permitting cross-examination or affording any other type of verifying process. The short answer is that the Federal Trade Commission is not Congress and should not be given the powers of Congress over this broad spectrum covering the entire economy.

As Mr. Weil has already pointed out, the members of the Commission are not elected, but appointed for a 7-year term which exceeds in duration the elected term of every Congressman and every Senator.

Fourth, this is not—as Chairman Kirkpatrick suggested in his three-sentence presentation on section 208 to this committee—the removal of doubt or making more explicit an existing Commission rulemaking authority.

We need not burden the committee with a legal demonstration that this type of authority was never conferred by Congress, was never sought to be exercised by the Commission until recently; indeed, the existence of such authority was repeatedly denied by the Commission, and that there is little basis for the suggestion that if and when challenged it will be upheld.

I might add here that one wonders why the Commission has so many times sought legislation containing specific rulemaking authority if it in fact already has this authority now. In title I there is such a request, in the Fair Package and Labeling Act there was such a request, as well as in the Fur Products Act, and in the Wool Products Act. For all of these acts the Commission came up and said we need rulemaking authority to cover this particular area. All of that becomes a farce if indeed it already had this authority.

Although no opportunity was presented for the discussion of this issue before this committee it was fully discussed and elaborately briefed in the testimony last August and September before the Judi-

ciary Committee of the Senate by Professor Handler and many other eminent legal authorities.

I request that his statement be included by reference in this record.

Senator Moss. It will be included by reference.

Mr. DUNKELBERGER. We recognize that in some areas questions are so complicated or involve so many changing variables that it is not realistic to attempt to write a statute which defines with absolute precision every aspect of the control we want exercised. A concomitant of this is the notion that to deal effectively with these areas a certain body of expertise must be developed and should rest in the administrators of the law.

As a result the Congress has on occasion written statutes creating certain standards to be applied but granting to an agency the power by rule to define the particularities of how the standard shall operate.

To a degree, title I of S. 986 indicates an awareness of the difference between congressional abdication and specifically limited rulemaking power. Section 109 of title I accords to the Commission the specific power to define the manner of stating warranties given by a manufacturer. It is obvious that if, in section 208, Congress gives the Commission unlimited rulemaking power, section 109 in this bill becomes meaningless. Indeed, Chairman Kirkpatrick suggested last week that unlimited rulemaking power could include all of the subject matter of title I on warranties.

In no instance has Congress abdicated to authorize an administrative agency to legislate across-the-board on everything done in the entire American economy.

What we are confronted with here is a complete abrogation of congressional authority in an area so broad as to be awe inspiring.

Nor is elaborate argument necessary that the procedure provided in section 208 is not only a travesty but that suggested court review is transparently inadequate. The Commission is not required to make findings of fact on which it is exercising its unlimited powers. Indeed, it is not required to winnow out these facts from the rhetoric submitted or from its own files. All it is asked to do is to adopt "a concise general statement of its basis and purpose.' Whether this need be even as long as a Senate or a House report is not made clear. The decisions under the Administrative Procedure Act make it clear that the required general statement is not a set of findings of fact.

I would like to add here that the draftsman obviously knew what he was doing. He put in the words "a concise, general statement of its basis and purpose," which sounds just fine. I would like to refer the subcommittee to the case of *Hoving Corp.* v. *Federal Trade Commission*, 290 F2d 803, in which the court of appeals held that regulations adopted by the Federal Trade Commission with respect to the Wool Products Act were valid even though the Commission had omitted a concise, general statement of its basis and purpose.

The Administrative Procedure Act requires such a statement. The court of appeals held that the omission in this case was a technical flaw which was cured by the obvious nature of the law in question. So we really have nothing at all in "a concise, general statement of its basis and purpose."

The court review provided is that left open by section 4 of the Administrative Procedure Act, and not the full protective provisions of section 7. In short, the only thing that can be reviewed is the record provided by section 208. That record does not contain "evidence." Instead, it is merely a record of unsworn talk and unverified submissions presented to the Commission as merely summarized in its general statement.

I would like to add another point on this degree of court review. The Chairman has pointed out to a previous witness that 6(g) as amended in its last sentence would refer to a substantial evidence rule. Here we look at some interesting drafting. It says, "In addition, the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence upon the record as herein defined." I really am totally puzzled by the reference to "findings and conclusions" to be reviewed by the reviewing court in a bill that specifically negates the requirement that there be any findings and conclusions by the agency. The only thing the agency has to have is a concise, general statement of its basis and purpose, the omission of which is nothing but a technical law in the eyes of the courts. How in the world this language in 6(g) as amended found its way in there I do not know, but it certainly makes no sense at all in the context of this provision.

Perhaps the best description of the summary fashion in which a Commission trade regulation rule is to be formulated to become the law of the land—whether or not you call that procedure "informal" as Chairman Kirkpatrick first did in his most candid moments—was the Chairman's later response to a question by Senator Cook last week. He said:

> In my own view the Commission can adopt fair rules without the delays, the unending delays and interruptions that I am fearful would really break down our rule-making proceeding were full cross-examination and discovery as a matter of due process to be compulsory. I would be very apprehensive that it would be a month of Sundays and much longer before we could adopt a rule that was going to be unpopular to those who would be governed by it, and by and large rules are not always the most popular thing, people have to change their ways because of the existence of a rule and and the longer they can fend it off, the happier they are. That is my problem.

I would like to add that this is indeed his problem. I guess due process is always the administrator's problem, but lack of due process is the problem of those that are being regulated. Maybe they do not like the rule because it is unfair, because it really is not what Congress would do. I think it almost borders on the bizarre to suggest that because the people who are regulated may not like it and may challenge the rule, we are going to cut out the safeguards that many people think are necessary.

In conclusion, any analysis of what is here presented in title II as an addition to the consumer warranty bill represents an extraordinary abdication by the Congress of its legislative powers. It constitutes a delegated authority to the Federal Trade Commission of the power to write laws affecting every business activity throughout the land.

I will skip over my reference to Professor Handler's testimony of last year.

If, in exercising virtually all the powers of Congress over any business activity affecting commerce, the Commission issues trade regulation rules, and it is held by the courts that the validity or need of those rules can be challenged in the further proceedings which are authorized, no more sweeping delegation of congressional power can be imagined.

Preliminary injunctions can be issued against anyone who fails to obey the Commission's substantive rules.

Heavy penalties can be sought for those violations, again with the rule possibly not subject to challenge.

If a complaint is issued, only the fact of violation is to be determined, and the resulting order is no longer merely a cease and desist order but may contain any additional requirements that the Commission determines are appropriate.

A failure to comply with whatever the Commission ordains can give rise to a class action.

These issues warrant the fullest inquiry by the Congress as to their necessity and as to the wisdom of this type of congressional abdication.

Including them under the guise of Federal Trade Commission "improvements" as an addition to a consumer warranty bill that is to be hurried to the floor of the Senate would hardly appear to be consistent with the careful consideration they deserve.

Thank you.

Senator Moss. Thank you, Mr. Dunkelberger.

Your appendix to your statement contains references to various pages in the previous hearings, and we are glad to have that, because it does itself cross-reference us to a good bit of testimony which was before the Congress or was before us last session, and certainly we can refer to it now.

Mr. DUNKELBERGER. Yes, sir, I hope the subcommittee members will take the time to look at those references because that was a most revealing hearing.

Senator Moss. We will do that. We have them here before us and we will make sure that we have referred to them as we consider this matter.

This rulemaking power of the Commission that you object to so strongly, is there restrictive language of some kind that you would like to suggest that might make it acceptable?

Mr. DUNKELBERGER. That is an interesting point.

Whether one considers it appropriate for the Commission to proceed on a substantive rule basis, I guess, is the initial inquiry.

Our feeling is that the Commission has for many years, and can continue to work on the basis of a case-by-case ajudication where you don't use rulemaking or lawmaking; you use case-by-case development of the kinds of things that really should be regarded as unfair and prohibited.

Certainly if the Congress does conclude that some kind of rulemaking authority should be specified for the Commission, there are a great many ways in which this can be improved, certainly in terms of the procedure, and in terms of the standards.

It is this latter area that concerns me, setting up standards that would provide a basis against which a court could evaluate the rules to be adopted.

We have not attempted to develop that at this stage. As I said, we really believe the Commission can operate most efficiently on the basis of case-by-case adjudication and interpretive rules—essentially rules that set forth what it believes the law to be, as it does in its present proceedings. Those can be subject to full review and given some weight by a court, but not the overriding weight as these substantive rules would.

Senator Moss. Mr. Kintner, I believe it was, referred to the fact that a degree of flexibility was certainly to be desired because of the constant change that goes on.

If, in every instance, the Congress must mark out the area and tell the Commission now go ahead and make rules in that area, don't we then lose this flexibility and ability to meet the changes that come rapidly in the business structure?

Mr. DUNKELBERGER. That is a very good point, Senator, and one I think that deserves consideration. But it isn't that we would lose the flexibility.

Let's keep in mind section 5 is still there. Section 5 is still there to be implemented on a case-by-case basis.

The most significant law made by the Federal Trade Commission in the last 58 years has been on case-by-case adjudication where there was cross-examination, and an examination of a particular circumstance. Once that decision is reached by the Commission and affirmed by the court, you don't need a rule. Everyone then knows what the law is, and it is developed in a most careful way.

The Commission has that authority and will continue to have that authority if title II never sees the light of day. In addition, the Commission has authority to come out with interpretative rules that announce what it believes the law to be until such time as a court action tests it in particular adjudication.

We don't feel that you are losing any of that flexibility.

Now, when situations arise and something becomes obvious to Congress that it wants the Commission to get into that it hasn't gotten into yet, at that time Congress can supplement—not replace, but supplement—the existing authority by your Fair Packaging and Labelling Acts, or by your Wool Products Acts. The class action legislation has the laundry list that is an attempt by Congress to spell out some of the instances where it sees a need for specific attention. But that laundry list does not derogate from the broad authority which the Commission has under section 5 right now.

Senator Moss. Thank you for your response.

Senator Cook?

Senator COOK. I am very interested in your reference to Professor Handler's testimony before the Judiciary Committee. One of the points he made was that provisions for hearings are woefully inadequate. And yet, in S. 3201, when we got it to Judiciary, we had finally won the authority to put into the bill the item:

> Commissioners shall permit cross-examination, limited as to scope or subject matter, by one or more parties as representative of all parties having similar interests where it determines that the granting of such cross-examination is not inappropriate.

Professor Handler, who, by the way, has represented a number of plaintiffs in class action suits and has been successful, felt that even

with the Commission making the determination when it was or when it was not appropriate, that procedures were woefully inadequate to develop a true record on its rulemaking authority; isn't that correct?

Mr. DUNKELBERGER. Yes, sir. This is an interesting point, because much has been made of the fact that there were 8 days of hearings before the Judiciary Committee last session on the rulemaking authority. I guess that is why Congress usually decides it is going to proceed on a committee basis and let each committee make its own record, because after the Judiciary Committee made this record on S. 3201, we end up with a bill that is not improved in this regard, but is cut back in this regard. So that record has been totally ignored.

As a matter of fact, you have gotten a reversal of the positions advocated by virtually every witness before the Judiciary Committee.

Senator COOK. Thank you very much.

Senator MOSS. Thank you.

Mr. Sutcliffe has a question he would like to ask.

Mr. SUTCLIFFE. May I try to understand the difference between case by case adjudication, interpretative rules, and substantive rulemaking?

At the present time, if X company commits an unfair or deceptive practice, it is adjudicated and a cease and desist order is issued.

What happens if the next day Y company does the same thing that X company did?

Mr. DUNKELBERGER. That is easy. A complaint is issued against them; and if that company has a lawyer of any merit whatever, he is going to recognize if the court has upheld the cease and desist order against a competitor that further fighting of that issue would be a total waste of time and funds on the part of the second company.

Mr. SUTCLIFFE. What if the economic considerations are such that for the 2-year delay before the cease and desist order could be issued against the y company, they can make more money than the cost of fighting the cease and desist order?

Mr. DUNKELBERGER. You have apparently thought of that by putting in the bill injunctive authority to go to the courts and get an injunction when the court finds itself justified in giving one. That is in section 212 of your bill before you. This is exactly the kind of thing they would have in mind.

Also, the Commission has explored at some length massive complaints against a whole number of people in an industry to deal fairly and equitably with them. I really don't think it is as much of a bugaboo that is made of it, or that there are very many situations that you can find a company is laboring under a cease and desist order and that is blithely ignored by other companies knowing it may take a while to catch up with them.

I think the fact is there is plenty of authority there to go in on an expedited basis and if necessary to use the existing injunction authority which is in the act in section 13, on to use the new authority that is to be added in your bill.

Mr. SUTCLIFFE. Would the ability of the Commission to issue redress, perhaps much more narrow than is presently interpreted by some of the testimony here, say, redress in term of recission or restitution, would that be an added incentive for y company not to do the same thing that x company had just been told not to do?

Mr. DUNKELBERGER. I guess the worse penalty you make it, you have added incentive. Let us not forget the fact that a cease-and-desist order and an intentional violation can run to very substantial monetary penalties. Five thousand dollars a day is substantial to any company if you are talking about a 2-year basis of proceeding, waiting for a final decision by the court.

Mr. SUTCLIFFE. Are the present rules that the Commission promulgates—for example, in the door-to-door sales area pending before the Commission—are they interpretative rules or substantive rules.

Mr. DUNKELBERGER. You could spend the rest of the day, the rest of the week, on that issue.

Mr. SUTCLIFFE. Is that the kind of rule that is helpful to the industry and the consumer?

Mr. DUNKELBERGER. I think that an interpretative rule by an agency setting forth what it regards to be the requirements of the act, and how that agency will apply the act in specific situations, can be very salutary, and indeed many agencies do this all of the time. In recent years the courts have recognized that it is a good idea, and you can even get judicial review of an interpretative rule. But that interpretative rule is always subject to collateral attack in a specific court proceeding. It is given some weight by the reviewing courts, but it is by no means the ruling weight. It is a helpful guide, but it is far short of having substantive law actually made by the Commission.

It is one thing for the Commission to say what it believes the law to provide, and it is a different thing for the Commission to write the law. And that is the difference between an interpretative rule and the kind of substantive rule that you intend here.

I notice you did not want any misunderstanding on that in here. You put in "substantive rule" to make clear what you have in mind.

Mr. SUTCLIFFE. Is the substantive rule subject to collateral attack when the rule is being applied in a particular case?

Mr. DUNKELBERGER. That is sort of, if I may say so, a dirty question.

Mr. SUTCLIFFE. I did not mean it to be. I am trying to learn.

Mr. DUNKELBERGER. I was being facetious. I do not want to give that point away. If Congress ultimately passes this law, I certainly do not want to be the one responsible for establishing in the legislative history that it is not subject to collateral attack. I will say this, it is apparently the apparent intention not to permit collateral attack. It does specifically provide that when any such trade-regulation rule is promulgated and becomes final, a substantive violation thereof shall constitute an unfair and deceptive act or practice. So you might argue that the intent here is to cut off collateral attack.

One difficulty Mr. Kintner has already pointed out, you are a participant in a rulemaking proceeding, you have your own business in mind, you have your own fact situation in mind, and you push that issue in the administrative proceeding. If you go to court review, that is again your outlook.

There may be many facets of this rule that are of no interest to you when you are seeking your judicial review. It may be of interest to a company on the west coast that does not know about it or a company that does not exist yet. But, if there is no opportunity for collateral attack, which seems to be your suggestion, those companies who did

not know about it or who did not have any concern with the rule at the time are foreclosed forever from questioning the legal validity of the rule as promulgated by the Commission.

I think this is a serious problem with the entire approach here. You foreclose everyone in the future merely because those who happened to be on the spot when the rule was promulgated had a chance to get some kind of a review—a review which Mr. Weil has made clear is extremely sketchy and almost nonexistent, because how can a court say when something is unfair or not to the Commission?

Mr. SUTCLIFFE. I appreciate your response to those questions in clarifying the different kinds of approaches before the committee.

Senator COOK. You have no objection to giving to the Federal Trade Commission injunctive relief, do you?

Mr. DUNKELBERGER. No, sir; as long as we are confident that the court in issuing that injunction is going to observe the usual equities.

Senator COOK. You have no objection to increasing the fine for violations from $5,000 to $10,000?

Mr. DUNKELBERGER. No, sir.

Senator COOK. Even though these fines continued for many, many days, they certainly would not be of any benefit to the consumer at all, would they?

Mr. DUNKELBERGER. No, they would not. The fines are there, You have got inflation. Maybe some day I will eat my words, but I do not think we have any major objection.

Senator COOK. In regard to the tremendous authority that could conceivably be vested in the FTC under S. 986, do you feel that S. 984 may not be necessary at all?

Mr. DUNKELBERGER. I think you can almost shut down any law on the Federal Trade Commission from now on. If you pass S. 986 this Committee here has a large chunk of its business written off the books, and the same on the House side. You would not have to worry about new FTC laws at all.

Senator Moss. Thank you very much, Mr. Dunkelberger. We appreciate your appearance and your testimony on this matter.

(The statement follows:)

STATEMENT OF EDWARD DUNKELBERGER, COUNSEL, NATIONAL CANNERS ASSOCIATION

My name is Edward Dunkelberger; I am appearing as counsel for the National Canners Association, a nonprofit trade association of about 550 members from all parts of the country. Members of the Association pack approximately 85 to 90 percent of the national production of canned fruits, vegetables, juices, specialties, meat and fish.

We greatly appreciate this opportunity to appear before this Subcommittee to present the views of the National Canners Association on S. 986 with particular reference to Title II and Section 208.

As the Subcommittee is aware, the provisions in Title II represent an addition to the Consumer Warranty Bill in the 91st Congress which passed the Senate last year.

Essentially, Title II is the same as Title I of S. 3201 which was reported to the Senate on August 14, 1970.

As then reported, S. 3201 had added to it an entirely new section—Section 105—authorizing the Federal Trade Commission to promulgate Trade Regulation Rules. Because that Section 105 in S. 3201 had been added after the close of the hearings, it was considered only in subsequent hearings before the Senate Judiciary Committee in late August and early September last year.

I respectfully ask that there be included in this record three pages—pages 312 through 314—of my testimony before the Senate Judiciary Committee dealing generally with the issue here presented.

The National Canners Association has repeatedly placed itself squarely on record in support of reasonable legislation to benefit the consumer. We have no position on nor shall I discuss Title I of S. 986 dealing with the disclosure of consumer product warranties.

Similarly, we have no position on Section 212 which will permit the Federal Trade Commission to seek injunctive relief against violations of Section 5 on the same conditions and principles as would be applied by an equity court. But we call to the Committee's attention that this preliminary injunction authority in Section 212 includes authority for the Commission to seek an injunction against any conduct prohibited by a substantive Trade Regulation Rule, that is, by any news substantive law which the Commission administratively issues under Section 208, to which this testimony will principally relate.

In addition, we have no position as to whether the Commission should, by Subsection (8) in Section 202 of the Bill, be authorized directly to institute penalty actions rather than be required to have the Department of Justice do so. But, here again, we call to the Committee's attention that penalties may be sought for any violation of a Trade Regulation Rule which the Commission determines to issue under Section 208. That is the plain meaning of adding to the civil penalties provision the right to seek penalties for violation of "any rule or regulation promulgated by the Commission under Section 6(g)," the language on lines 11 through 13 on page 17 of S. 986.

The fact that the penalties may amount to $10,000 for each violation offers an added reason for a close scrutiny of the rulemaking power proposed in Section 208.

Moreover, we shall leave to others to discuss the need and scope of the proposed addition of Subsection (7) to Section 5 of the Federal Trade Commission Act, which will permit the Commission to include in any order it issues against any person or company anything it administratively determines to be necessary to redress injury. This Section, of course, changes the whole notion of cease and desist and is plainly a condensation of an earlier section in S. 3201 which spelled out what it meant, namely, the authority to include in a Commission order provisions for the "payment of damages, refund of money or return of property, restitution, reformation or rescission of contracts, repair or replacement of goods, proper servicing, and public notification of violation." We limit ourselves once again to noting that a Commission order can be issued whenever the Commission determines that a person or company has violated any Trade Regulation Rule which the Commission has previously issued under Section 208.

Turning directly to Section 208, we respectfully call to this Committee's attention the meaning of that Section and the cross-reference to it in the other provisions of Title II.

First, taken together, Section 208 and the conversion of a Commission cease and desist order into a sweeping Commission order that may include every type of affirmative requirement that the Commission wishes to add, radically changes the entire concept of the Federal Trade Commission as an administrative agency.

The Commission is not only made into a court, but is given the power to issue sweeping affirmative controls in every instance in which it determines to act as a prosecutor, trial court, jury, and judge. By Section 208, it is also given the power by Congressional abdication to write the laws under which it desires to act.

We are not suggesting that Congress must make a fortress of history. But it is necessary at the outset to point out that since 1914 when Congress created the Commission, and up to this time, its assignment was to develop and define for future application unfair methods of competition, or unfair or deceptive acts, in commerce by a carefully designed and constitutionally proper process.

As this Committee knows, the Federal Trade Commission was originally given Congressional authority to develop the meaning of unfair competition which prohibition was later expanded by Congress in 1938 to embrace all "unfair or deceptive acts or practices."

The application of that delegated authority has throughout the Commission's history been cushioned by two important safeguards provided by the Congress. First the Commission has been required to follow an adjudicatory procedure, offering alleged violators full opportunity, consistent with the precepts of Anglo-

Saxon jurisprudence, to demonstrate that their activities were not within the statutory prohibition. In short, there was to be a trial, in which the facts were tested on the anvil of cross-examination, and the conclusion of the Commission that those acts or practices were to be thereafter considered violations of the Federal Trade Commission Act could be fully reviewed by the courts, on a record of sworn testimony, to determine whether there was substantial evidence.

Next, because the law is so broad, and any action would not be known to be illegal until it has been so adjudged, Congress has provided that no damages or criminal penalties should attach to an initial transgression. Rather, having now been put on notice that an act or practice is considered violative of the statute, the manufacturer is ordered to cease and desist from its commission. And in 1938, Congress provided that if the cease and desist order were violated, and that violation was established to the satisfaction of a court and jury, a civil penalty of $5,000 could be imposed.

In short, the Commission was required first to issue a complaint. The allegations of its complaint then had to be tried in a hearing in which due process was afforded through cross-examination, required findings of fact, and judicial review of its findings and order in the particular proceeding. Its enforcement powers were limited to issuing a cease and desist order operating in the future. Any later violation of that order could, after 1938, be made the subject of a civil penalty action brought by the Government and imposed by a court.

Title II turns all of that around. Section 208 gives the Commission the legislative powers of Congress. It authorizes the Commission to *legislate* a law of "unfair or deceptive acts or practices." I think you will appreciate—particularly those of you who are members of the Administrative Practices Subcommittee of this Committee—that there is no broader grant of delegated lawmaking anywhere in our administrative law statutes. Surely there is no parallel grant of rulemaking authority with so indefinite a standard to be applied. As Mr. Justice Cardozo observed back in the days of the NRA, "This is delegation running riot."

The changes in the other Sections authorize the Commission to seek an injunction, without any administrative complaint or administrative trial of the charges, for any violation of the laws which the Commission itself ordains. It can directly seek penalties for those violations without any intervening administrative procedure. Where it promulgates a Trade Regulation Rule—in the extraordinarily loose manner which I shall describe in a moment—it can issue a complaint charging violation of that rule. In that proceeding, the Rule cannot be questioned any more than an Act of Congress. If the Rule has not been obeyed, then the Commission can issue an order containing not simply prohibitory provisions, but any affirmative action it concludes is an appropriate remedy.

Even more, in the companion Bill, S. 984, pending before this Committee, it is made plain by Section (1)(P) and Section 102 that any new law issued as a trade practice rule by the Commission can also become the basis for a consumer class action.

Second, we ask the Committee to note particularly that this across-the-board sweeping lawmaking authority is not limited to consumer protection activities. Section 208 makes no reference whatsoever to consumer protection. The power of the Commission to legislate, to make substantive law, can operate on everyone, everywhere, on every business activity it wants to reach.

Under that authority, the Federal Trade Commission can regulate the activities of every person and every company operating every kind of business carried on in every state of the union.

Third, let us look precisely at what a substantive Trade Regulation Rule is and how it comes into being.

The Commission proposes any Rule it concludes should be made the law of the land. It permits the submission of written data, views, or arguments. On that paper record alone, it may write these specific new laws.

Section 208 does recite that "if requested" the Commission shall hold a hearing. What does that mean?

It does not mean any opportunity is afforded to cross-examine as to the facts on which the Commission desires to legislate. It does not mean sworn testimony. In the typical trade regulation so-called hearing, anybody can come in and make an unsworn speech, present any wild assertion of fact, or submit a written statement that is never subject to answer or checking. Typically, the Commission staff can shovel into the so-called record generalizations and opinions based on unrevealed and necessarily unverified fact.

Indeed, the looseness and potential arbitrary character of the proceedings further is revealed by the fact that the Commission does not have to hear even the vocal rhetoric or speeches at the so-called hearing. It can, and does, delegate that job to one of its staff, usually one of its own lawyers. There is little need to suggest elaborately that a Commission staff lawyer, who probably has participated in formulating the proposal, is hardly receptive to any challenge of the facts or reasonableness of the proposal.

It is no answer to suggest, as sometimes is suggested, that Congress may enact legislation on the basis of Congressional public hearings without permitting cross-examination or affording any other type of verifying process. The short answer is that the Federal Trade Commission is not Congress, and should not be given the powers of Congress over this broad spectrum covering the entire eocnomy.

The members of the Commission are not elected, but appointed for a seven-year term which exceeds in duration the elected term of every Congressman and every Senator.

Fourth, this is not—as Chairman Kirkpatrick suggested in his three-sentence presentation on Section 208 to this Committee—the removal of doubt or making more explicit an existing Commission rulemaking authority.

We need not burden the Committee with a legal demonstration that this type of authority was never conferred by Congress, was never sought to be exercised by the Commission until recently; indeed, the existence of such authority was repeatedly denied by the Commission, and that there is little basis for the suggestion that if and when challenged it will be upheld.

Although no opportunity was presented for the discussion of this issue before this Committee, it was fully discussed and elaborately briefed in the testimony last August and September before the Judiciary Committee of the Senate by Professor Handler and many other eminent legal authorities. We refer the Committee to the specific references and the comprehensive legal briefing in that hearing which I ask be included in this record at this point. They are included as an Appendix.

We recognize that in some areas questions are so complicated or involve so many changing variables that it is not realistic to attempt to write a statute which defines with absolute precision every aspect of the control we want exercised. A concomitant of this is the notion that to deal effectively with these areas, a certain body of expertise must be developed and should rest in the administrators of the law.

As a result the Congress has on occasion written statutes creating standards to be applied but granting to an agency the power by Rule to define the particularities of how the standard shall operate.

Largely, that concept has been applied in what are called the regulated industries where a license to engage in that business is required, and in the public interest the full details of operation, such as investment rates, freedom to engage in or to abandon activities, and, as illustrated by the communications field, the allocation of publicly owned areas such as the airways, "are regulated in full detail." No federal license is required to engage in the production of goods or the furnishing of services. In a few instances, as illustrated by the Wool Labeling Act and in certain portions of the Fair Packaging and Labeling Act, Congress has authorized rulemaking, but has circumscribed the extent and delimited the areas in which it was considered desirable.

To a degree, Title I of S. 986 indicates an awareness of the difference between Congressional abdication and specifically limited rulemaking power. Section 109 of Title I accords to the Commission the specific power to define the manner of stating warranties given by a manufacturer. It is obvious that if, in Section 208, Congress gives the Commission unlimited rulemaking power, Section 109 in this Bill becomes meaningless. Indeed, Chairman Kirkpatrick suggested last week that unlimited rulemaking power could include all of the subject matter of Title I on warranties.

In no instance has Congress abdicated to authorize an administrative agency to legislate across-the-board on everything done in the entire American economy.

What we are confronted with here is a complete abrogation of Congressional authority in an area so broad as to be awe-inspiring.

Nor is elaborate argument necessary that the procedure provided in Section 208 is not only a travesty but that suggested court review is transparently inadequate. The Commission is not required to make findings of fact on which it

is exercising its unlimited powers. Indeed, it is not required to winnow out these facts from the rhetoric submitted or from its own files. All it is asked to do is to adopt "a concise general statement of its basis and purpose." Whether this need be even as long as a Senate or a House Report is not made clear. The decisions under the Administrative Procedure Act make it clear that the required general statement is not a set of findings of fact.

The court review provided is that left open by Section 4 of the Administrative Procedure Act, and not the full protective provisions of Section 7. In short, the only thing that can be reviewed is the record provided by Section 208. That record does not contain "evidence." Instead, it is merely a record of unsworn talk and unverified submissions presented to the Commission, as merely summarized in its general statement.

Perhaps the best description of the summary fashion in which a Commission Trade Regulation Rule is to be formulated to become the law of the land—whether or not you call that procedure "informal" as Chairman Kirkpatrick first did—was the Chairman's later response to a question by Senator Cook last week. He said:

"In my own view, the Commission can adopt fair rules without the delays, the unending delays and interruptions that I am fearful would really break down our rule-making proceeding were full cross-examination and discovery as a matter of due process to be compulsory. I would be very apprehensive that it would be a month of Sundays and much longer before we could adopt a rule that was going to be unpopular to those who would be governed by it, and by and large rules are not always the most popular thing, people have to change their ways because of the existence of a rule and the longer they can fend it off, the happier they are. That is my problem."

In conclusion, any analysis of what is here presented in Title II as an addition to the Consumer Warranty Bill represents an extraordinary abdication by the Congress of its legislative powers. It constitutes a delegated authority to the Federal Trade Commission of the power to write laws affecting every business activity throughout the land.

As Professor Handler pointed out last year, among the major defects in Section 208 are:

1. The Federal Trade Commission's authority to legislate promulgation of a trade regulation rule would not be limited to consumer-related practices but would cover the entire waterfront of business activity.
2. The Commission's rules would, unlike other administrative regulations, have the force of substantive law and automatically create new federal causes of action which the federal courts would have to entertain.
3. The provisions for a hearing are woefully inadequate.
4. There will not be the kind of factual record which permits effective judicial review.

If, in exercising virtually all the powers of Congress over any business activity affecting commerce, the Commission issues Trade Regulation Rules, and it is held by the courts that the validity or need of those Rules cannot be challenged in the further proceedings which are authorized, no more sweeping delegation of Congressional power can be imagined.

Preliminary injunctions can be issued against anyone who fails to obey the Commission's substantive rules.

Heavy penalties can be sought for those violations, again with the Rule possibly not subject to challenge.

If a complaint is issued, only the fact of violation is to be determined, and the resulting order is no longer merely a cease and desist order but may contain any additional requirements that the Commission determines are appropriate.

A failure to comply with whatever the Commission ordains can give rise to a class action.

These issues warrant the fullest inquiry by the Congress as to their necessity and as to the wisdom of this type of Congressional abdication.

Including them under the guise of Federal Trade Commission "Improvements" as an addition to a Consumer Warranty Bill that is to be hurried to the floor of the Senate, would hardly appear to be consistent with the careful consideration they deserve.

APPENDIX

[Reference to statements in opposition to the rulemaking authority proposed by sec. 105 of S. 3201, contained in the Senate Judiciary Committee hearings, August and September 1970]

	Page at which statement commences	Passage dealing with rulemaking
Statement of Prof. Milton Handler, professor of law, Columbia University, and senior partner in the firm of Kaye, Scholer, Fierman, Hays & Handler, New York.	88	93, 105–106.
Statement of Gilbert H. Weil, general counsel, Association of National Advertisers.	221	238–240, 245, 250–255.
Supplement to statement by Gilbert H. Weil	222	222–237.
Statement of Thomas A. Rothwell, attorney at law, special counsel, National Small Business Association; accompanied by Herbert Liebenson, legislative vice president, National Small Business Association.	283	291–292, 299–300.
Statement of James D. Cope, executive vice president and treasurer of the Proprietary Association; accompanied by Daniel F. O'Keefe, Jr., vice president and secretary of the association; and William F. Weigel, associate general counsel of the association.	300	301–307.
Statement of Edward Dunkelberger, general counsel, National Canners Association, Washington, D.C.	309	311–315, 318–321.
Statement of George P. Lamb, general counsel, Association of Home Appliances Manufacturers, Washington, D.C.	321	321–323, 329–330.
Statement of J. Edward Day, special counsel, Consumer Products Division, Electronics Industry Association.	333	339.
Statement of Thomas Nichol, Jr., general counsel, Gas Appliance Manufacturers Association, Washington, D.C.	339	343–347.
Statement of the Southern States Industrial Council	361	363.
Letters from Earl W. Kintner	364	364–369.
Statement of the National Association of Manufacturers	376	377.
Statement of Simon F. Rifkind	378	381.
Statement of American Frozen Food Institute	384	386–387.
Statement of Chrysler Corp	400	401.
Letter from the Proprietary Association	410	410–412.

Senator Moss. We are into the noon hour, and we are going to have to recess. I want to see if our witnesses are here.

Off the record.

(Discussion off the record.)

Senator Moss. On the record.

We will recess and resume promptly at 2 o'clock.

(Whereupon, at 12:20 p.m., the hearing was recessed, to reconvene at 2 p.m., this same day.)

Afternoon Session

Senator Moss. Mr. George Lamb, general counsel for the Association of Home Appliance Manufacturers. We are glad to hear from you, Mr. Lamb.

STATEMENT OF GEORGE LAMB, GENERAL COUNSEL, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, WASHINGTON, D.C.

Mr. Lamb. Good afternoon, Senator. I am very happy to have this opportunity to come before your committee again.

My name is George P. Lamb. I am general counsel of the Association of Home Appliance Manufacturers. I am here today to give some views on S. 986.

As my formal statement says, the Home Appliance Manufacturers represent, both the major appliances such as washing machines, dryers,

ranges, refrigerators, and the like, and also represent portable appliances which include toasters and hair dryers, razors, and products of that nature.

I am here to give some comments with regard to both title I and title II of this legislation. We are in favor of parts of both and we are opposed to certain parts, and I am going to try to be specific as I can with regard to the sections that we particularly oppose.

Before I get into that, I would like to say that the Association of Home Appliance Manufacturers has tried to be constructive in its approach to this problem. Over the period of the last 3 or 4 years each of the companies in this industry has given its warranties and guaranties a very careful examination to bring them more into conformity with the wishes of the Congress and with the wishes of those folks who are pressing to get clarity in warranties. We support affirmative disclosures and we also support the idea of the Federal Government, the Federal presence being involved in the final resolution of this warranty problem.

Now, in addition to our effort, to clarify our warranties in the marketplace, we went an additional mile in that three associations created what is known as MACAP, the major appliance consumer action panel, which is a very unique idea headed up by Dr. Virginia Cutler of Brigham Young University. There were certain complaints that were unresolved on the part of dealers and also on the part of manufacturers, and we felt that the consumer should have an opportunity to have them reviewed by an objective board of people who represented the consumer and not the manufacturer.

This group has been in operation now for over a year, but prior to the time that they came into existence AHAM instituted a complaint procedure which was designed to try to answer some of these questions. It might be interesting for you to know that since March of 1968 we have processed 2,489 complaints. Only 191 of those complaints mentioned warranties, and of 43 unresolved complaints referred by AHAM to MACAP, only three were based on warranties alone.

This seems to me to be a rather enviable record when you consider the fact that in 1970 we shipped 26 million major appliances and at the same time there were in use in the American home some 292 million major appliances.

I want to reiterate that we do endorse the idea of having the warranty language disclosure part made absolutely clear, and our feeling is the major objection we have to certain parts of this title I is where there are certain ambiguities. I will turn to these immediately.

There are really three main points that we would like to make and one deals with whether or not oral warranties are covered. Secondly, the question of preemption, and thirdly, the effective date.

Now section 102 when read with the other sections, creates one of the ambiguities to which I have spoken. The bill is described in its title as being legislation to provide minimum disclosure standards for written consumer product warranties. Section 102(a) would establish items of information to be set forth in warranties "in writing."

Section 103, designation of warranties as "full" or "partial" speaks only of warranties "in writing." Section 104 would establish duties a warrantor must assume in giving a warranty "in writing." Other sec-

tions also indicate an intent to confine the bill's requirements to written warranties; but section 101(2) negates this intention when it provides that an "express warranty" may be created by "[a]ny affirmation of fact or promise," and by "[a]ny description of a consumer product * * *" In addition, the enforcement provisions of section 110(c) are not confined to written warranties; and section 110(e) provides redress for a person "damaged by the failure of a supplier to comply with any obligations assumed under an express * * * warranty * * * subject to this act * * *"

When read with section 101(2), section 110(e) clearly appears to contemplate redress for oral representations of a salesman. The two sections could subject a manufacturer to costly suits to determine whether or not a dealer's salesman who had made an "affirmation" or "description" that created an express warranty was the manufacturer's agent.

We believe this possibility can be removed if the words "or implied" are stricken from lines 20–21, page 14, and the words "in writing against defect or malfunction" are substituted. This would make the enforcement provisions of section 110(e) consistent with sections 102, 103, and 104, which would prescribe certain duties with respect to warranties "in writing against defect or malfunction."

We recommend that change be made in that section. We also recommend that section 110(e) be amended to make it clear that it does not authorize class suits based upon a Federal cause of action in State courts. This may be done by inserting the words "in an individual capacity but not as a representative of a class of plaintiffs" after the words "bring suit" in line 22 of page 14 of the bill. To make clear the limited effect of this proposal, we would have no objection to adding the following sentence to the subsection: "Said limitation upon capacity shall not affect any suit that does not involve a cause of action under this act."

Now I would like to turn for a moment to the preemption provision. Suppliers are becoming increasingly apprehensive about the burdens that may be imposed by the States, counties and municipalities with regard to legislation in this area. We therefore think that this statute should be crystal clear that it preempts those statutes. As a result, even though we recognize that this particular provision 112(b) has been extended by using the words "or other requirements" in the first line we would like to have substituted for section 112(b) the following—and I quote:

> It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may establish any requirements or provisions with respect to warranties relating to consumer products, which are in any way inconsistent with the requirements and prohibitions of this Act: *Provided*, That this Act shall not limit or affect any rights or liabilities created by State law with respect to claims for personal injury, death, damage to property, or to claims of breach of contract where the claims are unrelated to the warranty requirements under this Act.

Now, the effective date, this presents us with some real problems. Section 114(a) of the bill provides that the effective date of the act shall be 6 months after the date of enactment except for "consumer products in the stream of commerce prior to that date."

Well, I don't know what "in the stream of commerce" means. As you well know, it takes months sometimes to get these products to the market. They are manufactured and they are put in cartons. Sometimes they are held in inventory at the manufacturer's level. Sometimes they are shipped out and held in inventory at the wholesale level. Again they move on into the retail level. How many of these products are in inventory at any one of those three levels depends entirely on the demand for the product.

If this law were to have the effective date that is now in the proposed bill, it could place us under a great hardship. We therefore suggest that this bill be amended to give us, say, 60 days for those products—have the effective date not less than 60 days for those products manufactured after the date.

Now this means that the law would not apply to the products that have been manufactured prior to the time that this is in effect but would take effect immediately or within 60 days after the bill becomes law.

Now there are other provisions in title I which are important. I do refer to them briefly in my statement. I would like to say that the section of 102(a)(1)–(7) we have no disagreement with those. However we feel that (8)–(13) should be deleted from the bill. We think if these requirements are in this bill when it is enacted that it will make warranties so long and so confusing that we will be in worse shape than we are at the present time.

We don't think that these items (8) through (13) really are the correct subject of a warranty. I am referring to the availability of informal dispute settlement procedures, a recital of available legal remedies, a statement that the person guaranteed may recover reasonable attorney's fees in pursuing his legal remedies, a statement as to the time at which the warrantor will perform his obligations, and so forth.

Our feeling is that is not the proper subject matter of a warranty, although we do believe that the affirmative disclosure in the first seven should be retained. There is some ambiguity between the definitions of "repair" and "replacement" in sections 101(5) and 101(6). "Repair" is defined in section 101(5) as including "replacement" of a defective product with a new one "at the option of the warrantor". "Replacement" is defined in section 101(6) as including "the refunding of the actual purchase price of the consumer product less reasonable depreciation."

We think the replacement or refund should rest with the manufacturer rather than with the person warranted. We feel this because in the source of the development of the manner in which the warranty is going to be handled, some manufacturers give their wholesalers such sufficient markup to handle it and some manufacturers give a sufficient markup to the retailer to handle it. As a matter of fact, one of our companies feels very strongly on this point. Their method of merchandising is to place stress on the part of the retailer in the proper installment and proper servicing of the product and they build that into their price, as distinguished from the methods used by some of the others in either giving the dealer the exact amount of money or in giving him parts and labor.

We also are confused about this business of full and partial warranty. We think that that should be eliminated from the bill; largely, we think when you say "partial" that this is sort of a derogatory connotation in that it gives the impression that you really aren't warrantying your product. So we thing that all warranties should be full warranties rather than partial.

We have a little difficulty with this question of "equitably compensated." We don't understand what that means.

Briefly, those are the suggestions which are in the first part of my statement here through page 9, and we respectfully request that you give serious consideration to changing this bill in order to clarify them. This indicates, of course, that we are not here opposing this. We are here asking you to clear up certain ambiguities and we particularly place emphasis on the question to make sure that it is written, to make sure that the Federal law preempts the State laws and make sure this effective date is a date which we can comply with without too much difficulty. I would like to turn to title II for a few minutes——

Senator Cook. I wonder if we could question you a little bit on title I, if you don't mind, sir.

Senator Moss. No, you go right ahead.

Senator Cook. Mr. Lamb, one thing that puzzles me is the provision of section (13) of 102: "The characteristics or properties of the product or parts thereof that are not covered by the warranty."

Now, in looking over your statement, and I refer to exhibit A, let me ask you how a manufacturer of an air conditioner or a home-laundry appliance would comply with section (13) of section 102?

Mr. Lamb. That is one of the reasons why we would like to have that taken out. I don't think we can handle it.

Senator Cook. I think you ought to elaborate a little. For instance, I haven't the slightest idea how many parts there are in an air conditioner or how many parts there are in a home-laundry appliance or how many parts there are in a refrigerator. Let's assume there are two or three thousand, I guess.

Mr. Lamb. There could be.

Senator Cook. Would you construe section (13) to mean that a manufacturer would have to state in a warranty those parts of a particular appliance that were not covered by the warranty?

Mr. Lamb. I think they would have under this, yes. They would have to do that.

Senator Cook. This could be a bigger list than one of the parts that are warranted?

Mr. Lamb. That is correct.

Senator Cook. Have you any idea—let's say that you represent a manufacturer of air conditioners—how many parts are purchased from jobbers or suppliers; for instance nuts, bolts, frames, et cetera, would they have to state specifically each one of these parts that they would not feel inclined to warrant as an integral part of the item?

Mr. Lamb. I definitely think they would if this were part of the law. I know that this varies from one manufacturer to another, but there are a great many manufacturers that buy from a lot of sources of supply. If this were contained in here and if they didn't want to warrant it, they would have to so state it.

Senator COOK. This makes no differentiation between a moving part and a nonmoving part, does it?

Mr. LAMB. No distinction at all.

Senator COOK. According to section 9 there must be a recital that legal remedies are available to any person guaranteed if the warrantor has not complied with the provisions of the warranty. This is almost a basic presumption of law; it it not?

Mr. LAMB. Yes, it is.

Senator COOK. It always has been?

Mr. LAMB. That's right. I don't think there is any need for this.

Senator COOK. This is, in essence saying that if you don't like our product you can sue us?

Mr. LAMB. Yes, sir.

Senator COOK. I think almost everybody in the Nation knows that if they have a bad product they have a cause of action, don't they?

Mr. LAMB. Yes, I would think so. With these legal agencies we have now, these public-interest law firms, I would think anybody can find out.

Senator COOK. I am not particularly opposed to public-interest law firms if, in fact, somebody is doing something they should be doing. I have no objection to that. I find objection to saying that if you find this product isn't what it ought to be you have legal recourse, because I think this is a presumption that has been built into the law ever since the Constitution was written.

Mr. LAMB. Absolutely. I don't think there is any necessity for it being here. I did not want to give the impression that there is anything wrong with the public-interest law firms. But I do think there is available today to people a place where they can go to find out about it.

Senator COOK. Usually a product has been through a manufacturer, it has been through a wholesaler, it has been through a retailer, and then it has been sold. Unless the manufacturer has complete control of his supplier, unless he has complete control of his retailer as to pricing, he has no recourse under the terms of this bill as to the amount of recovery than can be made of him other than the full price paid for the product by the consumer purchaser; is that correct?

Mr. LAMB. That is absolutely correct.

Senator COOK. Now, if this is true, under your interpretation of the bill, what will this do to the manufacturer who does not have his own outlets? What does this do to this whole setup of appliance stores in communities throughout the United States who are not Sears Roebuck, Montgomery Wards, Western Autos, who are not completely and thoroughly controlled as to pricing?

Mr. LAMB. It is going to actually cause the prices to increase. They will have to be built into the price.

Now going back to your question——

Senator COOK. What does this do to the antitrust laws?

Mr. LAMB. Well, as far as putting a small businessman out of business, I thing there is a very good possibility that it will cause further concentration in the hands of a few. A small, independent retailer, his days would be numbered if this kind of complication is put into the law.

You were talking about how you are going to get redress for a so-called lemon, and this is a word we don't care very much for.

Senator COOK. I am sure. You will admit there are some periodically?

Mr. LAMB. Yes; there are some and for that reason the Association of Home Appliance Manufacturers were in favor of setting up this organization that we call MACAP that I spoke of in the early part. That is working very well. We have received complaints from Mrs. Knauer's office; we have received it from certain members of Congress who have received them who know of the existence of MACAP. We have tried to publish in magazines, in the trade press, in schools and colleges, to invite these people who do have these so-called lemons to bring them to our attention.

We have had a remarkable success in getting them straightened out. That is a completely voluntary effort. I think that is the way to solve that kind of a problem that you are speaking of.

Senator COOK. When you were suggesting changes, in section 101(2), "An express warranty is created as follows:" Are you saying that you would be satisfied with section 101(2)(a) if the words were "any written affirmation of fact or promise?"

Mr. LAMB. That would go a long way to correcting what I am worried about; yes.

Senator COOK. You understand that under the terms of the bill, if you don't want to warrant, you don't have to warrant.

Mr. LAMB. That is correct.

Senator COOK. I don't want to act like I am an antagonist about everything but if we limit ourselves to a warranty guarantee bill which says a warranty or a guarantee in writing, then the ultimate end is going to be that a manufacturer only warrants his product in writing. Are you willing to say that this may well be the end result of warranty guarantee legislation?

Mr. LAMB. I think that that is what it should be. I think that it should specifically state that it is in writing and I am happy with the idea that you don't have to warrant if you don't want to. The thing that we are mostly concerned about are the representations that can be made by a salesman on a retailer's floor that would be attributed to the manufacturer, where it will be attributed that that salesman is an agent of the manufacturer where he is not.

Senator COOK. I am not sure that is right, but let me give you an example and ask you if this is what you consider that section of this proposed legislation to mean. You are talking about a warranty over and above an implied warranty or warranty by the manufacturer?

Mr. LAMB. That is correct, sir.

Senator COOK. Let's take a washing machine and it says it has a 2-year guarantee or a 2-year warranty as to various parts, et cetera. Do you construe this law to mean that if somebody in a store says, well, this only says 2 years but you won't have a bit of trouble with this washing machine for 5 years. Do you construe it that under the terms of this bill that the manufacturer would be absolutely bound by the expression of a salesman who would then in fact become an agent under the law?

Mr. LAMB. I think there will be great attempts to bind them, yes, and we will suffer a great deal of litigation as a result of this.

Senator Cook. And that your warranty would be extended by 3 years?

Mr. Lamb. That's right.

Senator Cook. I am not sure that is my opinion, but I wanted to ask you if that was your opinion.

Mr. Lamb. We want to eliminate that possibility by putting it into the law now because between the enforcement section and section 101(2) there is definite ambiguity.

Senator Cook. Let me go to section (8).

Mr. Lamb. Are you talking about section (8) on page 4?

Senator Cook. Well, I am talking about another section, too, if I can find it.

Mr. Lamb. Section 101(8)?

Senator Cook. Yes.

Mr. Lamb. On page 4?

Senator Cook. Warranty means any supplier or other third party who—yes, that is the one I want.

Mr. Lamb. That is page 4.

Senator Cook. Also on page 11, section 107: "Any warrantor from designating representatives to perform duties under the warranty." In other words, we are saying in essence that a salesman far removed from a manufacturer, becomes a warrantor of the product.

Mr. Lamb. That's right.

Senator Cook. And that ties in with the definition of warranty?

Mr. Lamb. That's right.

Senator Cook. Under section (8) which means any supplier or other third party who gives or offers to give an expressed warranty?

Mr. Lamb. That is correct, sir.

Senator Cook. And then in brackets "[guaranty.]" You are concerned that unless a manufacturer has absolute and complete control of his organization from the time of manufacture to the retailer, and I mean control of cost, control of sales performance, that this bill does a tremendous disservice to the manufacturer who relies on independent retailers as an outlet, that the independent retailer who is in no way bound by the corporate structure such as a GE man or a Sears, Roebuck man, becomes a warrantor, that he becomes a third party who can warrant you right out of your britches?

Mr. Lamb. That is exactly what we are afraid of, and it is not clear at this time in this bill and that is what we want clear.

I turn now to title II of the Federal Trade Commission improvement provisions of S. 986. I would like to make a little statement here. I was present this morning and heard the testimony of Mr. Weil, Mr. Kintner, and Mr. Dunkelberger. I would like to point out that I have been operating in this arena here in Washington since 1933. I have been practicing law here since 1934. I was the author of 38 of the supplementary codes under the National Industrial Recovery Act, and I have tried a great many cases at the Federal Trade Commission.

I give you these prefatory remarks in view of the fact I have participated in many symposia, discussions of this subject, particularly in the area of affecting commerce, the question of whether or not the Trade Commission should have a right to injunction powers, and part of the time I have been in favor and part of the time I have been against.

But I have resolved my own thinking and my people have, too, with regard to affecting commerce; we have no disagreement with that, enlarging the jurisdiction to cover it, we have no disagreement with the idea of giving the Federal Trade Commission injunctive powers, but we do say this about the injunctive powers: We think when the Commission goes into the U.S. district court seeking a preliminary injunction, they should have their complaint prepared and the district court should give them 30 or 60 days depending on the circumstances to file that complaint. If they don't file it, the defendant in the district court should have a right to go in and have the injunction dissolved.

Now we think that one limitation should be on the injunctive powers of the Commission. If they can go in and get an injunction and it lasts 4 or 5 years and they don't bring a complaint, I think it would be wrong.

Senator Cook. Can't this be perfected by allowing temporary injunctions?

Mr. Lamb. I think so. I think it should be tightened up so it will be subject to the rules of equity. There should be an apparent irreparable damage if they don't get the injunction. Basically courts have been noted to grant injunctions unless somebody is going to get seriously injured.

It is my position that we are in favor of the injunctive powers, but we do think that it should provide that the defendant in the U.S. district court should be permitted to ask the court to set a time limit on which that injunction should prevail within which the Federal Trade Commission can bring its formal complaint.

We have no problem with increasing the penalties from $5,000 to $10,000. So I would like now to talk a little bit about rulemaking.

As you gentlemen know, the Federal Trade Commission did not use rulemaking until 1961, even though it had been talked about a great deal as a possibility prior to that time. The idea of simple rulemaking at the Federal Trade Commission was designed to cover a practice that was rampant in a particular industry.

For example, let's say there was a great deal of fictitious price advertising in the appliance industry. The Trade Commission under its rulemaking procedure would call in the appliance industry and say let's lay down a rule on fictitious price advertising and outlaw it as an unfair method of competition under section 5 of the Federal Trade Commission Act. They in effect would be saying to the appliance industry, all right, you go on and get your house in order. If some company did continue to use fictitious price advertising, then, the Commission could proceed against them in a formal complaint procedure.

When I testified last year on this bill, I felt—or on this legislation—I felt that what was thought of in S. 3201 was a kind of rulemaking which was designed to outlaw at one time in an industry unfair methods of competition or unfair deceptive acts or practices, and it was to do this in areas that were not clear under the broad language of section 5 of the Federal Trade Commission Act.

I was thinking more of a simple rulemaking.

Now we come along here and we have a different kind of rulemaking, and we add to it certain provisions in title II which gives the

Commission the broadest power they have ever had to go into a U.S. district court seeking civil penalties, performing duties that are normally performed by the Attorney General of the United States. We see in here giving them power to give redress to the consumers which in effect is a hidden type of class action being brought by the Federal Trade Commission.

Senator Cook. Don't you think, in all fairness, that one of the frustrating things at the FTC is that in the past it has submitted what it felt was a fair case to the Justice Department and it waited and waited and waited and the Justice Department took no action? Would you be opposed if the Justice Department had a time limit within which it would bring an action based on a complaint filed with the Federal Trade Commission?

Mr. Lamb. I would not be opposed at all to that. I realize the frustration that the FTC has had in its enforcement proceedings, but at the same time from the standpoint of orderly legal procedures, I don't think we should take the powers of enforcement of Federal laws away from the Attorney General. I think they are best left there.

If the Trade Commission is having the difficulty they say they are, something along the lines, Senator, that you suggest I think would be in order.

But I don't think we should give the Commission the right to redress the consumer by setting up some kind of a system to pay off consumers who contend that they have been injured by the loss sustained from a given product.

Now, I do think that title II needs a lot of tailoring, particularly section 208. I think section 208 can be rewritten, it can give the Trade Commission its simple rulemaking which I understand that they want—they want a statutory approval of what they have been doing. Is that correct, Senator?

Senator Moss. I would say that is broadly so.

Mr. Lamb. Basically what they want. I think they should be given that, but I don't think you should add into it all these other sections that give them the right to go into the Federal court.

Another thing, if you give them this simple rulemaking, I don't think the fact that they lay down a rule that it is declared to be an unfair method of competition, I don't think they should be regarded to a per se violation of section 5 of the Federal Trade Commission Act. I think once that rule is laid down, I think they should be required to bring their formal complaint and at that juncture the respondent in the case has available all of the rules, the FTC's own procedural rules and the rules of the Administrative Procedure Act.

I think at that time the Commission should be required to prove its case against a specific respondent, contending that that respondent in the fact that they alleged violated the regulation rule that they laid down. And that burden of proof should be on the Commission.

In the rewrite of section 208, and which I hope you get around to doing, there is a lot of language in 208 which I think is good, and when I first read it I felt that this question of cross-examination which was mentioned by Senator Cook here this morning, in section 208, if you could substitute the exact language you used this morning, cross-examination where appropriate. There is no question but what rule-

making is an extension of the legislative branch of the Government. This is not a judicial process. It is more of a legislative process. It is more like the hearings that you are holding here today.

The question then is from the bench. The question is not by a private attorney. For example, if I disagreed with Mr. Weil this morning and I approached the Chairman and said Mr. Chairman, I would like to cross-examine Mr. Weil on his statement that a certain provision is unconstitutional, I would like to ask him a few questions. I daresay you would have refused me. You would have said later on in the day we will give you an opportunity to come forward and express your views, or we will give you an opportunity to file a statement for the record.

I think that is the kind of rulemaking, at least that is what I thought was contemplated, and if it isn't contemplated, it ought to be put in this statute in that fashion, and if it is necessary to have under certain circumstances cross-examination, that ought to be written in.

I am more interested in being able to get into the U.S. district court once a rule is made to test out whether or not it is within section 5 of the Federal Trade Commission Act, that it is an unfair method of competition or an unfair deceptive act or practice, and get in there immediately, and secondly, I want to make sure once this rule is laid out that I have available to me all of my rights under the Administrative Procedure Act and under the Federal Trade Commission rules, that they have the burden of proof, they bring a complaint, and they have got to prove that what I did violated that rule that they laid down.

I think if that is put into this statute and we eliminate the Trade Commission's right of redress, holding hearings and paying off some alleged class actions or going into the district court to get fines or penalties, I believe that this bill would be more palatable.

We, therefore, in conclusion, we do not oppose limited rulemaking. We oppose the kind of rulemaking that is in this bill. We oppose the idea of the FTC having the powers that they do of going into the district court. We think that injunctions should be permitted subject to the equity rules and subject to the limitation on the length of time within which the Trade Commission can bring its complaint.

We have absolutely no objection whatsoever to broadening the FTC's statute to "affect in commerce."

Senator Moss. Thank you, Mr. Lamb.

I wonder if an injunction ever is made permanent in the first instance. Doesn't an injunction always go through a stage of a preliminary period?

Mr. LAMB. Temporary restraining order a preliminary injunction; yes.

Senator Moss. So, the time limit, if equity is exercised, would be that period of time that would be least likely to injure the person enjoined and still offer an opportunity to get appropriate evidence before the court issuing the injunction?

Mr. LAMB. Yes.

Senator Moss. I was a little disturbed by one of your responses to Senator Cook earlier when you were talking about the product going out to the retailer who, in effect, would accept the price and then who

would set the price and that would bind the manufacturer. He always has the option of repairing or replacing, doesn't he?

Mr. LAMB. Repair or replace or refund.

Senator Moss. Or refund. But if he didn't take the third option, he wouldn't be affected——

Mr. LAMB. He should have that option. That is my point. The manufacturer should have that option.

Senator Moss. Doesn't the bill give him that option?

Mr. LAMB. Because they vary in the manner in which they actually service their warranties. That responsibility varies from one manufacturer to another.

Senator Moss. There is a variation of servicing.

Mr. LAMB. There are several of our companies who build into the retail market a large enough amount of money that permits that retailer to service the warranty. Their thinking is that makes that retailer more responsible. It makes him want to install that product carefully and service it and see that it is functioned so he doesn't waste a lot of money that is built into that product. He makes a larger profit.

Senator Moss. Getting back to the manufacturer's options, he has, first of all, to repair or to replace, or, if that cannot be done, to refund.

Mr. LAMB. Right.

Senator Moss. So, he does have those options by the terms of the language. Just to clarify that point, Senator Cook's sugestion, I take it, met with your approval, that there perhaps be a time certain in which the Justice Department had to act.

Mr. LAMB. I have no objection to that.

Senator Moss. If Justice in that time either rejected the complaint filed by the Trade Commission or just failed to act, would the Trade Commission then be permitted to go into court directly?

Mr. LAMB. I wouldn't have any objection to that being written into the statute properly circumscribed as to what they were going to go into the court to do. I want to know what they are going to do.

Senator Moss. How would you circumscribe it, then?

Mr. LAMB. If it is a question of going in for a civil penalty, I would want it limited to a civil penalty.

Senator Moss. Nothing but a civil penalty.

Mr. LAMB. That is right.

Senator COOK. You are saying if that is the question.

Mr. LAMB. Right.

Senator COOK. If the question is to stop an unfair practice; would you have any objection to that?

Mr. LAMB. They have a right to go in on injunctions. No; I have no objection to that.

Senator Moss. Do you have some further questions, Senator Cook?

Senator COOK. Yes, I do; because I personally have no objection to a limitation on the amount of time that the Justice Department can take to bring suit in an FTC case. I think the FTC is entitled to a recourse from this failure to act on the part of the Justice Department.

But getting back to what you were talking about relative to preliminary injunctions. There is quite a discrepancy between the bill that was introduced the other day, commonly referred to as the administration bill, and S. 986. On seeking a preliminary injunction under the

administration proposal, proper notice to the defendant is required, and in the bill before us there is no notice to the defendant required.

I might also say that under the administration bill there is an additional paragraph which I think would meet with your approval. It says:

Provided, however, That is a complaint under section 5 is not filed within such period as may be specified by the court after the issuance of the temporary restraining order or preliminary instruction, the order or injunction may be dissolved by the court and be of no further force and effect.

Mr. LAMB. We would favor that.

Senator COOK. Do you feel it is incumbent upon the FTC, if they receive a preliminary injunction or a temporary injunction, that because they have taken this affirmative action they should be prepared to pursue that within a reasonable period of time and that that preliminary or temporary injunction should not be allowed to sit as long as the Federal Trade Commission so desires?

Mr. LAMB. That is right. You have a right to know what you are really accused of, what are you charged with, what is the violation, and you have a right to have that litigated properly also. Because if you are stopped from selling a product because of that temporary restraining order or that preliminary injunction, you——

Senator COOK. As a matter of fact, this would be a departure from the Federal rules of procedure, in that a preliminary injunction could be secured for any period of time without notice to the defendant, wouldn't it?

Mr. LAMB. Yes; it would be, yes.

Senator COOK. Thank you.

Senator MOSS. Mr. Sutcliffe, do you have any questions?

Mr. SUTCLIFFE. Just a couple of questions.

I would like to return to the hypothetical proposed by Senator Cook, where the salesman has represented a 5-year warranty when in fact the suppliers warranty in writing is 2 years.

Under the bill as it is presently written, someone could be held accountable for that 5-year representation, because as you pointed out it applies to oral warranties.

Does this provision in 101(2) comport with the provisions in the Uniform Commercial Code?

Mr. LAMB. That is right.

Mr. SUTCLIFFE. If you asked for preemptive authority as suggested by your language, would we then be denying a consumer's right to seek redress for oral warranties if we made section 101(b) applicable to only written warranties?

Mr. LAMB. I don't know whether we would or not.

Mr. SUTCLIFFE. But that would be something we should certainly pay attention to.

Mr. LAMB. It would be a problem; yes.

Mr. SUTCLIFFE. In a situation where the warrantor has provided a salesman with what as I understand in the trade is called spiff money, would there be any question about the agency relationship between the supplier of the product and the salesman?

In other words, if the salesman had been given money to promote the product outside his normal compensation from the representative,

would normal laws of agency bind the supplier to the affirmation of fact expressed in an oral warranty?

Mr. LAMB. First of all, I think it would be an unfair method of competition to give a "spiff." I think that would be a violation of section 5, unless there was a sign up saying, "This store is giving a spiff."

The question is whether there is any agency between the retail salesmen getting the spiff and the supplier, I suppose yes.

Mr. SUTCLIFFE. Would it be possible to break any alleged agency between the supplier and the salesman in order to make the salesman accountable for the representation rather than the manufacturer or even the retailer?

Mr. LAMB. I don't know.

Mr. SUTCLIFFE. But that would be one possible way that this committee could try to protect the interest of the consumer as well as the legitimate interest of the supplier, isn't it?

Mr. LAMB. If you want to write it in there, it is the salesman's responsibility, I wouldn't object to that as long as you don't make the manufacturer responsible.

Mr. SUTCLIFFE. Under the section that was referred to earlier on page 11 of the bill there is a proviso which says that when there is a designation of a representative to perform duties—not to sell the product, but to perform duties under the warranty—"no such designation shall relieve the warrantor of his direct responsibilities to the person guaranteed or make the representative a cowarrantor."

So that would give the manufacturer in that instance some protection, would it not?

Mr. LAMB. Some; yes.

Senator COOK. Not a great deal of protection with the salesman, would it?

Mr. LAMB. No.

Mr. SUTCLIFFE. The situation here, the hypothetical was the salesman saying it is a 5-year warranty when, in fact, the supplier had given a 2-year warranty. Is it your opinion that the consumer should have some kind of protection against those kinds of representation?

Mr. LAMB. I think that the consumer deserves to have the truth told him, yes, and, of course, this is our problem. We can put point of sale material with the appliance, we can furnish instruction manuals, but we as a manufacturer can't make a consumer read them. We can't even make the salesman read them.

Senator COOK. Mr. Sutcliffe, you and I read this two different ways:

> Provided, that such warrantor equitably well compensates such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the person guaranteed or make the representative a cowarrantor.

Which means he is not making him a cowarrantor.

Mr. SUTCLIFFE. If I said the opposite, I mean he was not making him a cowarrantor. That provision applies only to the duties created by the warranty, not whether or not the warranty is created. So if we were able to fashion the law so that it was clear that the person responsible for the misrepresentation; namely, the salesman, was in fact the one to be held accountable, you would see no objection to that provision?

Mr. LAMB. I wouldn't see any objection to it, if you can do that.

Mr. SUTCLIFFE. Thank you.

Senator MOSS. Thank you very much, Mr. Lamb. We appreciate your coming again before us and to give your testimony on this bill that we now have.

Senator COOK. One question, Mr. Lamb, with the broad powers given to the Trade Commission under S. 986, do you feel that S. 984 wouldn't be necessary?

Mr. LAMB. Yes, sir; it wouldn't be.

(The statement follows:)

STATEMENT OF GEORGE P. LAMB, GENERAL COUNSEL, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

I am George P. Lamb, General Counsel for the Association of Home Appliance Manufacturers (AHAM). As you know from my earlier appearances before the subcommittee, the association's members manufacture such major home appliances as refrigerators, home laundry equipment, humidifiers, dehumidifiers, and airconditioners; and such portable appliances as toasters, coffeemakers, hair dryers, irons, waffle irons, and so on. For the record, a list of the members and of the products with which the association is concerned is attached to this statement as Exhibit A.

We appreciate this opportunity to present our views on S. 986, the Warranty-Federal Trade Commission Improvements Bill. The bill's provisions differ rather substantially from the predecessor bills on which hearings were held during the 91st Congress. We hope that our comments will assist the subcommittee in its consideration of the new bill, so that whatever legislation is reported and eventually voted on by the Senate will adequately meet the problems that may exist, without placing unnecessary burdens on either the business community or the consumer. Let me say that AHAM's members endorse the enactment of federal legislation that would require full and clear disclosure of warranty terms, and that would assure fulfillment of the terms. We are concerned, however, lest Congress in seeking to protect the consumer enact legislation that could damage the consumer by increasing costs and eliminating smaller manufacturers and retailers from the market place.

Let me repeat what I have said before: namely, that the appliance industry supports without reservation the principles that warranties should be clearly stated, that their terms should be reasonable, and that warranty obligations should be met, fully and as promptly as possible. I believe that no other industry has gone as far as the appliance industry to simplify warranties and to urge voluntary adherence to the principles I have just stated.

You, Senator Moss, are well acquainted with the industry's Major Appliance Consumer Action Panel (MACAP), sponsored by the Association of Home Appliance Manufacturers, the Gas Appliance Manufacturers Association, and the American Retail Federation. MACAP's assignment is to go the second mile: to resolve complaints that neither the manufacturer nor the dealer in a specific instance has been able to resolve. The success of the industry's voluntary effort is indicated, I believe, by the fact that of some 2,489 complaints received since March 1968 by AHAM only 191 have mentioned warranties; and of 43 "unresolved" complaints referred by AHAM to MACAP only three have been based on warranty problems alone. This, it seems to me, is an enviable record, when one remembers that some 26.7 million major appliances were shipped from factories in the United States in 1970, and that some 292.9 million were in use in American homes at the beginning of 1970.

I want to reiterate, too, AHAM's endorsement of legislation to enlarge the Federal Trade Commission's jurisdiction to acts "affecting" interstate commerce, and otherwise to make it possible for the Commission to act expeditiously in carrying out its functions. As my testimony will make clear, however, we do not endorse all provisions of either Title I or Title II of S. 986.

One more prefatory remark. In drafting and enacting legislation you will agree, I am sure, that Congress owes a duty to the beneficiaries of legislation as well as to those on which the legislation places new demands. In this instance

these are the consumers and warrantors, respectively. This is a duty to avoid ambiguity—to make the Congressional intent abundantly clear. Otherwise, legislation leads inevitably to unnecessary and costly litigation. Along the way, the legislation creates unnecessary friction between the two parties—here again the consumer and the warrantor. In dealing more specifically with the provisions of S. 986 I shall point to several ambiguities, which we earnestly urge you to eliminate before a bill is reported.

TITLE I. WARRANTY PROVISIONS OF S. 986

Three sections of Title I are of greatest concern to AHAM's members. These are Sec. 101(2), which appears to bring oral statements within some parts of the bill's coverage; Sec. 112(b), a pre-emption provision; and Sec. 114, which sets an effective date for compliance with the bill's provisions and with the first regulations that would be issued by the Federal Trade Commission.

Sec. 101(2), when read with other sections, creates one of the ambiguities of which I have just spoken. The bill is described in its title as being legislation to "provide minimum disclosure standards for *written* consumer product warranties . . ." [Emphasis supplied.] Sec. 102(a) would establish items of information to be set forth in warranties "in writing." Sec. 103, designation of warranties as "full" or "partial," speaks only of warranties "in writing." Sec. 104 would establish duties a warrantor must assume in giving a warranty "in writing." Other sections also indicate an intent to confine the bill's requirements to written warranties; but Sec. 101(2) negates this intention when it provides that an "express warranty" may be created by "[a]ny affirmation of fact or promise," and by "[a]ny description of a consumer product . . ." In addition, the enforcement provisions of Sec. 110(c) are not confined to written warranties; and Sec. 110(e) provides redress for a person "damaged by the failure of a supplier to comply with any obligations assumed under an express . . . warranty . . . subject to this Act . . ." When read with Sec. 101(2), Sec. 110(e) clearly appears to contemplate redress for oral representations of a salesman. The two sections could subject a manufacturer to costly suits to determine whether or not a dealer's salesman who had made an "affirmation" or "description" that created an express warranty was the manufacturer's agent.

We believe this possibility can be removed if the words "or implied" are stricken from lines 20–21, page 14, and the words "in writing against defect or malfunction" are substituted. This would make the enforcement provisions of Sec. 110(e) consistent with Secs. 102, 103, and 104, which would prescribe certain duties with respect to warranties "in writing against defect or malfunction."

We also recommend that Sec. 110(e) be amended to make it clear that it does not authorize class suits based upon a federal cause of action in state courts. This may be done by inserting the words "in an individual capacity but not as a representative of a class of plaintiffs" after the words "bring suit" in line 22 of page 14 of the bill. To make clear the limited effect of this proposal, we would have no objection to adding the following sentence to the subsection: "Said limitation upon capacity shall not affect any suit that does not involve a cause of action under this act."

Pre-emption provision

Suppliers are becoming increasingly apprehensive about the burdens that may be imposed if the states and cities as well as the federal government enact statutes and ordinances to deal with the distribution of consumer products. The imposition of different requirements by the various jurisdctions, even though the requirements are not conflicting, will add to distribution costs and may well inhibit the national distribution of consumer goods. Neither of these results would benefit consumers or producers. We recognize that the pre-emption provision of Sec. 112(b) has been strengthened by the insertion of the words "or other requirements" in the first line. We repeat, however, our recommendation that the following pre-emption provision be included in a warranty bill—here that it be substituted for Sec. 112(b):

> (b) It is hereby declared that it is the express intent of Congress to supersede any and all laws of the states or political subdivisions thereof insofar as they may establish any requirements or provisions with respect to warranties relating to consumer products, which are in any way inconsistent with the requirements and prohibitions of this Act: *Provided*, That this Act

shall not limit or affect any rights or liabilities created by state law with respect to claims for personal injury, death, damage to property, or to claims of breach of contract where the claims are unrelated to the warranty requirements under this Act.

Effective date

Sec. 114(a) of S. 986 provides that the effective date of the act shall be six months after the date of enactment except for "consumer products in the stream of commerce prior to such date." Subsection (b) provides that the Federal Trade Commission may postpone for six months the time within which "designated classes of suppliers" must bring their written warranties into compliance with some regulations the Commission may issue. These provisions are ambiguous and confusing; and they do not recognize the realities of the distribution process for many consumer products.

What, for instance, is meant by "in the stream of commerce"? Would the term include only those products actually moving in interstate commerce on the date of the bill's enactment, or would it include products held in inventory by a dealer, a distributor, or a manufacturer? Most appliances are placed in shipping cartons with their warranties and care-and-use manuals, when they leave an assembly line. They are held in inventory by the manufacturer for varying periods of time, depending on the demand for them. They may also be held in inventory by a distributor or dealer after they have moved from the manufacturer's premises. Many months often elapse between the time a product comes off the line in its carton and time it is purchased by a consumer.

To avoid confusion over the meaning of the statute, and to eliminate the necessity for a manufacturer's having to uncrate products held in inventory on a specified date so that new warranties might replace the old ones. AHAM recommends that any warranty legislation and any regulations issued by the Federal Trade Commission under such legislation be made mandatory for products manufactured a specified number of days, 60 days for instance, after the effective date of the legislation or a regulation.

Other provisions of title I

I will comment briefly on several other recommendations AHAM has for provisions of Title I. There is no objection to the "disclosure requirements" of Sec. 102(a)(1)–(7)—the identity of the warrantor, persons to whom the warranty runs, products or parts covered, and so on. The requirements that the Federal Trade Commission might impose under (8)–(13)—the availability of informal dispute settlement procedures; a recital of available legal remedies; a statement that the person guaranteed may recover reasonable attorneys' fees in pursuing his legal remedies; a statement of the time at which the warrantor will perform his obligations; and a statement of the period of time within which, after notice, the warrantor will perform his obligations—are another matter. This information has nothing to do with the basic elements of a warranty. A recital of these matters would unduly lengthen warranties; and would cause the very type of confusion the bill is designed to prevent. We therefore recommend the deletion of points (8)–(13) of Sec. 102(a).

There is some ambiguity between the definitions of "repair" and "replacement" in Secs. 101(5) and 101(6). "Repair" is defined in Sec. 101(5) as including "replacement" of a defective product with a new one "at the option of the warrantor." "Replacement" is defined in Sec. 101(6) as including "the refunding of the actual purchase price of the consumer product less reasonable depreciation . . . if the person guaranteed is willing to accept such refund . . ." Are the words "at the option of the warrantor" implicitly included in Sec. 101(6) or does the purchaser have the option of obtaining a refund of the purchase price? Since the price paid by a purchaser includes the dealer's and distributor's markups, in making a refund a manufacturer-warrantor would be giving a purchaser more than he (the manufacturer) received in his sale of the product. If a manufacturer-warrantor is to assume this obligation, the option should be his, not that of the purchaser. This ambiguity as between Sec. 101(5) and (6) should be removed, and Sec. 101(6) should make it clear that the option of refunding or replacing is that of the warrantor.

AHAM reiterates its objection to a requirement that warranties be designated as "full" or "partial," as would be required by Sec. 103. We understand that there is objection to the terminology we have suggested—that is, that warranties be designated as "parts and labor" and "parts only"—because some products are not susceptible to a "parts only" warranty.

Nevertheless, "partial" is a confusing term, with derogatory connotations. Requiring its use by law may make it impractical for small suppliers to give any warranty at all. Furthermore, absent deception, American industries and individual manufacturers should be able to use terms that are accurately descriptive in their particular fields.

Under Sec. 104(d)(2) a warrantor would be under a mandatory obligation to assure that a prospective purchaser knows the duration of a warranty prior to the purchase of a product. Such a requirement, if enforced literally, could make it impossible for a manufacturer to warrant its products. A manufacturer has no control over what his dealers' salesmen disclose to prospective purchasers. A manufacturer also has no control over the point-of-sale materials a prospective purchaser reads. The only realistic requirement that can be placed on a manufacturer in this respect is that he provide point-of-sale materials that disclose the duration of his warranties.

Section 107 would permit a warrantor to designate representatives to perform warranty obligations provided the representative is "equitably" compensated. It is not clear what is meant or intended by the words "equitably compensated." The method of compensation differs among appliance manufacturers. Some compensate dealers who perform the manufacturer's warranty obligation by the payment of money for each service call. In so doing they have built this cost into their wholesale prices. Other manufacturers rely on their dealers to perform warranty service. They do not include the cost of warranty service in their wholesale prices, they provide for it in the dealer's mark-up. The theory of these manufacturers is that a dealer who pays for warranty service from his mark-up will be more conscientious with installation and service, and that consumers will be better satisfied because unnecessary service calls are avoided. If Section 107 is to become law, we recommend that the option of manufacturers as above described be preserved by striking from Section 107: ". . . , such warrantor equitably compensate such designated representative, but . . ."

TITLE II. FEDERAL TRADE COMMISSION IMPROVEMENT PROVISIONS OF S. 986

As noted earlier, AHAM's members endorsed bills before the 91st Congress that would extend the Federal Trade Commission's jurisdiction to acts "affecting" commerce. We also endorsed bills to authorize the Commission to obtain preliminary injunctions to restrain suspected violations of Section 5 of the FTC Act. Provided certain safeguards are written into the legislation. In addition, we have expressed no objection to formalizing the Commission's authority to promulgate trade regulation rules, although some provisions of Title II require that we restate our views on this subject. We must also state our grave concern over the way in which Title II of S. 986 would expand the Commision's power in other respects.

Authority for the Commission to seek preliminary injunctions

If the Federal Trade Commission is to have the authority to seek preliminary injunctions to restrain suspected violations of Sec. 5 of the FTC Act, such as Sec. 212 of S. 986 would grant it, the following provisions should be written into the section. The granting of an injunction at the Commission's request should be subject to the usual conditions and principles that control the granting of a preliminary injunction by a court of equity. In granting a preliminary injunction, a court should, on a defendant's motion, specify a period within which the Commission should file a formal complaint to initiate its own adjudicatory proceedings. If such a complaint is not filed within that period, the court should, again on a defendant's motion, dissolve the injunction.

Redress for consumers and expanded orders to be issued by commission

Under Sec. 5(b) of the FTC Act, 15 U.S.C. § 45(b), the Federal Trade Commission has authority to issue a cease-and-desist order against a respondent who, after adjudicatory proceedings prescribed by the subsection, has been found to have committed an act or practice prohibited by the act. A cease-and-desist order is a prohibition against continued commission of the acts or practice. Under Sec. 5(1) of the act a violation of a cease-and-desist order may be redressed through a civil action for the assessment of penalties of $5,000 for each violation. Subsections 5(c) and (g) of the FTC Act, 15 U.S.C. §§ 45(c) and (g), make addi-

tional reference to cease-and-desist orders. Secs. 202–206 of S. 986 would amend these subsections of the act, and would radically expand the kind of order the Commission might issue.

Sec. 202 of S. 986 would add two new subsections to Sec. 5 of the FTC Act. A new subsection (7) would permit the Commission to order a respondent "to take any other such action [in addition to the action prescribed in a cease-and-desist order] necessary to redress the injury caused by such acts or practices to consumers." This would in effect permit the Commission to conduct government class actions on behalf of consumers for an award of damages or other redress. This is a revolutionary departure from the Commission's role as an agency directed by Congress to regulate business behavior in a defined area through a carefully prescribed kind of order. There is no limit on the kind of action the Commission might direct a respondent to take under the proposed subsection (7). Such broad authority should not be vested in a body of five persons, not directly responsive either to Congress or the President; but if authorization is to be made both the deceptive practices that are to be grounds for an award and the kinds of redress the Commission might order should be precisely stated by Congress in the statute.

Sec. 202 would also add a subsection (8) to Sec. 5 of the FTC Act to permit the Commission to initiate civil actions in the federal district courts for the assessment of penalties. Such an action could be instituted against a person thought to be "engaged with actual knowledge or knowledge fairly implied . . . in any act or practice which is unfair or deceptive to a consumer and is prohibited" by Sec. 5 of the FTC Act, "including any rule or regulation promulgated by the Commission." Thus the Commission could on its own initiate a court action for a suspected violation of Sec. 5 and of its own rules for the assessment of civil penalties without a prior adjudicative determination that a respondent, now a defendant, had violated the section.

This is indeed another radical enlargement of the Commission's authority. The Commission would become the Attorney General in a designated field of law, with authority to enact the laws it would seek to enforce. This, of course, we oppose; and we urge this subcommittee to study the far-reaching implications of such a grant of authority before reporting such a provision favorably to the Commerce Committee.

Secs. 203–206 of S. 986[1] amend other subsections of Sec. 5 of the FTC Act to make them conform to the changes that Sec. 202 would make in the act. We are, of course, opposed to these sections of S. 986.

Formalizing the FTC's rulemaking authority

Our general concurrence in formalizing the Federal Trade Commission's authority to promulgate trade regulation rules, under Sec. 208 of S. 986, is known to you. We do not believe, however, a violation of a rule should be considered a per se violation of Sec. 5 of the FTC Act. Under the Commission's present procedures, when a violation of a rule is claimed to be a violation of Sec. 5, the Commission files a formal complaint and a respondent must be "given a fair hearing on the applicability of the rule to the particular case." [Federal Trade Commission, Procedures and Rules of Practice, § 1.12(c)] This provision is consistent with the demands of due process and fair hearing, and does not derogate from the Commission's adjudicatory powers. Similar words should be written into Sec. 208.

We also urge that the word "rules" be included in the enumeration of Commission action that must be supported "by substantial evidence upon the record," in lines 22–23, page 20. The inclusion of the word in the listing is implicit, but its express inclusion can avoid any doubt.

The only other substantial change S. 986 would make in the Federal Trade Commission's authority is found in several sections of the bill that would authorize the Commission to go directly into federal district courts, through its own attorneys, instead of having to go through the Attorney General. AHAM has no comment on these sections, since we believe they are matters solely of concern to the Attorney General and to the Commission.

We appreciate your attentiveness, and will be glad to answer any questions you may have.

[1] Sec. 203 of the printed copy of S. 986, which begins with line 24, page 17 of the bill, is incorrectly numbered Sec. 204, and incorrectly amends Sec. 5(c) of the FTC Act. There seem also to be typographical errors in lines 1 and 6, page 18, of the bill.

EXHIBIT A

AHAM MAJOR MEMBERS

Admiral
Airtemp
Amana
Blackstone
Carrier
Corning
Design & Manufacturing
Ebco
Fedders
Norge
Friedrich
Frigidaire
General Electric & Hotpoint
Hoover
In-Sink-Erator
KitchenAid-Hobart
Litton (Atherton Division)
Magic Chef
Maytag
McGraw-Edison
Albion
Speed Queen
National Presto
One Minute
Philco-Ford
Tappan
Vernco
Westinghouse
Whirlpool
White Consolidated
Franklin
Gibson
Kelvinator

PRODUCTS

Air Conditioners
Dehumidifiers
Dishwashers
Disposers
Home Laundry
Humidifiers
Ranges
Refrigerators

AHAM PORTABLE MEMBERS

Aluminum Specialty
Corning Glass Works
Essex International
General Electric
General Time
Seth Thomas
Westclox
Hoover
Iona
KitchenAid-Hobart
Lux Time
McGraw-Edison
Bersted
Laurinberg
Toastmaster
Merit
Richmond Cedar
Salton
SCM Corporation
Proctor-Silex
Shetland Floorcare
Schick
Scovill Manufacturing
Dominion
Hamilton Beach
Son-Chief Electrics
Squibb
Sunbeam
John Oster
Waring
Welby
West Bend
Westinghouse

PRODUCTS

Blenders
Broilers
Can Openers
Coffee Makers
Cornpoppers
Portable Food Mixers
Stand Food Mixers
Fry Pans
Hair Dryers
Dry Electric Irons
Steam and Spray Electric Irons
Electric Knives
Toasters
Toothbrushes
Waffle Irons
And others

Senator Moss. Mr. Edward Day, special counsel for Consumer Products Division of Electronic Industries Association.

Mr. Day, glad to have you here before us.

STATEMENT OF J. EDWARD DAY, SPECIAL COUNSEL, CONSUMER ELECTRONICS GROUP, ELECTRONIC INDUSTRIES ASSOCIATION

Mr. Chairman and members of the subcommittee and the staff:

My name is J. Edward Day. I am special counsel for the Consumer Electronics Group of the Electronic Industries Association. I appear here representing the great majority of manufacturers of consumer electronic products consisting of television, radios, phonographs, and tape equipment.

Senator Moss. As was done with the others, the full statement will go in the record.

Mr. DAY. Thank you.

I will discuss the warranty provisions of title I first. We favor without reservation guidelines designed to assure that warranties are in clear language, that they are not too involved and legalistic, and that they are carried out fully and fairly. The Federal Trade Commission already has a considerable amount of authority in this area, and to the extent they do this obviates the need for duplicating legislation. But we favor disclosure legislation.

Warranty provisions vary in our industry and different companies are continually offering new warranty provisions. This is because the warranty is a major positive competitive aspect of this business. Often, for example, a warranty for a television set as a whole is a parts warranty, lasting for a period up to 1 year. Often there is a separate parts warranty for the picture tube which may run for as long as 2 years. Many consumer electronic companies offer labor in their warranties but this is usually limited on television receivers to 90 days. At frequent intervals one company or another in our industry announces a significant change in the warranties it will offer—all as part of intense competition.

A broadening of warranty protection is not practical to an equal degree for all companies. Small or regional companies may find it more difficult to provide extensive repair services. Some businesses have well organized repair facilities run by the manufacturer while other companies may depend upon their distributors, retailers, or service agents for repair services.

We realize, of course, too, that S. 986 does not require that a warranty be given or that a particular kind of warranty be given. There may be a "full" warranty or a "partial" warranty or no warranty.

However, we submit that to expect a company to say or advertise that it gives a "partial" warranty is like expecting the company to say or advertise its product has an "incomplete" color reception or a "mediocre" sound clarity. "Partial" is a negative word denoting that something that should be included is in fact not included.

Last year in testimony favoring this "full" warranty or "partial" warranty language, it was stated:

> Thus, consumers shopping for product reliability could differentiate between reliable and less reliable products on the basis: (1) of the type of warranty given—"partial" or "full," and (2) the duration of the "full" warranties.

S. 986 would put unjustified pressure on companies to use the so-called "full" warranty rather than being able to continue to make

reasonable business judgments as to whether to offer only a parts warranty. This would be true despite the fact the "full" warranty provisions would have to be so long and complicated they would work against rather than toward what should be the prime goal which is simplification and brevity of warranty provisions.

If Federal warranty legislation is passed and it creates uncertainty as to what the additional cost to the manufacturer would be, the manufacturer, as a matter of good business judgment, might well have to include additional margin in his price to take care of these uncertainties. Eventually these uncertainties might be reduced by decisions of the courts or the Federal Trade Commission. But during the early years a manufacturer who decided to offer a warranty would very probably have to raise his price.

His alternative, which he might well follow, would be to offer no warranty at all. This is a strong possibility. We believe that some manufacturers would conclude they had to follow that course—of deciding to avoid offering any warranties at all. Some might conclude that this would be the only practical out since longer term warranties, including the cost of labor, together with unrestricted uncertainties as to warranty liability would add far too much to the price of the product.

Not only might Federal warranty legislation, as we see it working in this industry, hurt the consumer by the possible efforts which might be made by some manufacturers to avoid warranty protection entirely, but in addition such efforts to avoid creating a warranty will inevitably result in the customer being told less about the product when he buys it. Some manufacturers could, as we see it, end up being confined to stating meaningless generalizations.

You may ask: Why not offer everyone a service contract instead of a warranty? But how is the customer better off as a result of the Government decision to bring this about? Service contracts are offered today in the consumer electronics industry. But they are offered not as a substitute for warranties—they follow the warranty; that is, they come after the later portion of the warranty period is over.

Every time you reduce the choices and the variations and the chance for trying to offer something different, you tend to squeeze out the small operators, the less heavily financed operators, the less known operators, not only among manufacturers but among retailers. Many retailers in a competitive field such as this are able to stay in business by offering less service and appealing to those customers who prefer to buy on that basis at a lower price.

I might say this, gentlemen, that this matter of the effect of indirectly requiring labor to be included has been noted very forcibly in Mr. Kirkpatrick's testimony before this subcommittee. Although he said he favored this bill, I think his prepared statement really questions this entire concept of the full warranty which requires repairs without charging. He said, to briefly summarize, in that statement to this committee last week:

> I would like to point out that the provisions of Section 104(a) providing that any warrantor must make repairs without charge may have a possible anti-competitive effect. Only a large, well-financed supplier may be able to bear this burden, thus forcing his smaller competitor to abandon giving any warranties at all. This would clearly put the smaller supplier at a competitive disadvantage.

Now, I would like to move to some specific provisions of title I which we question.

We are concerned about the broad power of the Federal Trade Commission under S. 986 to determine the manner in which the various requirements for a warranty under section 102(a) are to be presented. We are particularly concerned about what might be prescribed as to subsections (9) and (10) on legal remedies. We can see the required description of available legal remedies turning out to be lengthy, complicated, and highly negative in tone. We do not think there should be an automatic or mandatory allowance for attorney's fees.

We respectfully suggest that as part of the analysis work on this proposal the committee staff prepare and make available for discussion a draft of a proposed full warranty covering a color television receiver which they believe would meet all the intended requirements of section 102(a) and section 104. We realize this would not be binding in the event the bill becomes law. But we would like to see about how many words might be required for some of these provisions. We believe they would find such a draft would involve about as many words as appear on the back of an airline ticket. We are convinced such a warranty would be too elaborate to describe in an advertisement for the product.

We do not see how the manufacturer, without knowing the particular location and circumstances, can be expected under section 102(a)(11) to know and state the time at which the warrantor will perform his obligations. We do not see how the manufacturer can be expected to know, under section 102(a)(12) the period of time within which repairs will be made.

We realize those requirements are also possible requirements under the administration bill, which we find generally acceptable, and we urge reconsideration of those provisions in that bill.

We question the provision in section 102(b) of S. 986 authorizing the Federal Trade Commission to determine the "manner and form in which information with respect to any written warranty against defect or malfunction of a consumer product or service" must be presented in advertising. The FTC already has authority to proceed against false and misleading advertising. We doubt the practicality of hearings designed to determine what sized print or which specific words or phrases must appear in a particular advertisement.

A serious problem is presented by the requirement in section 102(d)(2) of S. 986 that the warrantor must cause the duration of the warranty to be disclosed to the consumer prior to the time of purchase. In the consumer electronics business as well as in many other types of businesses the manufacturer has little or no control over what the retail salesman discloses to the purchaser or when he discloses it. As I pointed out in the early part of my statement which I skipped, generally the television manufacturers do not have control of retailers.

Consumer electronic products are frequently sold to distributors who in turn sell the products to independent retailers. In this situation the manufacturer would be unable to see that disclosure was made at the proper time. He could be in violation of the law through no fault of his own.

Section 107 should be amended by deleting or clarifying the words "*Provided*, That such warrantor equitably compensates such desig-

nated representatives * * * ." We do not suggest that these representatives should not be compensated for their work. However, over the years manufacturers have developed a variety of workable and satisfactory methods for compensating those who make repairs under warranties.

One method is for the manufacturer to pay the repairer for each repair he must make. But another method is to allow the distributor a specified dollar amount for every product sold to cover on an averaging basis the cost of meeting warranty requirements. The distributor passes this amount on to the dealer or service company. The dealer or service company may actually make money on this arrangement if there is limited need for warranty work to be done. The language quoted from section 107 could substantially interfere with such workable arrangements already existing between manufacturers and their distributors and dealers.

The general purpose of the provision in section 110(a) for establishment of informal dispute settlement procedures is commendable. However, section 110(d) should state that a person covered by a warranty or a service contract must have afforded the warrantor or maker of the service contract a reasonable opportunity to cure the problem prior to a court suit—not just to be eligible to recover costs and attorney's fees—but to have standing to bring the suit. This could be accomplished by taking the proviso out of subsection (d), placing it at the end of subsection (e), and rewording it as I show in my statement.

A major concern to all those who provide warranties is the growing number of State laws which impose a variety of new and onerous requirements. This is another factor which may cause many to refrain from offering warranties. This problem should be eliminated by revising section 112(b) to read as follows:

> The provisions of this Act supersede any and all laws of the states and political subdivisions thereof insofar as they may now or hereafter establish any requirements or provisions with respect to warranties relating to consumer products.

I realize that would fall even more in the question which Mr. Sutcliffe asked which was a very pertinent question, but the fact is the threat and the actual existence of various State laws may well bring about chaos in this warranty business because of the fact that we have to have some kind of an ability for companies to operate on a nationwide basis.

We realize this is a far-reaching provision, but such total preemption was included by this committee in the Radiation Control for Health and Safety Act of 1968. It required any State laws to be identical once the Federal standards were imposed. The granting of warranties by national concerns is of the very essence of Federal commerce. The problem has, up to now, been dormant because of the use of uniform laws by the States. But the various unrealistic State and local laws and ordinances which are being pressed and sometimes passed mean the applicable Uniform Commercial Code provisions are being superseded on a piecemeal basis. If there is to be a Federal warranty law it should provide total preemption.

We fully support the idea of full and fair disclosure of warranties. We support legislation which would accomplish that objective. We point out that disclosure is one thing and a laundry list of disclosure

requirements which include many required substantive provisions is another thing. We advocate disclosure.

Now I turn very briefly to title II. My discussion is brief only because this is a different major subject, not particularly related to warranties and not in last year's version of this Senate warranty bill, and to adequately discuss title II would require a separate in-depth statement.

Many of the proposals in title II have been fought over for years, and repeatedly rejected as unsound. Title II in our opinion should be a separate bill. It should have full hearings with a chance after plenty of notice for testimony, for example, on behalf of parties involved in pending FTC cases where some of these very same issues are being contested.

The proposals in title II as to direct remedies and trade regulation rules to name just two examples need the type of full consideration which was given to class action proposals by Senate committees in the last Congress.

Just as an example of what I mean of going into this thoroughly, Mr. Chairman, is again connected with Mr. Kirkpatrick's statement to this subcommittee on March 9. This matter of direct remedies which could be imposed by the Federal Trade Commission, in contrast to the usual cease and desist approach, I cannot see was ever discussed in his statement at all. In his prepared statement he has a heading that says: "Remedial Powers," but I do not see where he ever discusses the provision in this bill for direct remedies which is highly controversial, as has been pointed out here earlier, a complete departure from the historic role of the Federal Trade Commission, and something that I think is an entire major controversy in itself.

So on behalf of the Consumer Electronics Group, gentlemen, I want to express appreciation for the opportunity to testify today.

Senator Moss. Thank you very much, Mr. Day, for your statement.

Are the States getting into this warranty requirement considerably now by State law?

Mr. DAY. Yes, sir; there are several States that have proposals that are pending, and two States that have already passed laws which are the subject of a tremendous amount of concern and controversy. In the State of California they have passed a bill which really has business in an uproar. I think what was intended there was to do something about what had been happening in the warranty business in an entirely different industry than the consumer electronics or the appliance industries. But the law really went all out in the way of taking away the discretion of manufacturers to make choices as to what they would do in their warranties, and actually I would say that it has a quite vindictive approach in its provisions as to people that try to make choices.

It has many things that are subject to tremendous concern. It only went into effect 2 weeks ago, but they are having meetings and seminars out there to try and decide what is going on, and I think it is an example of something that brings in, as I say, the very essence of Federal power, because a company that is selling nationally should be able to have the same warranty every place.

A person who may be bigger in their manufacturing or sales operations in another part of the country should still be able to operate effectively in any given State; and this interferes with that.

Senator Moss. I see. This is that general provision about the repair work which must be done within California?

Mr. DAY. It requires the work to be done within 30 days, and if it is not done within 30 days it has provisions about very severe things that the consumer can demand. One of the big problems is it gets to a major issue in this whole area of warranties, and one of the reasons why costs have to be kept under control, and that is a manufacturer cannot just give carte blanche to everybody to do work on a given product and pay that person whatever he charges for it.

There is even a possibility under this California bill that a person, a repairman, or a service agency who has repaired a product, might be able to charge the consumer for the repair work—not for the parts—and then send a bill for the repair work to the manufacturer, too. The bill gets into an area of very long duration warranties and of allowing people to take their item to some retailer or service agent that is not in a controlled relationship with the manufacturer.

Senator Moss. Senator Cook.

Senator COOK. Mr. Day, you have referred to Commissioner Kirkpatrick's remarks. I would also like to refer to them:

> We also note that the bill does not provide for the transfer of warranty protection to subsequent purchasers. The Commission is of the opinion that any warranty should go with the product and the transfer of warranty protection should be mandatory.

Now this states nothing about the subsequent price to another purchaser, it says nothing about the fact that somebody may give you something when they move out of town, that you may find yourself in trouble for the entire cost of the product, when, in fact, the present owner is not a consumer at all, it has been given to him, or he has even bought it for $5. As a matter of fact, he may even have stolen it, but according to Mr. Kirkpatrick's remarks, I think you might look forward, under the broad rulemaking power, to the extension of warranty coverage to any subsequent purchasers regardless of the circumstances. Do you read that paragraph that way?

Mr. DAY. Yes. I think that any type provisions of that kind would have to have a considerable number of rules and regulations to go along with it, because there could be circumstances under which the manufacturer, in my opinion, should not be expected just as a general uniform proposition to make warranties good under all circumstances where there has been a transfer.

Senator COOK. Many of the manufacturers in your organization sell products, in which you open up the box and there is a card for you to fill out to mail back to the manufacturer. He then knows that you have purchased something and that the warranty is in effect. Apparently the manufacturer is going to have to include two or three cards and say to the purchaser, "in case if you sell it to a subsequent purchaser, would you please give this to the subsequent purchaser so that he can fill it out and send it back so that we know the warranty is extended? This is carrying it out a bit too far; don't you think?

Mr. DAY. Yes; I do.

Senator Moss. There is the other side of the coin, of the resale of the product at the very beginning, say, of the warranty period. Why should the manufacturer be exonerated from replacing the picture tube in 2 years it if fails to function?

Mr. DAY. Mr. Chairman, I realize this is an area where one does not want to have too broad and absolute rules, but I think it bears on something that is in your bill, in S. 986, and that is that the warrantor should be responsible for meeting the warranty if certain things have not been done, if certain duties have not been carried out by the purchaser. When you get into second purchasers it gets quite difficult to ascertain how you prove that kind of a test.

Senator Moss. Yes. Well, I can see that.

Did you have a question, Mr. Sutcliffe?

Mr. SUTCLIFFE. Yes, thank you, Senator.

Mr. Day, you mention in your testimony that the bill would cause manufacturers to give full warranties. Would you explain why they would be required to give full warranties, because the legislation doesn't require this.

Mr. DAY. No; I said, Mr. Sutcliffe, that I thought it was going to be impracticable to use the term "partial" warranty, and I think that that would tend to limit the manufacturer's choice to giving either a full warranty or no warranty. And if you give long-duration warranties and include labor, it is often going to be too expensive, particularly for manufacturers with more limited resources, and I think it is going to drive them to giving no warranty.

I don't mean that everybody is going to be giving a full warranty as a result of that. I would imagine that many enthusiasts about this bill would like to see that happen. But what I am saying is I think that the full warranty for all aspects of the consumer product, if it is for an extensive period of time, may result in manufacturers giving no warranty at all.

Mr. SUTCLIFFE. Could I question you then about the use of your word "cost" that would be attendant with the promulgation or the giving of a full warranty if that were to be done? What do you mean by cost there? Are you speaking of acquisition cost?

Mr. DAY. I am speaking of the built-in costs that the manufacturer puts in there to take care of meeting his warranty requirements. I speak of the kind of costs which caused a very major industry, having once gone to a very long warranty on a major part of the product, to decide that that wasn't financially feasible and to pull back to a much shorter period.

Mr. SUTCLIFFE. In terms of the cost to the consumer it is not only the acquisition cost but the cost of keeping that product in a working condition through a certain amount of time. So that if the manufacturer does not undertake those costs the costs still have to be borne by the consumer. So to say that by inboarding your warranties you are increasing the cost to the consumers does not necessarily apply because the consumer still has to pay one way or the other for a breakdown of a product during a warranty period; is that not correct?

Mr. DAY. That is correct, particularly your phrase "not necessarily."

We advocate the ability of the manufacturers to make choices.

Mr. SUTCLIFFE. Now, this bill does not prevent you from making those choices.

Mr. DAY. I submitted that for the reasons I have stated it is not really practical to use a word such as "partial." To me it is going to work out under this bill that some people who want to give full warranties are going to advertise: "I give the minimum Federal warranty." That is like the fellow who is running a meat market who advertises that his meat is federally inspected. It is not practical to sell meat that isn't federally inspected, and it is not going to be practical for people to sell other products that do not meet the Federal requirements.

Mr. SUTCLIFFE. Will competition cause this?

Mr. DAY. This will be because of competition.

Mr. SUTCLIFFE. What is wrong with that if competition is what causes it?

Mr. DAY. Because some people are not going to be able to keep up with that kind of competition. You can see some of the smaller companies do not have these resources.

Mr. SUTCLIFFE. Implicit in what you are saying—correct me if I am wrong—at the present time some people can offer warranty protection and other people can offer warranty protection, but they can be lesser terms, and by being able to confuse the consumer as to what that warranty coverage is some inefficient or less——

Mr. DAY. It isn't a matter of confusing them or deceiving them, Mr. Sutcliffe, and I think that is something I would like to try and emphasize here.

So many of these bills and the discussion of them gets down into such phrases as shoddy merchandise and deceiving the consumer and so forth. That is not what it is. Today you can, as a consumer here in Washington, go to certain retail stores and buy a television receiver with a warranty with the labor aspect in it that is even longer than the manufacturer gives in his printed warranty. On the other hand, some people prefer to go to a discount house and get the very minimum of all of these other things so they can pay the smallest cash price possible.

Now, that type of choice exists today and the fact that one company takes one approach and one another doesn't mean anybody is deceiving the public in my opinion. They are just offering a different approach to what they consider to appeal to the customer than another company.

Going back to your original question, "not necessarily." It is true that a company can decide that a very generous labor feature in their warranty is a big selling plus in their particular situation in the merchandising world, and some can and do have more extensive warranties than some other companies. In one of your biggest industries, one of the companies had a rather sensational warranty several years before the other companies followed it.

Mr. SUTCLIFFE. Perhaps I am misunderstanding the point because at the present time the consumer likes to have the alternative of full warranties in some situations and partial warranties in others, but as soon as they are told that some are partial and some are full you are saying that the competition is going to require them all to go to full? I don't understand that.

Mr. DAY. We don't use the expression "partial warranty" today. I don't believe it is used by industry generally.

Mr. SUTCLIFFE. In essence it is less than something that others give.

Mr. DAY. Is it less than something that somebody else has or is it less than what should be or less than what is complete? I think that is the heart of it. That is the reason I read this statement from last year's testimony because it correlates a partial warranty with having a less reliable product. That is a *non sequitur* in my opinion.

Mr. SUTCLIFFE. Let's examine that particular supposition then. If the manufacturer is responsible for picking up the labor cost or all costs attendant upon a breakdown in the product, would it be cheaper for him to design the product in the first instance to be reliable over the warranty period, or would it be cheaper for him to make sure that the service capabilities of his organization were able to meet his promised warranty provisions?

Mr. DAY. Well, there again "reliable" is a loaded word if it is used as a long-term ability to not have to have any servicing. A television receiver, particularly a color television receiver, is not like one of Mr. Lamb's principal products, let's say a refrigerator, where quite commonly you wouldn't have any repairman look at your refrigerator for 10 years. Your television is more like an automobile, and you are going to have to have some work done on it from time to time for adjustments and so on because it is such a highly complicated piece of equipment.

Mr. SUTCLIFFE. But that point there goes to the issue of what the manufacturer will do in the first instance. If he is going, as you suggest, through competition to give full warranties and going to have to pick up the repair cost even though he can't design a product that doesn't break down, he can design a product that is easier to repair, can he not? And if he has to pick up the cost of repair he will be more prone to design a product whose repairability is easier to come by than one where he doesn't have to worry about the cost of repair, only about buying the 25 cent part that goes to make up the very small cost of the repair operation?

Mr. DAY. The matter of making electronic equipment so that it is easier to repair is indeed a longstanding subject of discussion and companies are very conscious of that and are attempting to respond to it.

But the way you phrased your question would indicate that there is something in this bill that is going to force companies to do something, and that indicates that possibly in the thinking of some of the advocates of this bill there is an intention to force the giving of labor.

Senator COOK. May I interrupt right here, because I think this line of questioning is very interesting. This line of questioning indicates that maybe the intent of this bill is to make a better manufacturer, and that the purpose of this bill is to see to it that somebody will manufacture a better product. But this in itself, has to fail because under the terms of S. 986 nobody has to warrant anything if they do not want to.

You and I can discuss competition, Mr. Day, but competition to the American public today is price, and if a manufacturer does not have to warrant anything and can consequently lower price, he is going to be more competitive.

I think if we are looking at this bill from the standpoint that we are going to make a better manufacture and yet we do not compel the manufacturer to warrant or guarantee at all if he does not want to, then I think we are looking at this thing not from the consumer point of view but from the manufacturer's point of view, and we could write totally a different bill.

I want to ask you, in the trade you don't use the terms partial or full warranties, do you?

Mr. DAY. No, we do not.

Senator COOK. You used warranties such as parts only or parts and service?

Mr. DAY. Parts and labor.

Senator COOK. Parts and labor. In regard to section 110(2), which I had trouble with the other day with the chairman, when we discussed the terms "a reasonable man exercising due care and misleading to a reasonable man exercising due care." A reasonable man in today's market understands parts only and he understands parts and labor, but it would be a whole new ball game to explain to him what a partial warranty is or what a full warranty is, would it not?

Mr. DAY. Yes, it would, particularly because of other uses of the word "partial" which indicates that it is something inadequate and lacking in what it should be.

Senator COOK. Mr. Day, do you interpret section (13) of 102, and I will read it to you—

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

Does this mean if you give a partial warranty on a television set that you must also set out those things that are not warranted and, if so, how much longer will that be than the part which is warranted?

Mr. DAY. I think first you may have noticed—I am sure you noticed Mr. Kirkpatrick's comment that possibly subsection (b) of that section could be read as saying that this long list isn't applicable to partial warranties at all. I don't believe that was the intention.

Assuming it is applicable to partial warranties, and in the situation you described, I don't know what type of thing was intended to be covered by this. I would certainly want to give it reasonable interpretation, indicating that it leaves out such things as can't be avoided by the manufacturer, but I can see it being a source of tremendous confusion, of trying to think up everything that the manufacturer cannot economically undertake to warrant.

I am concerned about this whole list because I do think it is going to get you into a long document. I don't think, for example, on (9) up there that it tells the customer anything to say "Legal remedies are available." That is obvious. So, I would interpret that as meaning you have got to say something about what those legal remedies are. When you have 50 different States and the Federal Government, how you describe how you go about that, I don't know. I don't like to see these get so long because I suspect that people aren't going to read a long complicated document when they are buying a hi-fi set.

Senator COOK. As a matter of fact, Mr. Day, I would like to get any 100 purchasers of major appliances in here today who have already

purchased them and sit down and testify whether they read the warranty on the product before they bought it.

Thank you.

Mr. SUTCLIFFE. I would just like to pose one question. If you give a parts and labor warranty, and then require the manufacturer to ship a very large item back to the factory to accomplish that free repair or replacement, how is a differentiation between parts and labor versus a parts warranty going to aid in consumer understanding?

Mr. DAY. It isn't usual in this business to require shipping, say, a console television back to the factory. What the warranty would often provide is that even if labor is included the cost of coming out to the house may have to be paid by the customer.

Now, this again varies between companies, and it varies in all kinds of different circumstances. But this does not—I have not run across a situation where you are expected to bring your console television back to the factory. If it is a portable, the warranty for the portable would normally say you must bring it in for repair.

Mr. SUTCLIFFE. Also under section 109 of the bill the Federal Trade Commission is empowered to establish categories of consumer products where the designation of full and partial does not have to be made. It would be very difficult in the soft goods industry where you are giving warranties to designate it as parts and labor or parts only since it doesn't have applicability. If there is justification for going to different terms other than full and partial, there is already authority in the legislation to have the Federal Trade Commission after appropriate hearing on the matter choose those terms which are appropriate but which still convey to the consumer here is a full insurance policy of protection, here is something less than that.

Mr. DAY. Well, I would say that would be a very positive improvement if we could count on getting that type of an adjustment because this matter of the word "partial" is not just a manufactured objection on our part.

I do in that connection, however, feel that you have a real problem with this section which is headed with the words "Federal minimum standards for warranty." Federal standards and Federal inspections and Federal rules have a lot of prestige, and when you can advertise that you are meeting Federal minimum standards, I think you put the person who does not meet those standards—does not meet them for perfectly legitimate competitive reasons—you put him at a disadvantage.

I think that while the bill when carefully read does indeed preserve your choices that the realistic ability to use those choices is greatly handicapped by this heading in addition to the use of the word "partial."

If we could count on getting the FTC to say we did not have to say partial and could say labor, that would be a big improvement.

Senator Moss. Thank you very much, Mr. Day. We appreciate your testimony and it certainly has been pertinent on the terms of the bill, and we were very glad to have it.

Senator COOK. One last question. With the tremendous authority, at least with the short smattering of remarks contained in title II that are in S. 986, would you think that S. 984 would be necessary?

Mr. DAY. You mean assuming that this bill with title II in it passed without changes?

Senator COOK. That is correct.

Mr. DAY. This bill seems to pick up the three main things—you mean the so-called Federal administration——

Senator COOK. I am talking about S. 984, the consumer class action bill. Do you think there is sufficient latitude in 986 to give the FTC all the authority it wants to regulate on consumer class actions and that S. 984 really wouldn't be necessary?

Mr. DAY. Well, the consumer class action bill that was being discussed over here last year gave the Federal Trade Commission authority by rule to add to the list of things that could be a ground for consumer class actions. I would certainly hope that if this bill or some much modified bill passed that people would conclude it wasn't necessary to have a class action bill. But I think that is a rather optimistic view on my part.

Senator COOK. Thank you, Mr. Day.

Senator MOSS. Thank you very much. We appreciate your testimony, Mr. Day.

(The statement follows:)

STATEMENT OF J. EDWARD DAY, SPECIAL COUNSEL, CONSUMER ELECTRONICS GROUP, ELECTRONIC INDUSTRIES ASSOCIATION, REPRESENTING CONSUMER ELECTRONICS MANUFACTURERS

Mr. Chairman and Members of the Subcommittee, my name is J. Edward Day. I am special counsel for the Consumer Electronics Group of the Electronic Industries Association and I appear here representing the great majority of manufacturers of consumer electronic products consisting of television, radios, phonographs and tape equipment.

We appreciate the desire of the Subcommittee to grapple with the problem of increased protection for consumers. We feel that the record of our industry on concern for the consumer is good. Our goal is to produce a safe and well made product available at a price which will be attractive to the customer.

Our industry represents about $5 billion of annual sales volume at the manufacturer's level, of which about $2.5 billion is in television and $2.5 billion in other products. This would represent about $8 billion in annual sales volume at retail.

There are about 90 million television sets in use in the United States today, of which about 64 million are black and white and 26 million are color. Annual sales are about 13 million television receivers, divided approximately evenly between color and black and white. We estimate that there are 500 million units in total of the four products we represent in American homes.

There are 14 domestic manufacturers of television receivers and about 10 major importers who sell under their own label in this country. There are some very large and some very small companies in this group, and many more small companies who manufacture tape equipment, phonographs and audio components. The companies we represent are intensely aware of the importance of consumer satisfaction and fair treatment of the consumer.

We have in excess of 200,000 people employed in the manufacturing and related aspects of the four products represented by our Consumer Electronics Group. Our business is unusual in a most important respect affecting consumers. Our prices have been going down over the years instead of up. Retail prices of consumer electronic products, even in this era of almost constant inflationary pressure, have shown a dramatic decline since their first appearance in the Bureau of Labor Statistics Consumer Price Index. Using the 1957–59 standard of 100, television was 125.7 in 1951, but for 1969, the average for television receivers was 80.1. There has been a similar trend for phonographs, radios and tape recorders.

We are an intensely competitive business not only among the American manu-

facturers, but with foreign manufacturers who accounted for about 2.4 million units of television receivers sold in the United States under foreign labels in 1969.

Some of the companies use a one-step distribution system where they sell directly to retailers. Others use a two-step system utilizing distributors. There are approximately 20,000 full-line consumer electronic retailers who sell our products. and perhaps another 20,000, such as general merchandise stores, which sell some of our items.

In contrast to industries such as automobiles and gasoline, we have very little in the way of the captive dealer in our business. Most of our retailers are selling more than one manufacturer's product and the goods pass title when they go to the distributor or directly to the retailer.

In our Group, we have a Consumer Affairs Council made up of executives of many of the leading manufacturers. We have a full-time Consumer Affairs Coordinator to work with the Council.

We have only a handful of customer complaints per month received by our Group, and we send these for prompt handling by the organization most directly involved.

Various ones of our members have embarked on their own programs of special emphasis on consumer satisfaction. For many of them this has taken the form of specialized consumer affairs departments with special responsibilities for consumer information, consumer safety and product satisfaction.

I will first discuss the warrantly provisions of Title I of S. 986. We favor without reservation guidelines designed to assure that warranties are in clear language, that they are not too involved and legalistic, and that they are carried out fully and fairly. The Federal Trade Commission already has a considerable amount of authority in this area, and to the extent they do this obviates the need for duplicating legislation.

Warranty provisions vary in our industry and different companies are continually offering new warranty provisions. This is because the warranty is a major positive competitive aspect of this business. Often, for example, a warranty for a television set as a whole is a parts warranty lasting for a period up to one year. Often there is a separate parts warranty for the picture tube which may run for as long as two years. Many consumer electronic companies offer labor in their warranties but this is usually limited on television receivers to ninety days. At frequent intervals, one company or another in our industry announces a significant change in the warranties it will offer—all as part of intense competition.

A broadening of warranty protection is not practical to an equal degree for all companies. Small, or regional companies, may find it more difficult to provide extensive repair services. Some businesses have well organized repair facilities run by the manufacturer while other companies may depend upon their distributors, retailers, or service agents for repair services.

We realize that S. 986 does not require that a warranty be given or that a particular kind of warranty be given. There may be a "full" warranty or a "partial" warranty or no warranty.

However, we submit that to expect a company to say or advertise that it gives a "partial" warranty is like expecting the company to say or advertise its product has an "incomplete" color reception or a "mediocre" sound clarity. "Partial" is a negative word denoting that something should be included is in fact not included. Last year in testimony favoring this "full" warranty or "partial" warranty language, it was stated:

"Thus, consumers shopping for product reliability could differentiate between reliable and less reliable products on the basis: (1) of the type of warranty given—"partial" or "full", and (2) the duration of the "full" warranties."

S. 986 would put unjustified pressure on companies to use the so-called "full" warranty rather than being able to continue to make reasonable business judgments as to whether to offer only a parts warranty. This would be true despite the fact the "full" warranty provisions would have to be so long and complicated they would work against rather than toward what should be the prime goal—simplification and brevity of warranty provisions.

The liberality of the warranty for a consumer product is a significant factor in the price that must be charged for the product. The cost of providing a very broad warranty could well make the product less competitive in the contest for the consumer dollar. Any legislation which tends to make it necessary, as a

practical matter, for manufacturers to increase their warranty protection and to provide labor without charge is bound to increase the costs of the manufacturer. The end result could be substantial increases in the price that the consumer pays for the product.

If federal warranty legislation is passed and it creates uncertainty as to what the additional cost to the manufacturer would be, the manufacturer, as a matter of good business judgment, might well have to include additional margin in his price to take care of these uncertainties. Eventually, these uncertainties might be reduced by decisions of the courts or the Federal Trade Commission. But during the early years, a manufacturer who decided to offer a warranty would very probably have to raise his price.

His alternative, which he might follow, would be to offer no warranty at all. This is a strong possibility. We believe that some manufacturers would conclude they had to follow that course—of deciding to avoid offering any warranties at all. Some might conclude that this would be the only practical out since longer term warranties, including the cost of labor, together with unresolved uncertainties as to warranty liability, would add far too much to the price of the product.

Particularly in the current posture of this industry, where sales are down, it simply would not be feasible to make across-the-board price increases to pay for radically expanded warranties. No one has to buy this kind of product. The consumer electronics manufacturers are scrambling in competition with many other industries for the consumer's hard pressed discretionary dollar. Even those consumers who would keep buying if the prices go up might be motivated to buy the smaller, less expensive models.

Not only might federal warranty legislation, as we see it working in this industry, hurt the consumer by the possible efforts which might be made by some manufacturers to avoid warranty protection entirely, but in addition such efforts to avoid creating a warranty will inevitably result in the customer being told less about the product when he buys it. Some manufacturers could, as we see it, end up being confined to stating meaningless generalizations.

You may ask—why not offer everyone a service contract instead of a warranty? But how is the customer better off as a result of the government decision to bring this about? Service contracts are offered today. But they are offered not as a substitute for warranties—they follow the warranty.

Every time you reduce the choices and the variations and the chance for trying to offer something different, you tend to squeeze out the small operators, the less heavily financed operators, the less known operators, not only among manufacturers but among retailers. Many retailers in a competitive field such as this are able to stay in business by offering less service and appealing to those customers who prefer to buy on that basis at a lower price.

Massive import competition, inflation and all the rest are doing enough already to put a damper on the consumer electronics business. Our companies do not have a large amount of unused money somewhere that will make it possible for them to offer a lot more service without having it cost the customers an equivalent amount.

I would now like to move from the concerns we have about the general concepts to our concerns about the specific provisions of Title I.

We are concerned about the broad power of the Federal Trade Commission under S. 986 to determine the manner in which the various requirements for a warranty under Section 102(a) are to be presented. We are particularly concerned about what might be prescribed as to subsections (9) and (10) on legal remedies. We can see the required description of available legal remedies turning out to be lengthy, complicated and highly negative in tone. We do not think there should be an automatic or mandatory allowance for attorney's fees.

We respectfully suggest that as part of the analysis work on this proposal, the committee staff prepare and make available for discussion a draft of a proposed full warranty covering a color television receiver which they believe would meet the intended requirements of *Section 102(a) and Section 104.* We realize this wouldn't be binding in the event the bill becomes law. But we would like to see about how many words might be required for some of these provisions. We believe they would find such a draft would involve about as many words as appear on the back of an airline ticket. We are convinced such a warranty would be too elaborate to describe in an advertisement for the product.

We do not see how the manufacturer, without knowing the particular location and circumstances, can be expected, under Section 102(a)(11) to know and state

the time at which the warrantor will perform his obligations. We do not see how the manufacturer can be expected to know, under Section 102(a)(12), the period of time within which repairs will be made.

We realize those requirements are also possible requirements under the Administration Bill, which our Group finds generally acceptable, and we urge reconsideration of those provisions in that bill.

We question the provision in Section 102(b) of S. 986 authorizing the Federal Trade Commission to determine the "manner and form in which information with respect to any written warranty against defect or malfunction of a consumer product or service" must be presented in advertising. The FTC already has authority to proceed against false and misleading advertising. We doubt the practicality of hearings designed to determine what sized print or which specific words or phrases must appear in a particular advertisement.

A serious problem is presented by the requirement in Section 104(d)(2) of S. 986 that the warrantor must cause the duration of the warranty to be disclosed to the consumer *prior to the time of purchase.* In the consumer electronics business, as well as in many other types of business, the manufacturer has little or no control over what the retail salesman discloses to the purchaser or when he discloses it.

Consumer electronic products are frequently sold to distributors who in turn sell the products to independent retailers. In this situation the manufacturer would be unable to see that disclosure was made at the proper time. He could be in violation of the law through no fault of his own.

Section 107 should be amended by deleting or clarifying the words "Provided, that such warrantor equitably compensates such designated representatives * * *." We do not suggest that these representatives should not be compensated for their work. However, over the years, manufacturers have developed a variety of workable and satisfactory methods for compensating those who make repairs under warranties. One method is for the manufacturer to pay the repairer for each repair he must make. But another method is to allow the distributor a specified dollar amount for every product sold to cover on an averaging basis the cost of meeting warranty requirements. The distributor passes this amount on to the dealer or service company. The dealer or service company may actually make money on this arrangement if there is limited need for warranty work to be done. The language quoted from Section 107 could substantially interfere with such workable arrangements already existing between manufacturers and their distributors and dealers.

The general purpose of the provision in Section 110(a) for establishment of informal dispute settlement procedures is commendable. However, Section 110(d) should state that a person covered by a warranty or a service contract must have afforded the warrantor or maker of the service contract a reasonable opportunity to cure the problem prior to a court suit—not just to be eligible to recover costs and attorney's fees—but to have standing to bring the suit. This could be accomplished by taking the proviso out of subsection (d), placing it at the end of subsection (e), and rewording it as follows:

"*Provided*, that any person guaranteed, or protected by a service contract, in order to be eligible to bring (or be a party to or be an indirect participant in) a suit or proceeding under this Act, must have first afforded the maker(s) of that warranty or service contract a reasonable opportunity to cure the breach."

A major concern to all those who provide warranties is the growing number of State laws which impose a variety of new and onerous requirements. This is another factor which may cause many to refrain from offering warranties. This problem should be eliminated by revising Section 112(b) to read as follows:

"The provisions of this Act supersede any and all laws of the states and political subdivisions thereof insofar as they may now or hereafter establish any requirements or provisions with respect to warranties relating to consumer products."

We realize this is a far-reaching provision, but such total preemption was included by this Committee in the Radiation Control for Health and Safety Act of 1968. The granting of warranties by national concerns is of the very essence of federal commerce. The problem has, up to now, been dormant because of the use of uniform laws by the states. But the various unrealistic state and local laws and ordinances which are being pressed and sometimes passed mean the applicable Uniform Commercial Code provisions are being superseded on a

piece-meal basis. If there is to be a federal warranty law, it should provide total preemption.

We fully support the idea of full and fair disclosure of warranties. We support legislation which would accomplish that objective.

Now I turn briefly to Title II of the bill which would greatly expand the powers of the Federal Trade Commission. My discussion of Title II is brief only because this is a different, major subject—not particularly related to warranties and not in last year's version of this Senate warranty bill. To adequately discuss Title II would require a separate, in-depth statement. Many of the proposals in Title II have been fought over for years and repeatedly rejected as unsound.

Title II should be a separate bill. It should have full hearings with a chance, after plenty of notice, for testimony, for example, on behalf of parties involved in pending FTC cases where some of these very same issues are being contested. The proposals in Title II as to direct remedies and trade regulation rules, to name just two examples, need the type of full consideration which was given to class action proposals by Senate Committees in the last Congress.

On behalf of the Consumer Electronics Group, I want to express appreciation for the opportunity to testify today.

Senator Moss. I understand that Mr. Alan Weber will present the testimony for the Gas Appliance Manufacturers Association rather than Mrs. Dunkel, and we would be glad to have Mr. Weber come forward.

STATEMENT OF ALAN WEBER, COUNSEL, ON BEHALF OF THE GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC.

Mr. WEBER. Mr. Chairman and members of the committee, I am Alan Weber, a member of the bar of the State of New York. It is my privilege to appear before you today on behalf of the Gas Appliance Manufacturers Association, Inc., to present the association's views with respect to S. 986, the proposed Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971.

The Gas Appliance Manufacturers Association (GAMA) consists of over 500 members who manufacture more than 90 percent of all gas appliances and related equipment sold in the United States. Since its beginnings in 1935, it has been both the voice of the gas appliance industry before Congress and the public, and an innovator in devising effective methods and procedures to bridge the communications gap between consumers and industry.

In early February 1970, under the sponsorship of GAMA, the Association of Home Appliance Manufacturers, and the American Retail Federation, a bold new communications concept to provide a channel for a consumer voice to industry was brought into being with the creation of the Major Appliance Consumer Action Panel (MACAP), whose chairwoman is Dr. Virginia Cutler, a distinguished educator from Brigham Young University.

While GAMA and various of its staff members may be familiar to you, with your permission, I should like to digress for a few minutes to briefly summarize my background.

Consumer product warranty legislation is not only an area of deep concern to GAMA, but is also one in which by professional training, background, and civic involvement, I have my own personal convictions which coincide with those of GAMA.

For the past 5½ years, I have been the antitrust, marketing, and consumer legislative counsel for Carrier Corp. of Syracuse, N.Y. Carrier

is a diversified industrial corporation which is principally engaged in the manufacture and sale of a broad line of gas and electric air-conditioning, heating, and refrigeration equipment.

From 1961 to 1965, I served as a trial attorney in the Division of General Trade Restraints of the FTC.

In addition to my professional career, I have been active in various civic affairs which have related directly or indirectly to consumer protection.

The whole area of consumer protection is one in which the problems can be easily stated in broad, general terms. Unfortunately, to provide equitable and fair solutions through specific and detailed legislative enactments creates immense difficulties in effectively balancing the legitimate interests of both the consumer and business communities. Neither consumers nor businesses are monolithic entities. Their respective interests are not necessarily separate nor in opposition to one another. A consumer statute which fails to astutely take these facts into consideration may give birth to a condition which is worse than the one sought to be resolved.

Consumer product warranty laws are not an exception to these general observations. While GAMA believes that Federal consumer product waranty legislation could fulfill a consumer need, we are of the opinion that S. 986, in its present form, is defective and if not amended may have the undesirable effects of—

1. Permitting the promulgation of varying and complex State and local warranty laws. This would cause manufacturers' product warranties not only to be different in each jurisdiction, but also to be responsive only to legislatiive command rather than the dictates of the competitive marketplace and consumer needs;

2. Providing an impetus toward increased vertical and horizontal concentration in all segments of the business community by imposing unnecessary and costly burdens which may not be readily borne by small viable business concerns; and

3. Creating confusion in the courts and among consumers as to the meaning, purpose, and effect of a written product warranty.

Accordingly, we use this opportunity to bring to your attention several areas in title I of S. 986 in which we believe changes are essential in order to avoid foisting the enumerated undesirable side effects.

Our comments basically in title I are directed to seven areas.

The first one is we urge that if the proposed statute becomes law, it will in effect modify the pertinent warranty provisions of the Uniform Commercial Code which has been adopted in 49 States and the District of Columbia. Such a partial modification by Federal statute of a code which governs all commercial transactions in almost every State in the Union will undoubtedly cause difficult interpretive problems. These problems will be further compounded by the fact that, while utilizing terminology of the code, the bill does not use the definitions found in the code. If one of the overriding purposes of the bill is to insure that consumers receive a clear expression of warranties actually extended, we submit the confusion that will be generated by the conflicting terms between this bill and the code will more than offset any benefits which may be conferred by the bill. Therefore, we

strongly urge that the bill be amended in such a manner as to adopt not only the phraseology of the code but also its definitions.

Time does not permit a line-by-line analysis to point all inconsistencies in this area. However, we will enumerate some of the more obvious ones and request leave to submit before this record is closed, to be incorporated as part of our statement, a marked-up copy of the bill reflecting these changes as well as others.

Senator Moss. That is granted. You may submit that.

Mr. WEBER. Thank you, sir.

(The following information was subsequently received for the record:)

GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC.,
Arlington, Va., March 25, 1971.

Hon. FRANK E. MOSS,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR: Pursuant to the permission granted by the Subcommittee for Consumers of the Senate Committee on Commerce at their hearing concerning S. 986 on Monday, March 15, 1971, transmitted herewith for the Subcommittee's consideration and for incorporation in the record is a marked-up copy of Title I of S. 986 which reflects the recommended amendments proposed by Gas Appliance Manufacturers Association, Inc. (GAMA) on said date.

GAMA did not make any specific proposals and comments to Title II of S. 986—Federal Trade Commission Improvements; however, GAMA respectfully requests the Subcommittee's record to indicate that GAMA concurs in the comments made in regard to Title II by George P. Lamb, General Counsel for the Association of Home Appliance Manufacturers, on March 15, 1971, and favors:

1. Extension of the FTC's jurisdiction to include acts or practices "affecting" commerce;

2. Authorization for the Commission to obtain preliminary injunctions to restrain suspected violations of Section 5 of the FTC Act with the same built-in safeguards as are provided by courts of equity; and

3. Statutory approval formalizing only the rule-making procedures currently utilized by the Commission.

While endorsing the aforementioned three concepts, GAMA has grave concern over the phraseology utilized in Title II of S. 986 which goes far beyond accomplishing these ends. GAMA believes that insufficient time was provided to adequately brief and prepare its views in regard to Title II, as well as the Administration's proposals which are embodied in S. 1219 which GAMA supports. Accordingly, GAMA strongly and urgently recommends that Title II be deleted from S. 986 and incorporated in a separate and distinct bill in order to provide for a more adequate and equitable opportunity to present its opinions in regard thereto. If such an opportunity is provided, GAMA will be prepared to offer for the Subcommittee's consideration specific substantive constructive amendments.

Very truly yours,

ALAN H. WEBER,
On behalf of GAMA; Attorney, Carrier Corporation.

PROPOSED REVISIONS TO TITLE ONE OF S. 986 SUBMITTED FOR CONSIDERATION BY THE GAS APPLIANCE MANUFACTURERS ASSOCIATION

A BILL

To provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971."

II

TITLE I—CONSUMER PRODUCT WARRANTIES

DEFINITIONS

SEC. 101. For the purposes of this Act—

(1) ~~The term "consumer product" means any tangible personal property, normally used for personal, family, or household purposes, including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed. However, the provisions affecting consumer products in sections 102, 103 and 104 (d) (2) of this Act apply only to consumer products actually costing more than $5.~~ The term "consumer goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale which are used or bought for use primarily for personal, family or household purposes. The term does not include money in which the price is to be paid, investment securities and things in action.

(2) An "~~express warranty~~ express written warranty" is created as follows:

(a) Any written affirmation of fact or promise made by ~~a~~ the ~~supplier~~ seller to the ~~purchaser~~ buyer which relates to ~~a~~ the consumer ~~product or service~~ goods and becomes part of the basis of the bargain creates an express warranty that the consumer ~~product or service~~ goods shall conform to the affirmation or promise.

(b) Any written description of ~~a~~ the consumer ~~product~~ goods which is made part of the bargain creates an express warranty that the consumer ~~product~~ goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the written bargain creates an express warranty

that the consumer ~~product~~ goods shall conform to the sample or model.

It is not necessary to the creation of an express written warranty that the ~~supplier~~ seller use formal words such as "~~warranty~~ warrant" or "~~guaranty~~ guarantee" or that he have a specific intention to make a warranty, but ~~an~~ the written affirmation merely of the value of the consumer ~~product or service~~ goods or a statement purporting to be merely the ~~supplier's~~ seller's opinion or commendation of the consumer ~~product or service~~ goods does not create a warranty.

(3) "~~Purchaser~~ Buyer" means ~~the first buyer at retail of any consumer product or service to whom a warranty is offered or given, and any other person who is entitled by the terms of such warranty to enforce against the warrantor the obligations of the warranty~~ a person who buys or contracts to buy at retail consumer goods.

(4) "Reasonable and necessary maintenance" consists of those operations which the person guaranteed reasonably can be expected to perform or have performed which are necessary to keep any consumer ~~product~~ goods operating in a predetermined manner and performing its intended function.

(5) The term "repair" may at the option of the warrantor include replacement with a new, identical, or equivalent consumer ~~product~~ goods or component part thereof.

(6) The term "replacement" ~~shall~~ may include, at the option of the warrantor, the refunding of the actual purchase price of the consumer ~~product~~ goods less

reasonable depreciation based upon actual use if the warrantor is unable to effect replacement and repair is not possible or cannot be timely made~~; or if the person guaranteed is willing to accept such refund in lieu of repair or replacement~~.

"Seller"

(7) "~~Supplier~~" means any person (including any partnership, corporation, or association) who sells or contracts ~~engaged in the business~~ to sell consumer goods or who is engaged in the business ~~of making a consumer product available to consumers, either~~ of making consumer goods available to buyers, either ~~directly or indirectly~~. directly or indirectly.

(8) "Warrantor" means any seller ~~supplier~~ or other third party who gives or offers to give an express written warranty (guaranty).

(9) The term "warranty" includes guaranty, and to warrant is to guarantee.

(10) The term "without charge" means that the warrantor(s) cannot assess the person guaranteed for any costs the warrantor or his representatives incur in connection with the required repair or replacement of a warranted consumer goods ~~product~~. The term does not mean that the warrantor must necessarily compensate the person guaranteed for incidental expenses. However, if any incidental expenses are incurred because the repair or replacement is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the person guaranteed as a condition of securing repair or replacement, then the person guaranteed

shall be entitled to recover such reasonable incidental expenses in any action against the warrantor.

If the warrantor or his representative has designated a facility at which repair or replacement is to be performed and, due to the nature of the consumer goods, to require their return at buyer's expense would be unreasonable or if the buyer desired repair or replacement at the place wherein the consumer goods are located, the warrantor or his representative may require the buyer to pay reasonable transportation expenses and any other additional labor charges which would not normally be incurred by the warrantor or his representative if the buyer had returned the consumer goods to the designated facility; PROVIDED THAT, said fact is conspicuously disclosed in the warrantor's or his representative's express written warranty statement.

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DISCLOSURE REQUIREMENTS

SEC. 102. (a) In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer ~~products~~ goods, any ~~supplier~~ seller warranting ~~a~~ consumer ~~product~~ goods in writing against defect or malfunction shall fully and conspicuously disclose in simple and readily understood language the terms and conditions of said warranty pursuant to any regulations issued by the Federal Trade Commission under procedures specified in subsection (b) of this section. Such regulations may require inclusion in the written warranty of any of the followings items among others:

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

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

(3) The ~~products~~ consumer goods or parts covered.

(4) A statement of what the warrantor will do in the event of defect or malfunction—at whose expense—and for what period of time.

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

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

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

(8) The availability of any informal dispute settlement procedure for any warranty dispute.

~~(9) A recital that legal remedies are available to any person guaranteed if the warrantor has not complied with the provisions of the warranty.~~

~~(10) A recital that any person guaranteed who successfully pursues his legal remedies may recover the reasonable costs incurred, including reasonable attorneys' fees.~~

~~(11) The time at which the warrantor will perform his obligations.~~

~~(12) The period of time within which, after notice of malfunction or defect, the warrantor will repair, replace, or otherwise perform any obligations under the warranty.~~

(9) ~~(13)~~ The characteristics or properties of the ~~products~~ consumer goods, or parts thereof, that are not covered by the warranty.

(10)
~~(14)~~ The elements of the warranty in words or phrases which would not mislead reasonable men as to the nature or scope of the warranty.

(b) The Federal Trade Commission is authorized to determine in accordance with section 553, title 5, United States Code, upon a public record after opportunity for an agency hearing structured so as to proceed as expeditiously as practicable, the manner and form in which information with respect to any written warranty against defect or malfunction of ~~a~~ consumer ~~product or service~~ goods shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average ~~purchaser,~~ buyer when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing. Nothing in this Act shall be deemed to authorize the Commission to prescribe the duration of warranties given or to require that ~~a product~~ goods or any of its components be warranted.

DESIGNATION OF WARRANTIES

SEC. 103. (a) Any ~~supplier~~ seller warranting ~~or guaranteeing~~ ~~a~~ consumer ~~product~~ goods in writing against defect or malfunction shall clearly and conspicuously designate such warranty in the following manner unless exempted from doing so by the Federal Trade Commission pursuant to section 109 of this Act:

(1) If the written warranty incorporates the Federal

minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "~~full~~ "parts and labor / (statement of duration)" warranty, guaranty, or ~~word~~ words or phrases of similar meaning.

(2) If the written warranty does not incorporate the the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "~~partial~~ "parts only" warranty, guaranty, or ~~word~~ words or phrases of similar meaning.

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

FEDERAL MINIMUM STANDARDS FOR WARRANTY (GUARANTY)

SEC. 104. (a) Any ~~supplier~~ seller warranting consumer ~~products~~ goods in writing against defect or malfunction must undertake at a minimum the following duties in order to be deemed to have incorporated the Federal minimum standards for warranty:

The duties—

(1) to repair, or replace if repair is not possible or

cannot be timely made, any malfunctioning or defective consumer goods or any part or component thereof; warranted ~~product;~~

(2) within a reasonable time; and

(3) without charge.

In fulfilling the above duties the warrantor shall not impose any duty other than notification upon any person guaranteed as a condition of securing repair or replacement of any malfunctioning or defective consumer ~~product~~ good unless the warrantor can demonstrate that such a duty is reasonable. In a determination of whether or not any such additional duty or duties are reasonable, the magnitude of the economic burden necessarily imposed upon the warrantor (including costs passed on to the ~~purchaser~~ buyer) shall be weighed against the magnitude of the burdens of inconvenience and expense failure to provide reasonable and necessary maintenance)

(b) The above duties extend from the warrantor to the ~~purchaser~~ buyer.

(c) The performance of the duties enumerated in subsection (a) of this section shall not be required of the warrantor if he can show that damage while in the possession of the person guaranteed or unreasonable use (including failure to provide reasonable and necessary maintenance) caused any warranted ~~product~~ consumer goods to malfunction or become defective.

(d) Disclosure requirements—

(1) When making a warranty in writing against defect or malfunction which incorporates Federal minimum standards, the warrantor shall cause it to be labeled a "~~full~~ "parts and labor (statement of duration)" warranty, guaranty, or ~~word~~ words or phrases of similar meaning.

(2) The disclosure requirements and Commission authorization in section 102 of this Act shall apply to any warranty in writing against defect or malfunction of ~~a~~ consumer ~~product~~ goods which incorporates Federal minimum standards: *Provided, however,* That it shall be mandatory for the warrantor issuing written warranty in compliance with Federal minimum standards to cause the disclosure of the duration of the warranty period measured either by time or by some relevant measure of usage such as mileage to the ~~purchaser prior to the time of purchase~~ buyer at the time of purchase.

FULL AND PARTIAL WARRANTING OF A CONSUMER PRODUCT

SEC. 105. Nothing in this Act shall prohibit the selling of ~~a~~ consumer ~~product~~ goods which has both ~~full~~ parts and labor and ~~partial~~ parts only warranties if such warranties are clearly and conspicuously differentiated.

SERVICE CONTRACTS

SEC. 106. Nothing in this Act shall be construed to prevent a ~~supplier~~ seller from selling a service contract to the ~~pur-~~

buyer
~~chaser~~ in addition to or in lieu of a warranty if such contract fully and conspicuously discloses in simple and readily understood language the terms and conditions.

DESIGNATION OF REPRESENTATIVES

SEC. 107. Nothing in this Act shall be construed to prevent any warrantor from designating representatives to perform duties under the warranty: *Provided*, That such warrantor equitably compensates such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the person guaranteed or make the representative a cowarrantor.

LIMITATION ON DISCLAIMER OF IMPLIED WARRANTIES

SEC. 108. (a) ~~There shall be no express disclaimer of implied warranties to a purchaser if any express warranty of a consumer product against defect or malfunction is made by a supplier to a purchaser in writing~~.

(a) Nothing in this Act shall prevent the seller from disclaiming implied warranties which are inconsistent with his expressed written warranty provided that said limited disclaimer is set forth in clear and unmistakable language and prominently displayed on the face of the warranty and provided further that said limited disclaimer is not unconscionable.

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

FEDERAL TRADE COMMISSION

SEC. 109. In addition to the authority given in sections 102 and 104 of this Act pertaining to disclosure, the Federal Trade Commission is authorized to establish rules pursuant

to section 553, title 5, United States Code upon a public record after an opportunity for an agency hearing structured so as to proceed as expeditiously as practicable, to define in detail the duties set forth in subsection (a) of section 104 of this Act and their applicability to warrantors of different categories of consumer ~~products~~ goods with "~~full~~" "parts and labor" warranties and to determine when a warranty in writing against defect or malfunction does not have to be designated either "~~full~~ labor (statement of duration)" or "~~partial~~ parts only" in accordance with section 103 of this Act. "parts and

REMEDIES

SEC. 110. (a) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms. Such informal dispute settlement procedures should be created by ~~suppliers~~ sellers in cooperation with independent and governmental entities and should be supervised by some governmental or other impartial body.

(b) It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) for any person (including any partnership, corporation, or association) subject to the provisions of this Act to fail to comply with any requirement imposed on such person by or pursuant

to this Act or to violate any prohibition contained in this Act.

(c) (1) The district courts of the United States shall have jurisdiction to restrain any ~~supplier~~ seller from making a deceptive warranty with respect to ~~a~~ consumer ~~product or service~~ goods in an action by the Attorney General or by the Commissioner ~~or~~ or by any of its attorneys designated by it for such purpose. The court may, pursuant to the general standards governing the issuance of injunctions in civil actions, at any time grant such injunctive relief as it deems appropriate. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, a "deceptive warranty" means: (i) a guaranty or warranty that contains an affirmation, promise, description, or representation that is either false or fraudulent, or that, in the light of all of the circumstances, would mislead a reasonable man exercising due care; or fails to contain information that is necessary, in light of all of the circumstances, to make the guaranty or warranty not misleading to a reasonable man exercising due care; and (ii) a guaranty or warranty created by the use of such terms as "guaranty" or warranty", if the terms and

conditions of such guaranty or warranty so limit its scope and application as to deceive a reasonable man.

(d) If any person guaranteed ~~or protected by a service contract~~ shall finally prevail in any suit or proceeding for breach of a written express warranty or ~~an express or~~ implied warranty ~~or service contract~~ obligation on ~~a~~ consumer goods ~~product~~, he shall be allowed by the court of competent jurisdiction to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by such person guaranteed ~~or protected by a service contract for~~ or in connection with the institution and prosecution of such suit or proceeding unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate: *Provided*, That before any person ~~any person guaranteed, in a suit for breach of warranty, must have afforded the maker (s) of that warranty a reasonable opportunity to cure the breach to be eligible for such cost and expenses~~. guaranteed may utilize any or all of the remedies provided by this Act, he shall be required to: (i) Notify the seller alleged to have employed or committed methods, acts or practices declared unlawful by this Act of the particular alleged violations within 30 days or more before commencement of an action pursuant to the provisions of this Act; and, (ii) Demand that the seller correct, repair, replace or otherwise rectify the consumer goods or services

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alleged to be in violation of this Act. Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the last known principal business location of seller. No action by the person guaranteed under this Act may be maintained if an appropriate correction, repair, replacement or other remedy is given or agreed to be given to the buyer within 30 days after receipt of the aforementioned notice.

(e) Any person damaged by the failure of a ~~supplier~~ seller to comply with any obligations assumed under ~~an express or~~ a written express warranty or implied warranty ~~or service contract~~ subject to this Act may bring suit in an appropriate district court of the United States subject to the juridictional requirements of section 1331, title 28, United States Code, or in any State or District of Columbia court of competent jurisdiction.

SAVING PROVISION

SEC. 111. Nothing contained in this Act shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or any statute defined therein as an antitrust Act.

SCOPE

SEC. 112. (a) The provisions of this Act and the powers granted hereunder to the Federal Trade Commission and Attorney General shall extend to all sales of consumer ~~products and services~~ goods affecting interstate commerce.

(b) ~~Labeling, disclosure, or other requirements of a State with respect to written warranties against defect or malfunction of a consumer product inconsistent with those set forth in sections 102, 103, or 104 of this Act shall not be applicable to warranties complying with any of these provisions.~~ No state or political subdivision of a state shall have any authority either to establish or continue in effect any labeling, disclosure or other requirements with respect to consumer product warranties.

SEPARABILITY

SEC. 113. If any provision of this Act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 114. (a) Except for the limitations in subsection (b) of this section, this Act shall take effect six months after the date of its enactment but shall not apply to con-

sumer ~~products~~ goods in the stream of commerce prior to such date.

(b) Those requirements in this Act which cannot be reasonably met without the promulgation of rules by the Federal Trade Commission shall take effect six months after the final publication of such rules: *Provided*, That the Federal Trade Commission, for good cause shown, may provide designated classes of ~~suppliers~~ sellers up to an additional six months to bring their written warranties into compliance with rules promulgated pursuant to this Act.

(c) The Federal Trade Commission shall promulgate rules implementing this Act as soon as possible after enactment but in no event later than six months after the date of enactment.

Mr. WEBER. In this connection, in the interest of time, I would like to point out some of the points we make under this topic.

One, we urge the adoption of the term "consumer goods" in lieu of "consumer product" throughout the bill. "Consumer goods" would be defined to mean:

> All things, including specially manufactured goods, which are movable at the time of identification to the contract for sale which are used or brought for use primarily for personal, family or household purposes. The term does not include money in which the price is to be paid, investment securities and things in action.

This definition conforms to the definition found in sections 2–105 and 9–109 of the Uniform Commercial Code.

We would also ask to modify the definition of an express warranty in section 101(2) to the definition found in section 2–313 of the Uniform Commercial Code.

We would also like to ask your consideration of the term "purchaser," change the term "purchaser" to "buyer" and "supplier" to "seller."

I refer to my text on those particular definitions.

There are other areas of defined terms in the statute that we would like to bring to your attention.

The two stated purposes of title I of the bill are:

> (*a*) To provide minimum disclosure standards for written consumer product warranties against defect or malfunction; and
> (*b*) To define minimum Federal content standards for such warranties.

The whole thrust of the bill is directed at correcting claimed abuses in written product warranties. However, section 101(2) which defines the express warranty, appears to include oral as well as written express warranties. We believe this to be an oversight in the bill and recommend that the section be amended to refer to written express warranties and thereby eliminate any ambiguities created by this omission.

Section 101(5) defines the term "repair" to include replacement "with a new, identical or equivalent consumer product." The question raised in this definition is: Does the supplier have to replace the whole "product" if repair can be accomplished by replacing only a component part thereof? In order to resolve this ambiguity the term "repair" should be defined as follows:

> The term "repair" may at the option of the warrantor include replacement with a new, identical or equivalent consumer product or component part thereof.

Section 101(6) defines "replacement" to include at the option of the person guaranteed a refund of the actual purchase price less reasonable depreciation based upon actual use. The difficulty with this requirement is twofold:

First, all products contain various distributive markups from the supplier to the consumer. A refund to the consumer would require the supplier to refund not only what he received but also markups received in the chain of distribution. Second, the defined term has more applicability to shelf items or free-standing appliances which are not incorporated as a component part of a system. The mandate of the defined term raises serious problems in regard to a newly installed heating or air-conditioning system. The buyer in this instance buys an installed system which includes numerous component parts such as a furnace, condensing unit, coil, et cetera, plus installation labor. No at-

tempt is made in the contract of purchase to allocate costs to each individual component. If the furnace in the system proves deffective, and the consumer wants a refund, how much is he entitled to receive?

In view of these equivocations, we urge either elimination of the term or amendments in the term which would make refund of the purchase price at the option of the warrantor. Such a modification would be consistent with the definition of "repair" in section 101(5).

Next, we want to move also to the term defined in section 101 of "without charge" which is in section 101(10). It is a key definition in that it is one of the three Federal minimum standards specified for a full warranty in sections 103(a)(1) and 104. As defined, the term would appear to impose upon the warrantor the obligation to fix even small portable appliances such as a radio, toaster, et cetera, at the home of the consumer without being able to charge for transportation expenses and other related expenses which would not be incurred if the item had been returned to a repair facility. To impose this burden upon such a small item would be unconscionable. Accordingly, we urge the adoption of an amendment to that section which is incorporated in my prepared text.

We next would like to move to our recommendations concerning modification of the disclosure requirements in the bill.

Section 102(a) requires suppliers warranting a consumer product to fully and conspicuously disclose in simple and readily understood language the terms and conditions of said warranty pursuant to any regulations issued by the Federal Trade Commission under the procedures established in 102(b). The subsection then enumerates 14 specific disclosure requirements which the Commission can regulate.

In view of the broad powers of the Commission under the Federal Trade Commission Act and the introductory paragraph of this section, we do not believe the itemization of the 14 points is either necessary or desirable and accordingly would recommend their deletion from the bill. However, if it were deemed that some itemization be retained in the bill, we would suggest the modification of subsection (a)(7) by the deletion of the words "step by step" and the complete exclusion of section 102 (a) (9) through (12).

Subsections (a) (9) and (10) pertain to a recital of legal remedies and a statement that if the person guaranteed pursues his legal recourse, he may recover costs and attorney's fees. These two items are traditionally the responsibility of the legal profession. It would be impossible for a supplier to enumerate all possible legal remedies in every single State of the Union which are available to the consumer. Furthermore, the provision may have the effect of placing business corporations in the position of practicing law.

Subsections (a) (11) and (12) would require the warrantor to specify the exact time he will perform. It would be impossible for any warrantor to definitely specify such a time due to such varying factors as the location of a consumer's home, unavailability of servicemen, nature of the defect, and unavailability of spare parts over which the supplier may have no control.

We would like to now move in our suggestions for change in the modification of the designation of warranties and the Federal minimum requirements.

Sections 103 and 104 of the bill establish two classes of warranties: "full" and "partial." We do not believe any necessity can be demonstrated for such a two-tier classification. If part of the objectives of the bill is to "prevent deception and improve competition" we submit that the terms "full" and "partial" as defined in the bill are deceptive and will impair competition. The terms do not adequately take into consideration the realities of the marketplace.

The terms used in the appliance industry are "parts and labor" and "parts only" warranty. Under both warranties, the manufacturer primarily warrants the main component parts of the products which if proved defective would constitute a major expense item for the consumer. If the manufacturer offers labor in connection with his parts warranty the consumer will not incur an enormous repair bill. Under the definition of a full and partial warranty in the bill, such a warranty would be classified as "partial" even though it adequately protected the consumer.

The term "partial" has a derogatory meaning by conferring the erroneous impression that a manufacturer who offers a partial warranty has a product which is inferior to a product carrying a full warranty which may not in fact be true. A small manufacturer who makes a better and more reliable product than his large competitors but is financially or operationally unable to offer a full warranty will be adversely affected.

As earlier noted, we are of the opinion that the "repair or replacement" requirement under a "full" warranty be performed literally "without charge" is an unconscionable burden. It is unconscionable for the manufacturer of portable appliances which can readily be returned to a service center as well as for the manufacturer of free-standing appliances or products which are installed as component parts of a system such as heating or air conditioning systems.

Accordingly, we recommend either one of the following modifications of the bill:

One, delete sections 103(a)(1) and (2) and conform sections 104 and 105 to reflect the elimination of the terms "full" and "partial" warranties; or

Two, change the designation of "full" and "partial" warranties to read "Parts and Labor" and "Parts Only" warranty in sections 103, 104, and 105 and in all other provisions of the bill utilizing the terminology and amend the definition of "without charge" in section 101(10).

In connection with the above alternatives, we would strongly recommend the adoption of two other amendments to section 104:

One, add after the word "product," line 2 of page 9 of the bill, the phrase "or any part or component thereof" in order to avoid the confusion as to whether the manufacturer has to replace the whole as distinguished from only a part thereof.

Two, change the phrase "prior to the time of purchase," in line 16 of page 10 of the bill, to read "at the time of purchase." As now written, the manufacturer may be subject to the prohibitions of the bill if he did not give the consumer a copy of the written product warranty "prior to the time of purchase." If such a requirement is retained in the bill, this would place an impossible burden upon mass manufacturers who pack

their warranties with their products. The existing procedure currently insures that the purchaser obtain a copy of the warranty at the time of purchase. There is no known procedure that could insure that the purchaser will physically receive the written warranty before purchase.

Our point five concerns our suggested modifications to the limitations of a disclaimer om implied warranties.

Section 108(a) prohibits the disclaimer of implied warranties. Traditionally manufacturers have disclaimed all implied warranties in their express warranties. This device is used primarily to disclaim responsibilities and obligations over which they have no control.

For example, a completely installed heating, air conditioning, air humidification and air cleaning system consists of 23 or more installed component parts such as a thermostat, furnace, cooling coil, supply diffusers, electronic air cleaner, etc. The components used in the system may be supplied by 10 or more manufacturers. The components are supplied not to the consumer but to an installing dealer who designs, sizes, and installs the system. The installing dealer is in effect the manufacturer over whom the individual component suppliers have no control.

In view of the fact that the products are installed in residences by parties over which the supplier has no control, it is not reasonable that the supplier should have any responsibility for acts or omissions of the installer which result in failure of the products.

A unit may perform in accordance with its rated characteristics, but be installed under circumstances where it does not provide the level of heating, air-conditioning, or humidification expected by the consumer. This result can arise from a variety of reasons, including the installation of an undersized unit, inadequate or defective related equipment, improper venting or other installation work, and a number of other possibilities. When a consumer receives such installed products, he might naturally assume that the product would provide the requisite degree of heating or cooling: that is, be fit for the purpose for which it is installed. While the supplier could or should be held to the standard of performance of the product which he has expressed, he cannot be reasonably held to the requirement that the goods will be fit to provide the level of heating or air-conditioning which is expected by the consumer. Accordingly, the supplier of the installed goods must reasonably be in a position to disclaim implied warranties which are inconsistent with the express warranty without any adverse inference that the goods are not warranted by the supplier to the full extent which may be reasonable.

If there is a reasonable alternative to a complete abolition of implied warranties, this fact should be incorporated in the bill. We believe there is such an alternative and accordingly we recommend that section 108(a) be amended to read as follows:

"Nothing in this act shall prevent the supplier from disclaiming implied warranties which are inconsistent with his express written warranty provided that said limited disclaimer is set forth in clear and unmistakable language and prominently displayed on the face of the warranty and provided further that said limited disclaimer is not unconscionable."

Our sixth point pertains to the modification of remedies.

Remedies under the bill are set forth in section 110. In order to obviate frivolous suits and suits which may be brought about by misunderstandings, we believe that the "Remedies" provision of the bill should incorporate the requirements of the Uniform Commercial Code, namely:

Written notification by the consumer to the supplier of the alleged defect;

Demand for performance and a reasonable time in which to perform or settle the dispute.

We have provided in our prepared statement a suggestion along those lines.

Our seventh and final point pertains to the proposed amendment to the scope of the bill.

Under section 112(b) only labeling, disclosure or other requirements of the State which are inconsistent with those set forth in the bill shall not be applicable. The limited Federal pre-emption in this bill will permit the enactment of more stringent State and local laws, and, in addition, generate years of litigation to determine which State and local laws and provisions thereof are "inconsistent" with the Federal law. Furthermore, manufacturers wil be forced to have a multiplicity of warranties for the same product instead of one uniform national warranty which fully and conspicuously discloses in simple and readily understood language the terms and conditions of the warranty.

Our predictions are not ones obtained from crystal ball. On March 1, 1971, the Song-Beverly Consumer Warranty Act went into effect in California. The requirements for an express warranty under the Song-Beverly Act are different than those specified in S. 986; however, we do not believe there is a single attorney who could with any degree of accuracy, determine whether this act is so totally "inconsistent" with S. 986 as to render it null and void. There are several States considering comparable laws.

If the consumer, as the President enunciated in his Executive Order 11583, has:

> The right to make an intelligent choice among products and services; and the right to accurate information on which to make a free choice;

complete Federal preemption of State and local laws is required in this bill. Therefore, we strongly recommend that section 112(b) be amended to read:

> No state or political subdivision of a state shall have any authority either to establish or continue in effect any labeling, disclosure or other requirements with respect to consumer product warranties.

I might add in connection with the Song-Beverly bill that it does provide for sale of goods "as is," and one corporation has taken that particular course of action. However, the requirements for selling goods "as is" under the bill are very specific, and I am sure that any court in interpreting that law will construe a manufacturer selling goods "as is" very strictly so that it almost becomes an impossible burden for a manufacturer to do that.

In conclusion, I would like to state that the gas appliance and equipment industry is, as I pointed out earlier, in favor of Federal warranty legislation which assures the purchaser complete information on

the positive terms of the product warranty and conspicuous notification of any disclaimers of implied warranties of merchantability and fitness.

We are also firmly of the opinion that reasonable assurances should be given the purchaser that the terms of the warranty will be fully met.

When the Federal law requires full disclosure of all warranty terms including disclaimers, and provides effective enforcement, pre-emption of State and local laws is in order. Only through complete pre-emption, as outlined above, can chaos be avoided in the writing and enforcement of warranties applicable in all 50 States.

We do not have at this time any statement concerning title 2 of the bill, but we generally favor the comments that have been presented to you today.

Senator Moss. Thank you, Mr. Weber for your presentation of this statement for the Gas Appliance Manufacturers Association.

I gather from your statement, the end thereof, that you might very well welcome some Federal legislation if it carries the pre-emption with it because of what is going on in some of the States, is that right?

Mr. WEBER. Yes, sir.

Senator Moss. In fact, your recommendation is very strong that the States be fully pre-empted from doing anything in this field if the Federal Government establishes the standards and the requirements?

Mr. WEBER. Yes, sir.

Senator Moss. On your various points that you made, I have noted them carefully, and I think some of them are perhaps provided for in the legislation, but I want to assure you that we will look at them very closely, because if the legislation, the language as drawn, has the deficiencies that you are concerned about, we certainly don't want them to stand there.

Rather than engage in a colloquy as to whether our language is adequate or not, I think we will just measure yours against the language if we do move into executive session on it.

So, I have no questions. I ask Senator Cook if he has none?

Senator COOK. No, I have no questions.

The only thing I say is we may have some before we close the record, purely and simply because this is a detailed analysis, section by section. I would like to analyze it against the language in the bill, and if I have any questions, I hope I might feel free to put them down in writing to you so we may get them in the record.[1]

Mr. WEBER. I would appreciate the opportunity, Senator.

Senator Moss. We would include, of course, any response in the record that would help us with them.

Senator COOK. Mr. Weber, I wonder if your association might want to come back before the hearings are closed and comment on title II?

Mr. WEBER. Could we let you know later on?

Senator Moss. Thank you, Mr. Weber. We appreciate your coming to present this for us today.

(The statement follows:)

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[1] See p. 292.

STATEMENT OF ALAN WEBER ON BEHALF OF GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC.

Mr. Chairman and members of the committee, I am Alan Weber, a member of the Bar of the State of New York. It is my privilege to appear before you today on behalf of the Gas Appliance Manufacturers Association, Inc. to present the Association's views with respect to S. 986, the proposed "Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971."

The Gas Appliance Manufacturers Association (GAMA) consists of over 500 members who manufacture more than 90 percent of all gas appliances and related equipment sold in the United States. Since its beginnings in 1935, it has been both the voice of the gas appliance industry before Congress and the public, and an innovator in devising effective methods and procedures to bridge the communications gap between consumers and industry.

In early February 1970, under the sponsorship of GAMA, the Association of Home Appliance Manufacturers, and the American Retail Federation, a bold new communications concept to provide a channel for a consumer voice to industry was brought into being with the creation of the Major Appliance Consumer Action Panel (MACAP), whose chairwoman is Dr. Virginia Cutler, a distinguished educator from Brigham Young University.

While GAMA and various of its staff members may be familiar to you, with your permission, I should like to digress for a few minutes to briefly summarize my background.

Consumer product warranty legislation is not only an area of deep concern to GAMA, but is also one in which by professional training, background and civic involvement, I have my own personal convictions which coincide with those of GAMA.

For the past five and a half years, I have been the antitrust, marketing and consumer legislative counsel for Carrier Corporation of Syracuse, New York. Carrier is a diversified industrial corporation which is principally engaged in the manufacture and sale of a broad line of gas and electric air conditioning, heating, and refrigeration equipment.

From 1961 to 1965, I served as a Trial Attorney in the Division of General Trade Restraints of the Federal Trade Commission. As a Trial Attorney for the Commission, I had full trial and appeal responsibility for several leading Commission cases. In recognition for my services, the Commission awarded me an Official Commendation for Superior Service and "sustained unusually competent performance of duty as a trial attorney."

I have been a featured speaker and panelist at meetings of the American Marketing Association, Petroleum Jobbers' Management Conference, the Northern Virginia Gasoline Retailers Association, and the Sixth Annual International Management Conference on Franchises.

I have authored articles in the area of consignment distribution systems, role of corporate counsel, and franchising.

My professional experience is supplemented by a scholastic background which includes being a cum laude and Phi Beta Kappa graduate of Washington and Lee University and a J.D. graduate of the University of Michigan Law School.

In addition to my professional carreer, I have been active in various civic affairs which have related directly or indirectly to consumer protection. These activities have included among others: Founder and first president of The Sherwood Estates Citizens Association of Fairfax County, Virginia, for the period 1963–1965; Co-Chairman of the Mt. Vernon Council of Citizens Associations of Fairfax County, Virginia; organized the first Corporate Counsel Section of the Onondaga County Bar Association of New York and, in 1969, elected to the Board of Directors of the Bar Association, the first Corporation Counsel to be elected to the Board.

The whole area of consumer protection is one in which the problems can be easily stated in broad, general terms. Unfortunately, to provide equitable and fair solutions through specific and detailed legislative enactments creates immense difficulties in effectively balancing the legitimate interests of both the consumer and business communities. Neither consumers nor businesses are monolithic entities. Their respective interests are not necessarily separate nor in opposition to one another. A consumer statute which fails to astutely take these facts into consideration may give birth to a condition which is worse than the one sought to be resolved.

Consumer product warranty laws are not an exception to those general observations. While GAMA believes that federal consumer product warranty legislation could fulfill a consumer need, we are of the opinion that S. 986, in its present form, is defective and if not amended may have the undesirable effects of:

(1) Permitting the promulgation of varying and complex state and local warranty laws. This would cause manufacturers' product warranties not only to be different in each jurisdiction, but also to be responsive only to legislative command rather than the dictates of the competitive marketplace and consumer needs;

(2) Providing an impetus toward increased vertical and horizontal concentration in all segments of the business community by imposing unnecessary and costly burdens which may not be readily borne by small viable business concerns; and

(3) Creating confusion in the courts and among consumers as to the meaning, purpose and effect of a written product warranty.

Accordingly, we use this opportunity to bring to your attention several areas in Title I of S. 986 in which we believe changes are essential in order to avoid foisting the enumerated undesirable side effects.

I. CONFORM THE DEFINITIONS IN THE BILL TO EXISTING STATUTORY TERMINOLOGY

If the proposed statute becomes law, it will in effect modify the pertinent warranty provisions of the Uniform Commercial Code which has been adopted in 49 states and the District of Columbia. Such a partial modification by Federal statute of a Code which governs all commercial transactions in almost every state in the Union will undoubtedly cause difficult interpretive problems. These problems will be further compounded by the fact that, when utilizing terminology of the Code, the Bill does not use the definitions found in the Code. If one of the overriding purposes of the Bill is to insure that consumers receive a clear expression of warranties actually extended, we submit the confusion that will be generated by the conflicting terms between this Bill and the Code will more than offset any benefits which may be conferred by the Bill. Therefore, we strongly urge that the Bill be amended in such a manner as to adopt not only the phraseology of the Code but also its definitions.

Time does not permit a line-by-line analysis to point out all inconsistencies in in this area. However, we will enumerate some of the more obvious ones and request leave to submit before this record is closed, to be incorporated as part of our statement, a marked-up copy of the Bill reflecting these changes as well as others.

In connection with the aforegoing, we would suggest the following:

A. Adoption of the term "consumer goods" in lieu of "consumer product" throughout the Bill. "Consumer goods" would be defined to mean "all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale which are used or brought for use primarily for personal, family or household purposes. The term does not include money in which the price is to be paid, investment securities and things in action." This definition conforms to the definition found in Secs. 2–105 and 9–109 of the Uniform Commercial Code.

B. Modify the definition of an express warranty in Sec. 101(2) to the definition found in Sec. 2–313 of the Uniform Commercial Code.

C. Change the term "Purchaser" to "Buyer" and "Supplier" to "Seller". In this connection, Sec. 101(3) would be ammended to read " 'Buyer' means a person who buys or contracts to buy at retail consumer goods." (See U.C.C. Sec. 2–103) Sec. 101(7) would be amended to read: " 'Seller' means a person (including any partnership, corporation or association) who sells or contracts to sell consumer goods or who is engaged in the business of making consumer goods available to buyers, either directly or indirectly."

II. CLARIFYING AMENDMENTS TO OTHER DEFINED TERMS IN SECTION 101

A. The two stated purposes of Title I of the Bill are:

(a) "To provide minimum disclosure standards for written consumer product warranties against defect or malfunction;" and

(b) "To define minimum Federal content standards for such warranties."

The whole thrust of the Bill is directed at correcting claimed abuses in written product warranties. However, Section 101(2) which defines the express warranty

appears to include oral as well as written express warranties. We believe this is to be an oversight in the Bill and recommend that the Section be amended to refer to written express warranties and thereby eliminate any ambiguities created by this omission.

B. Section 101(5) defines the term "repair" to include replacement "with a new, identical or equivalent consumer product." The question raised in this definition is: Does the supplier have to replace the whole "product" if repair can be accomplished by replacing only a component part thereof? In order to resolve this ambiguity the term "repair" should be defined as follows:

"The term 'repair' may at the option of the warrantor include replacement with a new, identical or equivalent consumer product or component part thereof."

C. Section 101(6) defines "replacement" to include at the option of the person guaranteed a refund of the actual purchase price less reasonable depreciation based upon actual use. The difficulty with this requirement is two-fold:

First, All products contain various distributive mark-ups from the supplier to the consumer. A refund to the consumer would require the supplier to refund not only what he received but also mark-ups received in the chain of distribution.

Second, The defined term has more applicability to shelf items or free-standing appliances which are not incorporated as a component part of a system. The mandate of the defined term raises serious problems in regard to a newly installed heating or air conditioning system. The buyer in this instance buys an installed system which includes numerous component parts such as a furnace, condensing unit, coil, etc., plus installation labor. No attempt is made in the contract of purchase to allocate costs to each individual component. If the furnace in the system proves defective, and the consumer wants a refund, how much is he entitled to receive?

In view of these equivocations, we urge either elimination of the term or amendments in the term which would make refund of the purchase price at the option of the warrantor. Such a modification would be consistent with the definition of "repair" in Section 101(5).

D. The term "without charge" is defined in Section 101(10). It is a key definition in that it is one of the three Federal minimum standards specified for a "full" warranty in Sections 103(a)(1) and 104. As defined, the term would appear to impose upon the warrantor the obligation to fix even small portable appliances such as a radio, toaster, etc. at the home of the consumer without being able to charge for transportation expenses and other related expenses which would not be incurred if the item had been returned to a repair facility. To impose this burden upon such a small item would be unconscionable. Accordingly, we urge the adoption of the following paragraph to be inserted at the end of the definition:

"If the warrantor or his representative has designated a facility at which repair or replacement is to be performed and, due to the nature of the consumer goods, to require their return at buyer's expense would be unreasonable or if the buyer desired repair or replacement at the place wherein the consumer goods are located, the warrantor or his representative may require the buyer to pay reasonable transportation expenses and any other additional labor charges which would not normally be incurred by the warrantor or his representative if the buyer had returned the consumer goods to the designated facility; PROVIDED THAT, said fact is conspicuously disclosed in the warrantor's or his representative's express written warranty statement."

III. MODIFICATION OF THE DISCLOSURE REQUIREMENTS

Section 102(a) requires suppliers warranting a consumer product to fully and conspicuously disclose in simple and readily understood language the terms and conditions of said warrantly pursuant to any regulations issued by the Federal Trade Commission under the procedures established in 102(b). The subsection then enumerates fourteen specific disclosure requirements which the Commission can regulate. In view of the broad powers of the Commission under the Federal Trade Commission Act and the introductory paragraph of this Section, we do not believe the itemization of the fourteen points is either necessary or desirable and accordingly would recommend their deletion from the Bill. However, if it were deemed that some itemization be retained in the Bill, we would suggest the modification of Subsection (a)(7) by the deletion of the words "step by step" and the complete exclusion of Section 102(a)(9) through (12).

Subsections (a)(9) and (10) pertain to a recital of legal remedies and a statement that if the person guaranteed pursues his legal recourse, he may recover costs and attorney's fees. These two items are traditionally the responsibility of the legal profession. It would be impossible for a supplier to enumerate all possible legal remedies available to the consumer. Furthermore, the provision may have the effect of placing business corporations in the position of practicing law.

Subsections (a)(11) and (12) would require the warrantor to specify the exact time he will perform. It would be impossible for any warrantor to definitely specify such a time due to such varying factors as the location of a consumer's home, unavailability of servicemen, nature of the defect, and unavailability of spare parts over which the supplier may have no control.

IV. MODIFICATION OF DESIGNATION OF WARRANTIES AND FEDERAL MINIMUM STANDARDS FOR WARRANTY

Sections 103 and 104 of the Bill establish two classes of warranties: "Full" and "Partial." We do not believe any necessity can be demonstrated for such a two-tier classification. If part of the objectives of the Bill is to "prevent deception and improve competition" (Section 102 (a)), we submit that the terms "Full" and "Partial" as defined in the Bill are deceptive and will impair competition. The terms do not adequately take into consideration the realities of the marketplace.

The terms used in the appliance industry are "Parts and labor" and "Parts only" warranty. Under both warranties, the manufacturer primarily warrants the main component parts of the products which if proved defective would constitute a major expense item for the consumer. If the manufacturer offers labor in connection with his parts warranty the consumer will not incur an enormous repair bill. Under the definition of a Full and Partial warranty in the Bill, such a warranty would be classified as "partial" even though it adequately protected the consumer.

The term "partial" has a derogatory meaning by conferring the erroneous impression that a manufacturer who offers a "partial" warranty has a product which is inferior to a product carrying a "full" warranty which may not in fact be true. A small manufacturer who makes a better and more reliable product than his large competitors but is not financially or operationally able to offer a "full" warranty will be adversely affected.

As earlier noted, we are of the opinion that the "repair or replacement" requirement under a "Full" warranty be performed literally "without charge" is an unconscionable burden. It is unconscionable for the manufacturer of portable appliances which can readily be returned to a service center as well as for the manufacturer of free-standing appliances or products which are installed as component parts of a system such as heating or air conditioning systems.

Accordingly we recommend either one of the following modifications of the Bill:

1. Delete Sections 103(a) (1) and (2) and conform Sections 104 and 105 to reflect the elimination of the terms "Full" and "Partial" warranties; or
2. Change the designation of "Full" and "Partial" warranties to read "Parts and Labor" and "Parts only" warranty in Sections 103, 104, and 105 and in all other provisions of the Bill utilizing the terminology and amend the definition of "without charge" in Section 101(10).

In connection with the above alternatives, we would strongly recommend the adoption of two other amendments to Section 104:

1. Add after the word "product," line 2 of page 9 of the Bill, the phrase "or any part or component thereof" in order to avoid the confusion as to whether the manufacturer has to replace the "whole" as distinguished from only a part thereof.
2. Change the phrase "prior to the time of purchase," in line 16 of page 10 of the Bill, to read "at the time of purchase." As now written, the manufacturer may be subject to the prohibitions of the Bill if he did not give the consumer a copy of the written product warranty "prior to the time of purchase." If such a requirement is retained in the Bill, this would place an impossible burden upon mass manufacturers who pack their warranties with their product. The existing procedure currently ensures that the purchaser obtain a copy of the warranty at the time of purchase. There is no known procedure that could ensure that the purchaser will physically receive the written warranty before purchase.

V. MODIFICATION TO THE LIMITATION ON DISCLAIMER OF IMPLIED WARRANTIES

Section 108(a) prohibits the disclaimer of implied warranties. Traditionally manufacturers have disclaimed all implied warranties in their express warranties. This device is used primarily to disclaim responsibilities and obligations over which they have no control.

For example, a completely installed heating, air conditioning, air humidification and air cleaning system consists of 23 or more installed component parts (thermostat, furnace, cooling coil, supply diffusers, electronic air cleaner, etc.). The components used in the system may be supplied by 10 or more manufacturers. The components are supplied not to the consumer but to an installing dealer who designs, sizes and installs the system. The installing dealer is in effect the "manufacturer" over whom the individual component suppliers have no control.

In view of the fact that the products are installed in residences by parties over which the supplier has no control, it is not reasonable that the supplier should have any responsibility for acts or omissions of the installer which result in failure of the products.

A unit may perform in accordance with its rated characteristics, but be installed under circumstances where it does not provide the level of heating, air conditioning, or humidification expected by the consumer. This result can arise from a variety of reasons, including the installation of an undersized unit, inadequate or defective related equipment, improper venting or other installation work and a number of other possibilities. When a consumer receives such installed products, he might naturally assume that the product would provide the requisite degree of heating or cooling: i.e., be fit for the purpose for which it is installed. While the supplier could or should be held to the standard of performance of the product which he has expressed, he cannot be reasonably held to the requirement that the goods will be fit to provide the level of heating or air conditioning which is expected by the consumer. Accordingly, the supplier of the installed goods must reasonably be in a position to disclaim implied warranties which are inconsistent with the express warranty without any adverse inference that the goods are not warranted by the supplier to the "full" extent which may be reasonable.

If there is a reasonable alternative to a complete abolition of implied warranties, this fact should be incorporated in the Bill. We believe there is such an alternative and accordingly we recommend that Section 108(a) be amended to read as follows:

"Nothing in this Act shall prevent the supplier from disclaiming implied warranties which are inconsistent with his express written warranty provided that said limited disclaimer is set forth in clear and unmistakable language and prominently displayed on the face of the warranty and provided further that said limited disclaimer is not unconscionable."

VI. MODIFICATION TO REMEDIES

Remedies under the Bill are set forth in Section 110. In order to obviate frivolous suits and suits which may be brought about by misunderstandings, we believe that the "Remedies" provision of the Bill should incorporate the requirements of the Uniform Commercial Code:

Written notification by the consumer to the supplier of the alleged defect;

Demand for performance and a reasonable time in which to perform or settle the dispute.

In order to effectively incorporate this provision in the Bill, we recommend the following amendments to Section 110:

Amend Section 110(d) by deleting the proviso clause beginning on line 15 of page 14 of the Bill and substitute the following:

"Provided, that any person guaranteed must do the following before he may utilize any or all of the remedies provided by this Act:

"(i) Notify the supplier alleged to have employed or committed methods, acts or practices declared unlawful by this Act of the particular alleged violations within 30 days or more before commencement of an action pursuant to the provisions of this Act; and,

"(ii) Demand that the supplier correct, repair, replace or otherwise rectify the consumer goods or services alleged to be in violation of this Act.

"Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the last known principal business location of the supplier.

"No action by the person guaranteed under this Act may be maintained if an appropriate correction, repair, replacement or other remedy is given or agreed to be given to the buyer within 30 days after the receipt of the aforementioned notice."

VII. AMENDMENT TO THE SCOPE OF THE BILL

Under Section 112(b) only labeling, disclosure or other requirements of the state which are *inconsistent* with those set forth in the Bill shall not be applicable. The limited Federal pre-emption in this Bill will permit the enactment of more stringent state and local laws, and, in addition, generate years of litigation to determine which state *and* local laws and provisions thereof are "*inconsistent*" with the Federal law. Furthermore, manufacturers will be forced to have a multiplicity of warranties for the same product instead of one uniform national warranty which fully and conspicuously discloses in simple and readily understood language the terms and conditions of the warranty.

Our predictions are not ones obtained from a crystal ball. On March 1, 1971, the Song-Beverly Consumer Warranty Act went into effect in California. The requirements for an express warranty under the Song-Beverly Act are different than those specified in S. 986; however, we do not believe there is a single attorney who could, with any degree of accuracy, determine whether this Act is so totally "*inconsistent*" with S. 986 as to render it null and void. There are several states considering comparable laws.

If the consumer, as the President enunciated in his Executive Order 11583, has:

". . . the right to make an intelligent choice among products and services; and the right to accurate information on which to make a free choice;"

complete Federal pre-emption of state and local laws is required in this Bill. Therefore, we strongly recommend that Section 112(b) be amended to read:

"No state or political subdivision of a state shall have any authority either to establish or continue in effect any labeling, disclosure or other requirements with respect to consumer product warranties."

CONCLUSION

The gas appliance and equipment industry is, as I pointed out earlier, in favor of Federal warranty legislation which assures the purchaser complete information on the positive terms of the product warranty and conspicuous notification of any disclaimers of implied warranties of merchantability and fitness.

We are also firmly of the opinion that reasonable assurances should be given the purchaser that the terms of the warranty will be fully met.

When the Federal law requires full disclosure of all warranty terms including disclaimers, and provides effective enforcement procedures, pre-emption of state and local laws is in order. Only through complete pre-emption, as outlined above, can chaos be avoided in the writing and enforcement of warranties applicable in all 50 states.

Senator Moss. This will conclude our hearings today, but the hearings will resume tomorrow afternoon at 2 o'clock in this room.

(Whereupon, at 4:20 p.m., the hearing was recessed, to reconvene at 2 p.m. Tuesday, March 16, 1971.)

CONSUMER PRODUCTS WARRANTIES AND IMPROVEMENT ACT, 1971

TUESDAY, MARCH 16, 1971

U.S. SENATE,
COMMITTEE ON COMMERCE,
CONSUMER SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 2:35 p.m. in room 5110, New Senate Office Building, Hon. Marlow W. Cook presiding.

Present: Senator Cook.

Senator COOK. The subcommittee will be in order.

I apologize for my tardiness. We have had a series of votes, and we will have some more. So I think the sooner we get started the better off we will be.

Mr. Clarence G. Adamy, president of the National Association of Food Chains.

STATEMENT OF CLARENCE G. ADAMY, PRESIDENT, NATIONAL ASSOCIATION OF FOOD CHAINS, WASHINGTON, D.C.

Mr. ADAMY. I am Clarence G. Adamy. I am president of the National Association of Food Chains. NAFC is a nonprofit trade association of corporate food chains of the United States, representing some 225 companies ranging in size from those operating two stores to those operating as many as 4,000 stores.

I appear before you today to testify in general support of the objectives of S. 986, because we believe that many of the provisions of title II will add to the ability of the Federal Trade Commission to quickly and effectively protect the consumer from that fringe of the business community by which he is too often open to exploitation.

Our legal counsel is preparing a more detailed and comprehensive analysis of this legislation which we shall file with you at an early date and which I would appreciate having included in the hearing record following my oral presentation.

Senator COOK. That will be done.

Mr. ADAMY. In order to conserve the time of the subcommittee, however, I would like here to summarize our views and answer any questions that might arise.

At the outset may I simply endorse the suggestion that has been made to this subcommittee by a number of witnesses that the two titles of the bill be handled as separate measures. The specific warranties

provisions of title I have been examined in greater depth during the legislative hearings than have the current proposals in title II concerning expansion of the authority of the Federal Trade Commission. While it is true that the subject area of title II was reviewed in hearings before the Senate Judiciary Committee last year, the provisions as now written in S. 986 differ considerably and appear to be contrary to the weight of the testimony offered that committee.

At this time I would limit my comments concerning title I to the suggestion that those problem areas exposed by other witnesses who are most directly involved deserve serious study. Insofar as food retailers are concerned we are properly covered under section 103(b).

I might make the point at this juncture that one of the important reasons for the success of the food chain system is the fact that all have always offered unqualified money-back guarantees for all merchandise, regardless of source. I know of no food chain that does not have such a policy today, and rigorously enforce it.

The matters to which S. 986 and other consumer protection proposals address themselves are of particular concern to chain supermarket operators. As merchants offering many thousands of items for sale to the consumer, each of which carries a small individual price and nearly infinitesimal profit, we are uniquely aware of the necessity of attracting repeat business from satisfied customers.

At the same time, because of our industry's position in society, perhaps even more than other businessmen we recognize the reflection on the entire business community of that small segment of it that treats the consumer unfairly or inequitably.

For these reasons we support the concept of rigorous enforcement of sound consumer protection measures by agencies such as FTC, armed with the power and funds necessary to assure every shopper of justice in the marketplace.

In our statement presented to this subcommittee on April 17, 1970, NAFC supported the grant of increased power to FTC to ask courts to issue preliminary injunctions pending final administrative determination to halt unfair acts or practices. With the assurance of speedy administrative proceedings, we continue to support this increased power.

Likewise, we have previously endorsed and continue to support expansion of FTC's jurisdiction into matters "affecting" commerce as provided in section 201 of S. 986.

While, as I have indicated, we are in general support of S. 986, we are most troubled by two of its specific provisions in title II.

The first of these is in section 202, which would authorize the Commission "to take any other action necessary to redress injury caused by such acts or practices to consumers."

This is, as the subcommittee is undoubtedly aware, a drastically truncated version of language previously considered by this body during the last Congress which articulated a number of specific remedies to be made available to the Commission in certain cases. As reported by the full committee, the Commission would have been empowered to seek redress in court for these specific remedies.

It seems to us far preferable in matters of this kind for Congress to spell out in detail—for the guidance of both the Commission and the business community—the powers and authority of the Commission

in some detail, rather than granting it unbridled discretion such as this one, which we cannot help but view as a "doomsday provision" of potentially awesome consequence.

Additionally, we are advised by counsel that this section raises constitutional questions to the extent that it may allow the Commission to award damages in civil actions without a trial by jury, in violation of the seventh amendment.

Secondly, the trade regulation rule provision in section 208 would, it seems to me, grant the Commission legislative powers to issue rules that have statutory effect, cutting off the traditional rights of affected parties to contest the agency's view of the law. Exercise of this power, at least through the procedures set forth in the bill, is contrary to the appropriate role of the Commission, and the grant should not be made.

In the past when Congress has granted the Commission authority to promulgate legislative rules it has done so expressly and in limited areas where Congress itself has made extensive legislative findings. We believe this to be sound procedure and urge that it be continued.

Our feelings about both of these provisions, among others, will be spelled out in more detail in our written testimony and I urge that they receive serious consideration by this subcommittee.

Senator COOK. Thank you very much, Mr. Adamy.

What you are saying in essence is that first of all the two titles should be separated?

Mr. ADAMY. Yes, sir.

Senator COOK. And you have very few reservations about title I, as I take it from your statement?

Mr. ADAMY. Inasmuch as they affect food retailers, very minorly.

Senator COOK. In other words, without section 2 you probably would not be here testifying?

Mr. ADAMY. We would not be a party of interest to that degree, yes, sir.

Senator COOK. And section 2 gives you troubles purely and simply because of the tremendous broad and unbridled rulemaking authority it gives to the Federal Trade Commission?

Mr. ADAMY. Unspecified, yes, sir.

Senator COOK. I am very interested in your remark, that you feel that the Commission's authority to award damages in civil actions without trial by jury would be a violation of the seventh amendment. You are going to make me do a little more homework.

Mr. ADAMY. My counsel informs me, I am not an attorney, that the seventh amendment provides for the right of trial by jury in any award of more than $20. And this could be possible, and therefore you could have a violation. The force of this proposal is that FTC has such power.

Senator COOK. Now, you have no problems with granting to the FTC injunctive relief?

Mr. ADAMY. That is right, with assurances of prompt action by FTC, as the administration's bill provides and as most judges—any judge would provide.

Senator COOK. Then would you be satisfied with the language in the administration bill that provides that in seeking a preliminary injunction it is incumbent upon the FTC to commence its action within a

reasonable period of time and file its complaint; otherwise, such a temporary or preliminary injunction would be dissolved?

Mr. ADAMY. I not only would support that, but I would urge you to consider the possibility of simultaneously entering the complaint. If they are going to win in court a position from the judge, they must present enough case to demonstrate the validity of their posture. If they can do that, they ought to be able to enter the complaint at this time. So at least promptly. I really do not see that there is any real reason not to make it simultaneously.

Senator COOK. Mr. Adamy, as many problems as I see with title II, I must honestly say that many times when one has to get an injunction, one has to do it expeditiously for the benefit of the general community, for the benefit of many, many things that present themselves at that time. In all fairness they really do not have the occasion to prepare and submit a properly drafted complaint. So, as is usually the case in the filing of either a preliminary or temporary injunction, a time limit is established by the court within which the complaint should be filed, and I think this would not violate your basic theory.

Mr. ADAMY. Exactly so. I certainly do not want to belittle our point by asking for an administratively or clerically impossible task.

Senator COOK. With the broad provisions that you have read and expressed in S. 986 and with the almost complete and unbridled authority of rulemaking, do you feel there is any necessity to hold hearings on S. 984, for instance, that would call for consumer class actions; or do you believe the broad authority that is granted in here would be sufficient for the FTC to establish regulations on that themselves?

Mr. ADAMY. If enacted, it certainly would be. I think there would be no reason, if this is enacted, to consider S. 984.

Senator COOK. Thank you, Mr. Adamy.

Mr. Sutcliffe.

Mr. SUTCLIFFE. Mr. Adamy, I have just one question. You object to the provision in title II of S. 986 that would allow the Federal Trade Commission to award relief to consumers directly for fear that that provision as presently drawn would authorize unbridled Commission action. In a situation where there has been an unfair, deceptive act or practice, where there has been a cease-or-desist order, would you have objection to empowering the Commission not to award damages but to rescind the contract that was entered into because of an unfair or deceptive act or practice? In other words, limit the remedy available to the Commission to something very narrow, such as recission or restitution of the money paid by the contract. Do you have any feeling for that particular question?

Mr. ADAMY. I like the approach you are taking now in that you are now starting to specify the areas in which they can act, defining them carefully, and that we agree to. If there has been a sin committed and it has been established by due process, and you make them make restitution, generically I agree with you.

I am not a lawyer and I do not want to get in over my head here. But your basic point is totally correct, and I agree with it, and it is our posture to agree with that.

Mr. SUTCLIFFE. I appreciate your comment. You realize when we go through the legislative process we often start with the general and

try to work down to the specific, and we will certainly try to do this in this legislation.

Mr. ADAMY. I particularly appreciate the fact that you are proceeding this way with due proceedings where there is a chance for counterproposals and counteractions, and this is what won my approval of your point of view.

Senator COOK. As long as the right of the defendant is such to appeal?

Mr. ADAMY. Certainly.

Senator COOK. Thank you, sir, very much.

Mr. ADAMY. Thank you, Senator.

(The following information was subsequently received for inclusion in the record:)

NATIONAL ASSOCIATION OF FOOD CHAINS,
Washington, D.C., March 29, 1971.

S. LYNN SUTCLIFFE,
Senate Committee on Commerce,
New Senate Office Bldg.,
Washington, D.C.

DEAR MR. SUTCLIFFE: During my March 16 oral testimony on S. 986, I indicated that our legal counsel was preparing a memorandum relative to certain aspects of Title II. Enclosed herewith is that memorandum which evaluates proposed § 208, granting legislative rulemaking power to the Federal Trade Commission, and that part of § 202 which would authorize the Commission to impose unlimited sanctions on firms found to have committed an unfair or deceptive act or practice.

Senator Cook stated during the hearing that this memorandum would be placed in the record. I hope the views contained therein will be helpful to you and to the Committee.

Sincerely,

CLARENCE G. ADAMY, *President.*

MEMORANDUM

MARCH 29, 1971.

To: Subcommittee on the Consumer, Senate Committee on Commerce.
From: National Association of Food Chains.
Subject: Certain aspects of title II, S. 986.

In the course of his testimony on March 16, 1971, Clarence G. Adamy, President of the National Association of Food Chains, stated that the Association's legal counsel was preparing an analysis of certain aspects of S. 986 which would be furnished to the Committee at a later date.

This memorandum offers that analysis in an effort to demonstrate that Congress should not delegate authority to the Federal Trade Commission to promulgate legislative-type rules covering the entire range of the Commission's jurisdiction and further that the procedures which would be established by § 208 are wholly inadequate to the formulation of legislative-type rules and to the reasonable protection of the rights of parties which would be affected thereby.

In addition, this memorandum demonstrates that the Commission should not be empowered to order redress as proposed in § 202 of the bill. The breadth of this provision is unlimited and could impair the Commission's performance of its traditional role.

I. SECTION 208: PROMULGATION OF LEGISLATIVE-TYPE RULES

Proposed § 208 of S. 986 would amend § 6(g) of the Federal Trade Commission Act to empower the Federal Trade Commission to issue substantive and procedural rules and further to authorize the agency to promulgate rules and regulations "defining unfair or deceptive acts or practices in a manner sufficiently specific to reasonably inform affected persons of the acts or practices prohibited." When such rules become final, after certain enumerated, truncated procedures, which are hereinafter considered, they would have legislative effect. Any violation of the rule would constitute an unfair or deceptive act or practice under § 5(a)(1) of the Federal Trade Commission Act.

A. The Commission should not be given authority to promulgate legislative-type rules

It is evident that the proposed legislation would authorize the Commission to issue legislative-type rules, not merely those of interpretive or advisory effect. In promulgating legislative-type rules the Commission would be exercising the powers of Congress to identify and describe unlawful practices. Once a rule is final, the rights of parties against whom proceedings are initiated thereunder would be cut off and there would be no opportunity to challenge either the substance of the rule or the procedures or record upon which it is founded. In such a proceeding, the Commission would, moreover, rely on the "record" of its administrative proceedings, however fashioned, in establishing its adjudicative groundwork. Rules of this nature differ markedly from interpretive rules such as guides or enforcement policies in that adjudicative proceedings may not be based on such statements but must proceed from the underlying statute itself.

The Federal Trade Commission is unique among administrative agencies. It does not operate in a narrowly confined subject area as does the National Labor Relations Board nor does it exercise quasi-public utility control over closely regulated sectors of the economy where licenses are often required as a condition of doing business. Rather its authority ranges broadly over the entire market-regulated sector of the economy.

In the consumer protection field, the Federal Trade Commission may attack a diversity of practices including misleading advertising, false labeling, lotteries, bait and switch tactics, the dissemination of false advertising of food, drugs, cosmetics and devices and a number of similar practices, all under the Federal Trade Commission Act as amended by the Wheeler-Lea Act in 1938. In addition, specialized statutes have given the Commission specific, limited authority to proceed in the areas of misbranding of wool, fur and textile fiber products as well as hazardous substances. More recent enactments have given the Commission certain specific rulemaking and enforcement jurisdiction under the Fair Packaging and Labeling Act and the Truth in Lending Act.

The Commission also possesses substantial power in the anti-trust field. Under the Federal Trade Commission Act, the agency may proscribe in their incipiency practices which when full blown would be violations of the Sherman Act, the Clayton Act, or other antitrust statutes.[1] And, of course, the Commission has coordinate jurisdiction with the Department of Justice for the enforcement of the Clayton Act.[2]

From this brief survey it can be readily seen that the jurisdictional range of the Commission is enormous. It stands in stark contrast to that of those agencies whose concern is with such confined fields as communications, air routes and transportation. Equally significant, the Commission moves in an economic environment where a license is not required as a precondition to business operations. No federal permission is necessary to the production and sale of food, clothing and sundry other products made and sold by firms which are subject to the Commission's jurisdiction. Indeed the concept of licensing is foreign to the basic national policy covering by far the preponderant sector of the economy.

The provisions of § 208 would authorize the Commission to legislate across this broad field without limitation as to any aspect of its jurisdiction. Both complex antitrust questions as well as unfair consumer practices could be covered.

In implicit recognition of the wide latitude of the Commission's jurisdiction, Congress in 1914 deliberately tailored the provisions of the Federal Trade Commission Act so that they would have the more generalized applicability to the evolving types of conduct which could arise in a dynamic industralized society. Congress deliberately refrained from enumerating the specific acts and practices which would come within the sweep of § 5. Congress furnished the Commission with adaptable language whereby it could evaluate changing patterns of conduct and determine in the first instance whether an unfair method of competition or, since 1938, an unfair or deceptive act or practice had occurred.

No doubt sensitive to the broad powers vested in the Commission, Congress provided that the agency's orders in such proceedings would be entered only after a trial type hearing with full right of cross-examination and would be

[1] See, e.g., *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357 (1965); *Brown Shoe Co.* v. *Federal Trade Commission*, 384 U.S. 316 (1966).

[2] §§ 11 and 15 of the Clayton Act, 15 U.S.C. §§ 21, 25.

subject to thorough judicial review. In the same vein, since the substance of the Commission's orders would inevitably involve novel applications of law, there were and are of only prospective effect and do not partake of the redress that might be obtained in proceedings under a statue structured to cover more specific type of conduct.

This legislative design has operated effectively since the organization of the Commission to permit it to act with flexibility through adjudication in fashioning new legal concepts while maintaining the rights of firms subject to its jurisdiction to procedural due process, insulated against penalties and similar sanctions for past conduct. Sections 5(a)(6) and 5(b) of the Federal Trade Commission Act authorize the agency to prevent unfair methods of competition and unfair or deceptive acts or practices through the issuance of cease and desist orders. These orders operate entirely with prospective effect.

The contrast between the Commission and the licensing agencies is clear. While agencies with broad public utility and licensing powers may appropriately be given properly structured powers to promulgate rules with the force of law, the grant of such powers to a wide-ranging enforcement agency is inconsistent with sound administrative procedures and considerations of fundamental fairness. There is, moreover, no evidence whatever that Congress intended the Commission to act as a five-man legislative body in which as few as two of its members could enact through rulemaking precise "statutes" governing all aspects of business. We are not aware of any administrative agency with the jurisdictional scope of the Commission to which Congress has delegated open-ended legislative powers. Indeed, such broad delegation could raise serious constitutional questions concerning the power of Congress in such a generalized manner to abdicate its legislative function.

Where Congress has authorized the Commission to promulgate legislative type rules it has done so with regard to narrowly confined subject matters and pursuant to legislative standards which describe in detail the nature and scope of the regulations which may be issue. Illustrative of Congressional enactments granting such power are the Wool Products Labeling Act, 15 U.S.C. §§ 68–68j; the Fur Products Labeling Act, 15 U.S.C. §§ 1191–1200; the Flammable Fabrics Act, 15 U.S.C. §§ 69–69j and the Textile Fiber Products Identification Act, 15 U.S.C. §§ 70–70k.

More recently, Congress authorized the Commission to promulgate certain rules of legislative force under the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–61; however, even in this statute the Commission's authority is limited to prescribing certain features of the statutorily required declarations to be set forth on the labels of packaged consumer commodities and to certain other issues, such as cents-off labeling, which might arise in the administration of the Act.

Title I of S. 986, itself, contains rulemaking provisions with respect to guaranties and warranties which are in direct conflict with those contained in Title II. Title I specifically enumerates and limits the subjects which may be covered by Federal Trade Commission regulations whereas Title II would empower the Commission to legislate through the entire economy.

The conclusion is inescapable that up to this time Congress has not seen fit to delegate its entire *legislative* function to the Commission but has reserved to itself the enumeration of practices which as a statutory matter should be unlawful. The Commission was intended to act through adjudication to supply the interstices of the broad statutory mandate of § 5 in *ad hoc* situations looking to a remedy of prospective force.

Section 208 would stand this historical concept of the Commission on its head. The Commission itself would be the legislative body, and the forging of new approaches would no longer be on the anvil of adjudication but rather through the unconfined rulemaking discretion of the Commission acting in whatever area of the market regulated sector of the economy that the Commission might choose. In addition the "laws" promulgated by the Commission would no longer be of prospective force but could serve as the basis for civil penalties under § 202 of S. 986 and form the basis for class actions under the companion bill S. 984. Such a grant of power would not only destroy the rights of private persons but would operate to the detriment of the Commission itself.

The Commission's effectiveness in the past has most often been achieved through adjudication which has fashioned new legal theories on the basis of concrete facts, developed in trial-type hearings, which have resulted in innova-

tive approaches to the antitrust and trade regulation laws.[3] The broad-brush legislative power which would be sanctioned by § 208 would inhibit this flexibility or would permit flexibility and innovation only in a manner which undermines the basic concepts of administrative due process.

Even if the Commission were to have available adequate manpower resources, it lacks the expertise to legislate generally in broad sectors of the economy on the abbreviated set of facts which would inevitably be present in a rulemaking proceeding. The consequence of its undertaking to make such laws could either be to rigidify the Commission's approach in an attempt to seek simplistic solutions to problems which do not lend themselves to such resolution or to produce a hopeless hodge-podge of unworkable rules which Congress might ultimately be called upon to unravel. By way of illustration, the Commission recently undertook to promulgate trade regulation rules governing games of chance in the supermarket and petroleum industries. The nature of the rules finally promulgated has resulted in a practical preclusion of games which was accomplished without the benefit of an adjudicative record or the opportunity for judicial review thereon. Such a procedure does not do credit to the agency nor does it afford private persons the right fully to present their case.

Finally, it is submitted that there is no need for Congress to give the Commission the powers encompassed by § 208. The adjudicative process itself has worked efficiently over the past half century as a mechanism for the development and announcement of law and policy. Moreover, the Commission has a number of non-adjudicative tools for the announcement of general policy which do not preclude private parties from a fair hearing on a fair opportunity for review. These include guides,[4] advisory opinions,[5] and enforcement policies.[6] Whereas these procedures permit the Commission to declare its position on various issues they do not interfere with the guaranties of administrative due process. Cases must be maintained on the basis of the underlying statute, and adjudication does not turn on the interpretive statements of the Commission.

B. The procedures prescribed by § 208 are wholly inadequate to protect the rights of affected parties

Proposed § 208 of S. 986 fails to provide procedures to be followed by the Commission in promulgation of substantive rules and regulations defining unfair acts or practices which would assure that even-handed and equitable standards of fairness will be accorded affected and interested parties.

Under the provisions of § 208, a hearing would be held on a proposed rule only "if requested"; nowhere is the nature or scope of such a hearing specified. No provision is made for sworn testimony or cross-examination and there is no requirement that the Commission's rule be based solely on the hearing record or supported by detailed agency findings of fact or conclusions of law. In fact, it does not appear that the Commission's issuance of a rule would be based entirely on the record. There is likewise no provision which would require the agency to found its rule on reliable and probative substantial record evidence. And the proposed provisions for judicial review are inadequate to permit affected parties to test the validity of the rule.

On this informal, unstructured procedure, S. 986 would empower the Commission to legislate throughout the economy. It is no answer that Congress often enacts laws under procedures somewhat similar to § 208, for the simple fact is that the Commission is not Congress but rather consists of five individuals appointed for seven-year terms who are not in any way responsible to the electorate.

Given the truncated procedures under which these rules would be promulgated and the limited scope of review available as to their validity, this provision must be candidly recognized as a radical delegation of congressional legislative power without guarantee that the administrative rulemaker will accord all interested parties complete and sufficient opportunity fully to participate in the rulemaking process. In fact it is illuminating to note the response of Chairman Kirkpatrick to the inquiry of Senator Cook questioning the propriety of the summary procedure to be followed in the Commission's legislative process.

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[3] See, e.g., Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374 (1965) (Application of FTC Act to television "mock-up"); Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967) (Application of Clayton Act to conglomerate mergers).

[4] Federal Trade Commission, General Procedures, §§ 1.5, 1.6.

[5] *Id.*, §§ 1.3, 1.4.

[6] See, *e.g.*, Federal Trade Commission Enforcement Policy with Respect to Mergers in the Food Distribution Industries.

The Chairman stated:

In my own view, the Commission can adopt fair rules without the delays, the unending delays and interruptions that I am fearful would really break down our rulemaking proceeding were full cross-examination and discovery as a matter of due process to be compulsory. I would be very apprehensive that, it would be a month of Sundays and much longer before we could adopt a rule that was going to be unpopular to those who would be governed by it, and by and large rules are not always the most popular thing, people have to change their ways because of the existence of a rule and the longer they can fend it off, the happier they are. That is my problem.

Section 208 would authorize the promulgation of substantive legislative rules not just related to protection of the consumer in the market place but covering all supposed "unfair or deceptive acts or practices" throughout the national merchantile arena on the basis of unsworn, unverified testimony and submissions not placed on the record.

Under present standards, and as would be the case under § 208, the Commission enjoys wide latitude for the development of a rulemaking record and for other standards upon which the promulgation of its rules may be based. It could, as it has in the past, rely upon unsworn, unverified statements, oral and written, and can preclude all cross-examination of all persons, including those propounding unreliable, exaggerated, and inaccurate factual assertions. It could, as it has in the past, rely in large measure upon such extra-record, unverified make-weights as its asserted "accumulated experience" with particular industry practices as well as unnamed "studies and reports" on an industry's practices.

If businesses are to be subjected to the severe risks imposed by § 202 of S. 986 and the related provisions of S. 984, the consumer class action bill, and if an industry is to be publicly tarred with having engaged in such acts and practices as to necessitate the promulgation of a trade regulation rule, the principle of fair and equitable treatment establishes the need for more adequate procedural safeguards.

Significantly, the rulemaking procedures currently employed by the Commission in rulemaking under the Fair Packaging and Labeling Act specifically require that the regulations "shall be based *only* on substantial evidence *of record*."[7] Extra-record, unverified material is thus specifically excluded from the legislative process.

As a minimum, interested parties to Commission rulemaking proceedings authorized by § 208 should be afforded the right to complete cross-examination of other persons who testify at rulemaking proceedings. Similarly, the documents and knowledge lodged deep within the Commission and which represents its "accumulated experience" and unnamed "studies and reports" should be spread on an open record and subjected to the cross-examination process. The question cannot be avoided: Will the "accmulated experience" of the Commission always withstand the glare of reasoned and careful analysis? There is no need for blind faith in the adequacies of Commission staff attorneys and economists. Appropriate and fair rule-making is always the product of well-informed efforts.

Moreover, under § 208 the Commission could, as it has in the past, delegate its responsibility to conduct a rulemaking proceeding to a Commission attorney, thus waiving any opportunity for the Commissioners to hear and weigh the validity of the testimony presented and the credibility of those proferring it. Moreover, the staff attorney to whom this function is delegated is often the one responsible for drafting the proposed rule on which the hearing is conducted. His objectivity in evaluating the evidence is obviously subject to question. While these procedures may be acceptable in the case of advisory rules, they are inappropriate in the formualtion of legislative rules which will have the full force and effect of law.

As critical as any other deficiency in § 208 is its failure to require the Commission to set out legislative findings of fact which demonstrate the need for the particular rule being promulgated. Several fundamental considerations militate for a requirement of complete findings by the Commission as a predicate to legislating specific acts and practices unlawful: (1) Effective judicial review of the Commission's action would be facilitated. In fact, based upon a "concise general statement of its basis and purpose", the only required "finding" under

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[7] Food, Drug, and Cosmetic Act, § 701(e)(3), 21 U.S.C. § 371(e) (3) [Emphasis supplied].

§ 208, meaningful judicial review of a rule would be no more than a pipe dream; (2) The Commission would be thereby encouraged not to roam beyond the bounds of its jurisdiction; (3) Interested and affected parties would be equitably assisted in their preparation of petitions for judicial review of the rulemaking proceedings; and (4) Finally, the required preparation of findings would help protect against careless or arbitrary action. Any lawyer or layman can appreciate that when one is confronted with a complex set of facts or law, the process of analyzing in writing what is understood only imperfectly will immeasurably enhance further understanding.

The words of Judge Jerome Frank, though addressing the preparation of adjudicative rather than legislative facts, are instructive.

It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.[8]

Chief Justice Hughes once remarked:

An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles." [9]

Judge Frank went on to say that Chief Justice Hughes' comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which we trust, seldom exists.[10]

The argument that procedures which will adequately protect the rights of affected parties would unduly prolong Commission rulemaking is not compelling. First, essential considerations of administrative due process should not be sacrificed on the altar of expedition. Second, if the agency has thoroughly done its homework in preparation for a rulemaking proceeding and has been able to fashion a rule which is responsive to the needs of the public and the realities of the industry involved, there is no reason why complete and fair procedures will frustrate the rulemaking function. Perhaps the concern with a time lag in the promulgation of rules in this context is tacit recognition of the impropriety of legislative rulemaking over so broad an area as is encompassed by the jurisdiction of the Federal Trade Commission.

The provisions for judicial review provide that the reviewing court shall set aside agency "action, findings, and conclusions found to be unsupported by substantial evidence upon the record as herein defined." The patent shortcomings of such a record have immediately above been explained. At a minimum, agency action should be invalidated if it is not supported by substantial evidence on the record *as a whole*. The mere intrusion of some evidence into the record in support of a rule should not preclude the court from reversing agency action if the entire record demonstrates that the supportive showing does not merit credence or weight.

Finally, there is substantial question whether a party who has not contested a rule in the Court of Appeals for the District of Columbia Circuit immediately subsequent to promulgation as provided for in § 208 could make a collateral attack on the validity of the rule in a later enforcement proceeding.

II. SECTION 202: COMMISSION REDRESS ORDERS

Proposed new § 5(a)(7) of the Federal Trade Commission Act had its genesis in S. 3201, considered by this Subcommittee in the last session of Congress. In Committee Print No. 2 of S. 3201, Section 103 authorized the Commission in any proceedings it instituted to order * * * [the respondent] to take such action

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[8] *United States* v. *Forness*, 125 F. 2d 928, 942 (2d Cir. 1942).
[9] Address before Federal Bar Ass'n. in 1931, quoted in N.Y. Times, February 13, 1931, p. 18.
[10] *United States* v. *Forness*, *supra*, n. 8, at 942.

as the Commission shall find necessary to redress injury caused by such acts or practices to consumers, including, but not limited to, payment of damages, refund of money or return of property, restitution, reformation or rescission of contracts, repair or replacement of goods, proper servicing, and public notification of violation.[11]

Section 202 of S. 986 would substitute in lieu of the specific remedies articulated in S. 3201 the authority for the Commission to order a respondent to take any other action necessary to redress the injury caused by such acts or practices to consumers.

This grant of authority to the Commission to fashion and shape remedies without either standard to guide or limitations upon its remedial actions far exceeds the bounds of accepted administrative discretion. Specific remedies which may be required by the Commission should, at a minimum, be set forth with precision by the Congress and not left to the unconfined discretion of an administrative agency.

There is substantial question whether the Federal Trade Commission presently possesses the authority to require affirmative redress in administrative proceedings. The Commission is energentically testing its authority in this regard. In cases presently in the pipeline, the Commission staff argues that the agency may require reimbursement of prepaid subscription fees following the terminated publication of a magazine. The staff is also arguing that companies found to have violated the Federal Trade Commission Act must so state in their subsequent advertising for a period of time. In fact in one of its proposed orders the Commission staff reserves the right to require that a certain product be taken off the market if the cautionary statements which would be required in the advertising under this order do not thoroughly apprise the consumer of its alleged hazards. These are but a few examples of the manner in which the Commission staff is currently and vigorously assessing the boundaries of the agency's jurisdiction. It would seem far preferable as a matter of legislative policy to evaluate the powers now held by the Commission before making such a generalized grant as is contained in the proposed bill. The same principles, in fact, apply with equal force to both § 202 and § 208.

Moreover, if the Commission is to be vested with the authority to cloak its orders with retrospective remedial power, other questions of practical moment arise. For instance, if the Commission were not to confine its remedies to prospective application it would be held to a much stricter standard. What affect this burden would create on the Commission's limited resources in effectuating its role as a flexible, responsive element for consumer protection in the economy cannot be foreseen. It is not unreasonable to predict that the Commission's resources would be over-committed to justification of retrospective remedies relative to staying abreast with current changes in the economy and providing aggressive regulation therein.

In addition, the proposed grant if made could be construed as authority for the Commission to award damages and similar legal remedies. Constitutional problems immediately arise. Under the Seventh Amendment of course, parties in civil actions involving more than $20 are entitled to jury trial. Questions arising out of breach of contract and tortious conduct were treated as common law jury questions and that right is guaranteed today. Liability and amount of damages, if any, are to be determined by jury if not voluntarily waived by the parties. "It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution."[12] While it may be that an administrative agency has broad powers to fashion equitable remedies, and even civil penalties under an expressed stautory delegation, we are not aware of any right of an agency to preclude jury determination.

Senator Cook. Our next witness is Mr. Eugene A. Keeney, president of the American Retail Federation.

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[11] It should also be noted that S. 3201 as approved by the Commerce Committee would have authorized the agency to proceed *in court* for such redress.

[12] Stevens v. Howard D. Johnson Co., 181 F. 2d 390, 394 (4th Cir. 1950).

STATEMENT OF EUGENE A. KEENEY, PRESIDENT, AMERICAN RETAIL FEDERATION, WASHINGTON, D.C.; ACCOMPANIED BY JAMES MARSHALL GOLDBERG, VICE PRESIDENT OF GOVERNMENT AFFAIRS DIVISION

Mr. KEENEY. Thank you, Mr. Chairman.

My name is Eugene A. Keeney. I am president of the American Retail Federation. Accompanying me is James Marshall Goldberg, vice president of Government affairs division of our federation.

We are a national organization which, through its 50 State and 28 National retail trade association affiliates, represents more than 800,000 retail establishments of all types across the country.

The federation finds much to support in the bill, S. 986, introduced by Senators Magnuson, Moss, and other distinguished members of this committee. We also support many of the concepts in the administration's proposal. However, the Federation offers below substantive and constructive proposals which would give added protection to the consumer by clarification and elucidation of both bills.

TITLE I—WARRANTY PROVISION

The Federation has long advocated clear and meaningful guarantees offered on products sold to the consumer. While guarantees are primarily the creation of the manufacturer, the Federation has worked with manufacturers to voluntarily develop programs directed toward the improvement of guarantee practices.

Last year the Federation testified on the voluntary efforts to improve and simplify warranties. We were pleased to work with the Association of Home Appliance Manufacturers and the Gas Appliance Manufacturers Association in establishing the Major Appliance Consumer Action Panel (MACAP). In addition, at least four of our national trade association affiliates—the National Retail Merchants Association, the Association of General Merchandise Chains, the National Home Furnishings Association and the National Appliance and Radio–TV Dealers Association—launched independent programs designed to simplify and improve guarantees. These programs are proceeding successfully.

In January 1970, when the Federation testified on S. 3074, we expressed our deep concern that the bill had gone beyond disclosure by imposing severe restrictions on the content of guarantees themselves. We are pleased that the committee adopted many of the suggestions made in our testimony and that S. 3074, as it passed the Senate last year, had become primarily a disclosure measure.

Title I of S. 986 is, with some minor changes, the same bill that passed the Senate in 1970. However, there are some problem areas remaining in that bill. With respect to Federal preemption, section 112(b) of S. 986 provides that:

> Labeling, disclosure or other requirements of a State with respect to written warranties against defect or malfunction of a consumer product inconsistent with those set forth in sections 102, 103 or 104 of this Act shall not be applicable to warranties complying with any of those provisions.

SECTION IS TROUBLESOME IN AT LEAST THREE ASPECTS

First is the meaning of the words, "or other," which has been added to the bill passed last year. One interpretation of these words would be that S. 986 would supersede State labeling and disclosure requirements, as well as any other requirements which may relate to the content of the guarantees themselves.

For example, this interpretation would serve to supersede the California warranty law requirement of providing service within the State within 30 days of a consumer claim, if the Federal Trade Commission, in exercising its authority under section 109 of S. 986 were to decide that a 60-day period for servicing was desirable.

Senator COOK. Let me stop you right there, if you don't mind.

Mr. KEENEY. Not at all.

Senator COOK. I have the feeling the words do mean what you have indicated. We had a witness yesterday, if I am not incorrect, who made it very plain that he thought if we were going to do anything for the benefit of the industry that we really preempt this field. Do you feel that it should be preempted?

For instance, you talk about the California law. It is my understanding that it is pending in two or three other States. It is presently pending before the State legislature in the State of Georgia.

Is it your feeling that this field should be preempted so that an association such as yours, for instance, can have one clear-cut policy rather than conceivably 50 policies?

Mr. KEENEY. This is our position, sir.

Senator COOK. All right. Thank you.

Mr. KEENEY. However, the rule of legislative interpretation known as *expressio unius est exclusio alterus* dictates that, where a general term follows a listing of specific terms, the expression of the specific is the exclusion of all other specifics. Thus, using this doctrine, the words, "or other," would relate *only* to labeling and disclosure requirements of State law, and not substantive requirements such as is contained in California's Song bill. We believe that this doctrine should not be followed in this case.

Second, section 112(b) limits its application to sections 102, 103, and 104 of this bill. We believe that the preemptive provisions of section 112(b) should apply to the entire bill.

Third, the use of the word "inconsistent" is troublesome, because its definition is often imprecise. A lack of uniformity in this area would result in harsh penalties to warrantors who would be forced to comply with different regulations at different levels of government. Dual regulation, whether consistent or inconsistent, does not alleviate consumer confusion; rather, it enhances it.

The question of what is inconsistent again crops up when one considers the proposed Federal law in relation to the recently effective California statute. This, as we pointed out before, requires that suppliers making a guarantee within the State repair the guaranteed products within 30 days of a consumer claim. However, if the FTC, in exercising its section 109 authority under S. 986, mandated that a supplier making a "full" guarantee had the duty to repair or replace

within 60 days, would the California requirement be considered inconsistent, and thus of no effect? We would hope so.

In view of these problems, Mr. Chairman, in our statement we recommend amendment of section 112(b).

Senator Cook. Let me read it. I wonder what we do with your new section 112(b) in regard to the Uniform Commercial Code. If either one of you can answer that, I think we ought to get it in the record.

Why don't you go ahead and read that section?

Mr. Keeney (reading):

(b) Labeling, disclosure, or other substantive or non-substantive requirements of a state with respect to written warranties against defect or malfunction of a consumer product inconsistent with or more stringent than provisions of this Act or rules and regulations adopted by the Federal Trade Commission in implementing the provisions of this Act shall not be applicable to warranties complying with any provision of this Act.

Shall I continue?

Senator Cook. Yes, go ahead.

Mr. Keeney (reading):

FTC REGULATORY AUTHORITY

The regulatory authority conferred on the Federal Trade Commission by title I is vast. We fear that such an open-ended delegation might possibly lead to the end of advertising of guarantees. Such a move would adversely affect the consumer by depriving him of needed information.

In section 102(a) there is a lengthy list of items which the Commission may require to be included in a written warranty. The Commission is not, however, limited to this list. We recommend, for example, that on line 14 of page 5 of S. 986 the words "among others" be deleted and replaced by the words "as applicable." his would make it clear that the Commission could not require inclusion of items beyond the 14 listed in section 102(a).

The inclusion of the words "as applicable" will make it clear that the Commission does not have to require the 14 items where the situation does not warrant it. It is only with respect to warranties meeting the "Federal minimum standard" that the Federal Trade Commission is given substantive regulatory authority. With this exception S. 986 is essentially a disclosure statute. This minor change in 102(a) will certainly reflect this.

Something more is needed to insure that the Federal Trade Commission is not to be given the authority to regulate the substantive terms of warranties, but is only authorized to issue rules that attempt to insure the clear and conspicuous disclosure of whatever warranty terms and conditions are decided upon by the supplier.

For example, under section 102(a)(8) the Commission would be able to require inclusion in a written warranty of the availability of any informal dispute settlement procedure for any warranty dispute. The Commission could decide to issue sample warranties which warrantors may incorporate by reference in their warranties. All of these examples could include provisions for settlement of disputes by arbitration. This would almost force a warrantor to include arbitration language in a warranty even if he did not wish to do so. Thus, the Commission would be in the substantive warranty business.

Therefore we recommend the following language be included in section 102 at the end of subsection (b): "Nothing in this section shall be deemed to authorize the Commission to prescribe the scope, substance or content of warranties."

REMEDIES

Section 111(e) was inserted, according to the 1970 Senate Commerce Committee report on S. 3074, "to make explicit the fact that this legislation has no effect on the present ability of consumers to pursue their remedies in Federal courts by instituting class actions nor does the bill affect class action availability in State court proceedings."

We urge this subcommittee to carefully review this portion of the bill. The failure of a guarantor to perform those obligations which he undertakes in a guarantee is an individual problem between the guarantor and purchaser. We believe that this problem is best solved individually, and not through group action.

One need only to look at the history of class actions under the Truth-in-Lending Act to see how they are abused in the name of consumer protection. Many pending suits alleging violations of the disclosure requirements have been directed at large, national companies. To our knowledge, no class action suits have been directed at any of the small companies which have been cited in FTC complaints for allegedly violating this law.

We therefore suggest that section 111(e) be amended to read:

(e) Any person damaged by the failure of a supplier to comply with any obligations assumed under an express or implied warranty (guaranty) or service contract subject to this act may bring suit in an appropriate district court of the United States subject to the jurisdictional requirements of section 1331, title 28, United States Code, or (in an individual capacity but not as a representative of a class of plaintiffs), in any State or District of Columbia court of competent jurisdiction. (Said limitation upon capacity shall not affect any suit which does not involve a cause of action under this subsection.)

TITLE II—FEDERAL TRADE COMMISSION IMPROVEMENTS

Title II of S. 986 would make many significant and far-reaching changes in the Federal Trade Commission Act. There are two sections of title II which the federation endorses, one without change, and one with minor modification.

EXPANSION OF JURISDICTION

The federation is in support of section 201, which would expand the jurisdiction of the Commission from unfair and deceptive acts and practices "in" interstate commerce to similar practices "affecting" interstate commerce.

This change would enable the Commission to take action in many more cases, spreading a uniform pattern of enforcement across the country, thus affording greater protection for the consumer.

PRELIMINARY INJUNCTIONS

Further, the Federation supports section 212 of S. 986, which would give the Commission authority to seek preliminary injunctions for alleged violations of section 5 of the act. Such authority is necessary, we believe, to the effective enforcement of the FTC's mandate, by preventing fraud before it can prey on consumers.

However, we are troubled by the lack of any provision in section 212—a lack rectified in the administration version of this same proposal—which directs the Commission to proceed expeditiously with the issuance of a formal complaint when a preliminary injunction is sought.

We believe that if the Commission has sufficient grounds to seek a preliminary injunction, it should have sufficient grounds to proceed with the issuance of a complaint.

Therefore, we would recommend amendment of section 212 to provide that a complaint must be issued either prior to, or simultaneously with, the seeking of a preliminary injunction.

DIRECT ACCESS TO COURTS

Title II would also make significant changes in the procedure by which a defendant is taken to court by the Federal Government. S. 986 would allow the FTC to proceed to court using its own attorneys, rather than having the Justice Department bring suit for it.

These provisions, coupled with the others in S. 986, would put the FTC in the unique position among Federal agencies of being prosecutor, judge, jury, and enforcer in cases involving unfair and deceptive practices. This unbridled authority with no guidelines for its proper use would also set a dangerous precedent for other Federal agencies.

CIVIL ACTIONS

While we support expansion of FTC jurisdiction and preliminary injunction authority, other provisions of title II of S. 986 pose many problems. These provisions are not contained in the administration bill relating to the FTC.

For example, section 202 of S. 986 would authorize—and indeed, direct—the Commission to initiate civil actions for knowing violations of the act.

The FTC was established to perform primarily two imoprtant functions: (1) to provide guidelines to the business community as to acts and practices which do not conform to broad legal criteria; and (2) to bring to play an imaginative law enforcement framework in the prevention of a number of unfair practices which had emerged or might emerge and with which Congress was not suited to deal.

Congress, therefore, empowered the Commission to proceed against a wide range of conduct which would fall within the term "unfair methods of competition" and, in 1938, extended its jurisdictional authority to reach "unfair or deceptive acts or practices." It also vested the Commission, as an administrative agency, with power to initiate administrative complaint proceedings looking to the issuance of prospective injunctive relief in the form of a cease and desist order. Both in identifying unfair practices and in fashioning the form of prospective relief, the Commission has been accorded wide latitude.

Section 202 would inevitably result in the discontinuance of the vital functions which the agency was designed to perform. FTC would be transformed into essentially a prosecuting agency; its administrative law enforcement function would go by the boards. Enormous and,

history shows, irresistible pressures would be leveled on the Commission's limited resources, compelling it to initiate court actions whenever it may have reason to believe an unfair or deceptive practice has occurred. In this respect, it is important to note that proposed section 5(a)(8) court actions would encompass any act or practice which is unfair or deceptive to a consumer.

The FTC should not be required to perform such a prosecutorial function.

PROMULGATION OF TRADE REGULATION RULES

Section 208 of S. 986 would specifically authorize the FTC to promulgate trade regulation rules:

> * * * defining unfair or deceptive acts or practices in a manner sufficiently specific to reasonably inform affected parties of the acts or practices prohibited.

Once promulgated, after certainly roughly defined administrative procedures, a violation of the rule "shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1)" of the Federal Trade Commission Act. As a result, such violations could subject the person, partnership or corporation charged to civil penalty proceedings under section 202.

The trade regulation rule provision would vest the Commission with legislative powers to issue rules with statutory effect, cutting off the traditional rights of affected parties to contest the agency's view of the law in subsequent litigation or adjudicative proceedings. Exercise of this power is contrary to the appropriate role of the Commission and the grant should not be made.

The impropriety of vesting the Commission with legislative rulemaking powers relates in major part to the substantial distinction between its central function and that of administrative agencies whose jurisdiction covers segments of the economy in which licenses are required as a precondition of doing business. An administrative agency such as the Federal Trade Commission, is neither an appropriate or competent body to legislate in the broad trade regulation field across the entire market-regulated spectrum of the economy. Legislative rulemaking, under procedures prescribed by section 208 or any others which might be developed, are not suited to the fair announcement of standards for future conduct in the trade regulation field.

Unlike adjudication, rulemaking does not provide affected parties with reasonable opportunity to develop an adequate record upon which a reasoned determination of violation can be found. The right of parties to present evidence may be limited by what the Commission would determine is appropriate, and no provision for discovery or consideration of motions would be made.

When Congress has granted the Commission authority to promulgate legislative rules, it has done so expressly and in limited areas where Congress itself has made extensive legislative findings. Illustrative of congressional enactments bestowing such power are the Wool Products Labeling Act, the Fur Products Labeling Act, the Flammable Fabrics Act, the Textile Fiber Products Identification Act, and the Fair Packaging and Labeling Act.

BROAD POWER TO ISSUE ORDERS

Among the most troublesome provisions of S. 986 is that portion which would amend section 5(a) of the Federal Trade Commission Act to empower the Commission to take "any other action necessary" to redress injury caused by unfair and deceptive acts or practices.

It is worthy to note that this same committee, in approving S. 3201 last year, chose not to grant such broad authority to the FTC, but instead authorized the Commission to go to court to seek, not "any other action necessary," but specified types of redress to be granted by the judiciary.

This proposed broad language, as we have pointed out before, would transform the Commission into a prosecutorial agency, whose determination of what was "necessary" to redress an injury would not be reviewable. Such a grant of power, in our judgment, would be excessive.

CONCLUSION

In sum, we urge this committee not to legislate impediments to the effectiveness of the proposed guarantee legislation.

We urge that the committee adopt the administration approach of separating these two distinct subjects—warranty regulation and FTC improvements—into two separate bills, and consider each on its merits.

Senator COOK. Thank you very much, Mr. Keeney.

Would you go so far as to say in regard to this delegation that you might actually see a serious violation of the separation of powers?

Mr. KEENEY. Yes. I had not thought of it to this extent, but it does. The more you think about it, the more the point does have merit. So much criticism of the Congress not being effective today is pointed in the direction of the executive area of our Government. So many of the students of political science today have referred to the ineffectiveness, the inability, of the Congress to legislate; and in effect they have abrogated their responsibility to legislate and given it to the administrative agencies.

I can be personal for a moment, Mr. Chairman, and refer back 15 years or more in my experience as a young attorney entering the Federal Government, and the first instruction given to me was, Mr. Keeney, as a lawyer working for the Federal Government, administering a law passed by Congress, your responsibility is to study the law and explore the peripheries and to expand them as much as we can. And your point is very well taken, Mr. Chairman.

Senator COOK. That sounds like a perfect new adaptation of bureaucracy, I might add.

In other words, maybe we too often get enthusiastic about taking congressional action on a question, and then simply turn around and decide to give away our authority to an executive agency.

Mr. KEENEY. I agree with you. Congress is asserting more and more of its authority, and I am pleased to see this in many areas. It is not too evident in the proposed legislation in a number of instances, and I am most hopeful a number of changes can be made.

Senator COOK. I think one of our real problems is that we spend a great deal of time hearing witnesses on proposed legislation, and then

we go back here and mark it up. We do one of two things: We either leave in it such language as "any other things that they may feel are necessary to come to this conclusion or that conclusion or stop this or stop that," and then we have another one that we quite frequently put into bills, and that says after we get through laying the groundwork, we put in that devastating section which says once this agency is established it shall have authority to promulgate such rules and regulations as they deem necessary to put this act into operation, and in effect what we are really saying is we have written down about 10 or 15 guidelines and then we have given them a carte blanche to do anything they want to do.

I think this is the periphery that you made reference to. Do you know of any other agency, in your dealings and in the dealings of the association that you represent, that would have this type of authority, this type of rulemaking authority, not only from the standpoint of creating for themselves within their own framework, legal causes of action for which the Federal judiciary shall immediately take notice of, but which gives to them such an informal method of promulgating those rules in regard to establishing a record? Do you know of any other agency that would have that type of authority?

Mr. KEENEY. To my personal knowledge, no. But my personal experience in dealing with the Labor-Management Act, known commonly as the Taft-Hartley Act, if you go back to 1938, it was known as the Wagner Act, and it gave all this authority to the National Labor Relations Board as is now presently proposed for the Federal Trade Commission.

By 1945 and 1946 the hue and cry of prosecutor, judge, jury, and enforcer was heard throughout the land, and there was a ferment throughout the country, and Congress listened and they changed this provision, felt that this was so unfair to place all this authority within one Government agency, and in effect they separated the general counsel of the National Labor Relations Board and gave him almost complete autonomy for enforcement, issuance of complaints, and injunctions, which the Board itself, the five-member board, does not have.

So there is some precedent as far as bad experience that we have had, the country has had as far as giving this unlimited, unbridled power to a Government agency.

Senator COOK. Therefore, the only real case that you know of was soon abandoned and the agency reverted to the adversary system.

Mr. KEENEY. Yes.

Senator COOK. One other thing, and I think this ought to be made clear: If I were to go out and find 100 people today that bought major appliances in the Washington area and brought them all in here, how many of the 100 do you think could answer in the affirmative, if we asked them, if before they bought these products did they read the warranty?

Mr. KEENEY. I am not sure that many would say they have read it. Even myself, representing retailers throughout the country, when we go and purchase a major appliance or even a smaller appliance, we seldom really read the warranty. We look at the product, we examine it, we look at some of the other similar products, but seldom do we

actually read the warranty itself. We should, it is our responsibility to do so, but we do not.

Senator COOK. Really, the point I am trying to make is that I think maybe the passage of a warranty/guarantee bill might be, on the part of some of us, self-satisfaction without any results to the consumer; and I think this is the important element we are looking to: How do we protect the consumer?

Let me ask you this: Do you think there is any way that this bill, as written, is going to make a manufacturer a better manufacturer, if in fact he need not warrant anything if he does not want to?

Mr. KEENEY. No; I do not know that this would make him a better manufacturer or not. I would go back to the history of this guarantee dialog that is going on. So much has happened, and it is detailed in the committee report of last year, so much has been done on a voluntary basis, manufacturers have initiated so many new changes as far as their guarantees are concerned, for the most part this proposed legislation would be superfluous.

We have talked to most of the manufacturers around the country, and improvements have been made in the guarantees by making them more clear and more precise with larger print. The dialog has been effective.

Senator COOK. We got into a discussion yesterday, and I would like your comments on it. Do you think the general public more adequately understands the words "parts only" or "parts and labor" than they would recognize or understand a warranty that said "full" or a warranty that said "partial"?

Mr. KEENEY. I am smiling because we have been talking about this a great deal amongst our members. I would say "full" or "partial" are words that are subjective as to what they mean to you. You finish eating a meal, you feel full. That may be a subjective feeling. But what does "full" mean when you refer to a guarantee?

Senator COOK. What does "full" mean if your plate is still half empty and mother says finish it?

Mr. KEENEY. If I am watching my weight and half the meal is still there, when I say full, it is a subjective thing. When you look at an appliance when it says full guarantee, what does this mean?

Mr. Goldberg and I have a continuing dialog and discussion and disagreement. He refers to an automobile manufactured by any of the "Big Three"; he says suppose they take the train or the trolly, whatever he calls it, and they give it a 5-year, 50,000 warranty and then they only warrant the rest of the car for 2 years. Now, is this full or is this partial?

Then we go into the wording of the statute, and we will talk to many of the draftsmen as to what it means. He and I disagree on this. But the point is well taken. What is any malfunctioning or defective warranted product as encompassed by section 104(a)(1)? I reached the conclusion, in complete disagreement with Mr. Goldberg, that I do not think I like the word "full"; I do not like the word "partial." I would rather see "parts and labor." As a consumer I know what parts and labor mean. I know just what service means. I am not sure if I know what full or partial means.

Senator COOK. Mr. Goldberg, do you want to add to that, because if you disagree, I think it would be well to have your opinion.

Mr. GOLDBERG. We do not disagree on the bottom line, Senator, and that is we both think that the words "parts and labor" or "parts and service" or "parts only" or "service only" is a lot more meaningful to the consumer than full versus partial. It is just how we get to the bottom line that we differ. But we do not differ at all on the outcome.

Senator COOK. Are warranties a source of controversy between retailers and manufacturers?

Mr. KEENEY. Not to any great degree. It has not come to my attention that there was this great a problem. I would say that maybe several years ago, before this dialog started, before there was the spotlight of publicity put on it, there were some problems with respect to manufacturers and retailers, but a great deal of this has been worked out voluntarily.

Senator COOK. Let me ask you one last question. Under section 102, it says, "Such regulations may require inclusion in the written warranty of any of the following items, among others:"

Let us assume for the time being that the FTC imposes all of these, all 14 of them. Now let's take two products side by side, one without a warranty and one with a warranty, but let's attach to the one with a warranty item 13: "The characteristics or properties of the products or parts thereof that are not covered by the warranty." Now, the customer looks at, let's say, the washing machine that is warranted, but after it warrants the substantial parts, it then has a list of 35 or 40 or 60 parts that are not warranted.

Do you think he buys the warranted product or do you think he says, why, I am not going to buy this product that has all these things that are not covered, to cover, so I will buy the one that is not warranted at all?

Mr. KEENEY. Again I think you are talking about a subjective situation there, and it may be just a theoretical one. For the most part retailers today offer appliances or any other item for parts and labor or labor only involving service, and this covers most, if not all of the parts, and usually most of the parts.

Senator COOK. Thank you. That is all I have. Do you have anything to say?

Mr. SUTCLIFFE. Yes.

Mr. Keeney, I appreciate the constructive suggestions for language change that you have included in your statement, but I have some specific questions as to the thrust of that suggested language. I guess the first question is, Why have you given up the second suggested language change as to preemption of State class action rights when you have given us the first preemptive provision?

To be more specific, under your preemption clause that you suggest for section 112(b), you say that "Labeling disclosure or other substantive or nonsubstantive"—I guess "procedural" could be substituted there—"requirements of the State," and then it goes on, "which are more stringent than provisions of this act shall be preempted."

Certainly a State class action right which is not provided for in the act would be more stringent than a provision in the act, because the act is silent as to that problem.

Therefore, you have already accomplished through your first preemptive clause the exclusion of State consumer class action rights, and it would seem that your second recommendation to us would be superfluous.

Mr. KEENEY. I don't know. You know, Mr. Sutcliffe, you and I have had a continuing dialog for the past year or so on this legislation regarding is she or is she ain't my baby as far as class actions are concerned, and we have a difference of opinion there.

In my judgment, I think you are finding something which I don't see.

Mr. SUTCLIFFE. You see you have included in here substantive and nonsubstantive measures that are more stringent than the provisions in the act.

Now, the way in which the preemptive clause was originally written, it referred to specific provisions in the act. If you say more stringent than the act, the act doesn't cover many, many procedural and substantive rights that are of the body of State law that would allow the Federal legislation to integrate with the State legislation.

For example, under the Uniform Commercial Code which forms the matrix for the warranty legislation, what would you do with section 2–719 as it relates to section 2–316?

Section 2–316 says that you can contractually modify your contract in accordance with section 2–719.

Section 2–719 says you can do it but not as it relates to denying recovery for personal injuries.

If you put your preemptive clause as you suggest to us in the bill, we have eliminated for consumer products the provisions of the Uniform Commercial Code 2–719 and 2–316, because it is more stringent than the provisions in the act because we don't cover them in this act.

We have by reference referred to a vast body of State commercial code and decisional law in formulating the proposal. This is why the committee I think was forced to be very narrow in its preemptive provisions and refer to specific sections in the act that were preempted; otherwise, you get into a very, very difficult situation.

Mr. KEENEY. I can see your point. I don't believe that the preemption clause as we recommend would affect the Code as passed by the States involved.

I do say that it has to be a tough preemption clause. You were deeply involved—I believe you were deeply involved in the truth-in-lending legislation. The problems of the Federal Reserve Board and the Federal Trade Commission in interpreting what is inconsistent and what is preemption is something we should learn by, the history of the problems that we have learned.

In view of this history and background, I would hope that you would support a preemptive clause much stronger than that presently recommended.

Mr. SUTCLIFFE. We would have to fashion a preemptive clause that did not destroy the matrix into which this legislation has to fit.

Mr. KEENEY. I do not agree that it would destroy it.

Mr. SUTCLIFFE. Would you also comment on why you feel it is necessary to preempt State procedural rights, namely, the rights of States through their own legislative process to determine that their consumers have the right to redress through class action breach warranty claims?

Mr. KEENEY. This again is not our intention in the proposed preemption provision. Again you are reading it stringently, and this was not our intent, to preempt this.

Mr. SUTCLIFFE. Let me refer to your testimony where you say "Any person damaged by the failure of a supplier to comply with any obligations assumed under an expressed or implied warranty or service contract subject to this Act" could only go to court as an individual in a State.

So, you have preempted the right of the State to determine that it would provide its citizens with a State class action right.

Mr. KEENEY. Well, in our judgment, as far as warranty is concerned, it is an individual problem when the consumer and the retailer, and it is not really the subject for——

Mr. SUTCLIFFE. If it is an individual problem, then class action would not lie; is that correct?

Mr. KEENEY. It should not lie.

Mr. SUTCLIFFE. Well, the court is to determine whether or not it is an individual action. I simply wanted to provide for the record any justification for preempting a State's rights to decide upon whether or not it would allow class action for its inhabitants.

Mr. GOLDBERG. I think I can answer that by saying that, as I read 110(3), as written, it would allow a consumer who feels that he has suffered a breach of warranty on the party of a manufacturer or a retailer to pick out any State in the country to bring his class action in.

As I read it, he has got——

Mr. SUTCLIFFE. Can he do that today?

Mr. GOLDBERG. As I understand it, today he would have to go in the State either in which he resides or where the transaction took place and bring a class action on behalf of all the consumers within that State.

Mr. SUTCLIFFE. I mean we wouldn't be changing the situation if this law passed between today and tomorrow except we would be according him a little more specificity as to what his consumer rights are.

Mr. GOLDBERG. As I read 101(e), you would be changing the law to the extent that the consumer could not only get into Federal law subject to 1331, but he could go to any State court, not necessarily the State court in which he resides or where the transaction took place, and bring a class action not only on behalf of himself and the consumers within his State but on behalf of all consumers all over the country.

In effect, it would allow him to forum shop for a friendly court and bring a national class action, whereas today he may be allowed to bring a State class action. And I think our point in limiting the——

Mr. SUTCLIFFE. But a preemption of this sort would be properly considered in separate legislation, would it not, rather than trying to accomplish a change in the conflict of laws or choice of laws and

proceedings of the United States in a warranty bill; wouldn't it be more appropriate to consider this in separate legislation?

Mr. GOLDBERG. Perhaps. Maybe that is an argument for taking out the remedy section entirely and dealing with that separately.

Mr. SUTCLIFFE. As you recall in our conversations last year, we did have that particular remedy section removed, and it was fearful that therefore by being silent we were inadvertently conferring a class action right.

The reason that provision is in there is to express that we are not.

Mr. GOLDBERG. I think our concern here is that a breach of warranty situation, which is what this covers, is an individual problem as between you, the warrantor, on the one hand and I, the consumer, on the other, and the notion that the court will ultimately determine that a class action will not lie or there aren't sufficient people to make up the class or whatever doesn't stop that consumer from saying I am dissatisfied, you have breached the warranty and, therefore, I am going to bring a lawsuit against you, and there is not enough in it for me to bring an individual suit, so let's make it a class action.

Mr. SUTCLIFFE. Of course we do have the incentive with the reasonable attorney's fees to, in those cases where it is a personal dispute, to go and seek redress for that particular breach of the warranty obligation.

I don't wish to belabor that issue. I simply wanted to ask for your explanation of why you have suggested this approach, and if you have anything further to add after review of the record, we would certainly appreciate this.

One last question, if I may.

What do the words "parts and labor warranty" mean to you? If you read that and did not take the time to read the rest of the warranty, what would parts and labor mean to you?

Mr. KEENEY. Exactly what it says, parts and labor.

Mr. SUTCLIFFE. Explain what you would get from that warranty, then.

Mr. KEENEY. Parts would be any part of any item of purchase. Labor would be that needed involved in servicing such an item of purchase.

Mr. SUTCLIFFE. If you had a parts and labor warranty then and your product broke down, what would be your remedies?

Mr. KEENEY. The remedies?

Mr. SUTCLIFFE. Yes.

Mr. KEENEY. I am not sure as to what your question might mean.

Mr. SUTCLIFFE. Would you call up the person and say, my product is broken down, come out here and fix it, please?

Mr. KEENEY. You mean I would get on the phone and say, come on over, my parts and labor need work?

Mr. SUTCLIFFE. You wouldn't have to bear any cost in that situation, would you, if you had a parts and labor warranty?

Mr. KEENEY. It all depends on the warranty. You haven't explicated your entire premise.

Mr. SUTCLIFFE. If we had full warranty, would you know? Have you given your full protection when you say full warranty under this bill?

Mr. KEENEY. I am afraid we have a difference of opinion there as to what full and partial is. Parts and labor in my judgment is much clearer to the rank and file—not a sophisticated lawyer as yourself—but a housewife or my wife, for example, or any number of consumers going into a store would understand parts and labor much more than what full might mean.

Mr. SUTCLIFFE. But parts and labor doesn't tell you anything about what you have to do with the product to effectuate the repair free of charge. What if you had to mail or send to the factory your piano under a parts and labor contract?

Mr. KEENEY. It would be spelled out as far as the disclosure is concerned.

Mr. SUTCLIFFE. But you say you don't read it until you get the product home.

Mr. KEENEY. I am afraid your reasoning and your line of questioning doesn't seem to flow as far as my own ability to respond, sir. We have a difference of opinion with respect to full and partial and parts and labor or just parts.

Mr. SUTCLIFFE. You say that the consumer understands parts and labor much better.

Mr. KEENEY. I would say so.

Mr. SUTCLIFFE. What does she understand? She is more familiar with those terms?

Mr. KEENEY. She understands those terms.

Mr. SUTCLIFFE. Does she understand what the warranty means?

Mr. KEENEY. Does she understand what?

Mr. SUTCLIFFE. The theory of labeling in the heading of the warranty, the theory was to give the consumer some kind of initial indication of what was in the warranty.

Mr. KEENEY. Right.

Mr. SUTCLIFFE. If she has a parts and labor warranty, does she have that initial indication of what is in the warranty?

Mr. KEENEY. Of course she does. This is my judgment. We differ.

Senator COOK. Might I add to this. You can have the word "full" and in the language of the warranty it can say in order to be fixed you have to mail it back to the factory. What if the Federal Trade Commission stipulates under their rulemaking power that "full" means the warrantor must come and pick up the defective product?

Mr. KEENEY. Then you are setting minimum standards. This is just supposed to be a disclosure statute. Those are setting the standards as to what a guarantee should include, and I question as to whether this is the intent of the legislation rather than mere disclosure.

Mr. SUTCLIFFE. The preface to the bill says "To provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties."

The minimum Federal content standards are incorporated in the concept of full warranty.

Mr. KEENEY. When we were way back a long time ago, Mr. Sutcliffe, in law school, when we studied procedural and substantive law, we learned that they merged a great deal. What we are talking about basically in S. 986 is a substantive statute. When you spell out certain

requirements as far as a guarantee or a warranty is concerned, in effect you are spelling out what a warranty should contain.

Mr. SUTCLIFFE. Thank you.

Mr. RUSH. I gather that in your recommendations with respect to title I you are attempting to eliminate what might be referred to as legislative rulemaking by the Commission?

Mr. KEENEY. That is correct.

Mr. RUSH. So long as only interpretive rulemaking, is provided and as limited in title I you do not object to the Commission having a right of access to court in title I?

Mr. KEENEY. That is correct.

Mr. RUSH. Direct access to court?

Mr. KEENEY. That is correct.

Mr. RUSH. You do not object to a direct access to court by the Federal Trade Commission for preliminary injunctions in title II?

Mr. KEENEY. For preliminary injunctions?

Mr. RUSH. For preliminary injunctions.

Mr. KEENEY. That is correct.

Mr. RUSH. If it were not for the change in rulemaking authority of the Commission which is affected in title II, would you object to them having a direct right of access to enforce their own cease-and-desist orders?

Mr. KEENEY. This is where we separate.

Mr. RUSH. You would?

Mr. KEENEY. We feel that this authority should be with the Department of Justice and not with the FTC. It is spelled out in our testimony.

Mr. RUSH. What troubled me is that you have objected to direct access coupled with other provisions of that bill, and what I am asking is assuming that only changes beyond what is in the so-called administration bill on Federal Trade Commission Act amendments was to grant a direct right of access with respect to enforcing cease-and-desist orders, would you object.

Mr. KEENEY. As far as our position is concerned, the enforcement of cease-and-desist orders should rest with the Department of Justice and not within the Federal Trade Commission.

Senator COOK. If you vest it in the Department of Justice, which was, I think, an allusion to 3201 and the triggering procedures that we had last year, don't you feel that even under those circumstances that the FTC would be entitled to have some time limitation on the Justice Department, after it had full hearings under its present procedures, after it established its entire record, that it did not have to turn it over to Justice and say please do this, but you don't have to? Don't you think there ought to be some obligation on Justice to either bring an action or to refer a file back to the FTC and indicate that the FTC has not established a case and give them an opportunity to establish a case?

I must say in all fairness, I think the rulemaking powers here are so broad as to constitute a total absence of separation of powers as I talked about, almost an extra constitutional authority granted by the Congress of the United States to an independent agency. But I do get the feeling that the FTC feels tremendously frustrated when it builds

an adequate case and it turns it over to Justice and then it cannot get any action.

Mr. KEENEY. I would like to comment on that. I think your point may be well taken, that a certain time limit could be given by the FTC and if Justice did not act the authority might be returned to the FTC. However, I would have reservation about this for one simple reason. That does not guarantee that the FTC will act.

Let me go back again in my own experience. We think that these Government agencies are going to work fast and expeditiously, but they do not. A new agency was created just a few years ago called the Equal Employment Opportunity Commission. They are now over 2 years behind as far as their own caseload is concerned.

I think it is rather illusory if we say, well, the deadline will be given by the FTC and it will come back to the FTC and expeditious action will be taken. I doubt if it would be. The wheels grind mighty slow as far as government is concerned.

Senator COOK. In other words, you think that some of the testimony that has been before this committee and the committee last year, that portrayed all the fellows on the FTC as good guys and all the fellows in Justice as bad guys just does not ring true?

Mr. KEENEY. I agree. They are all good guys.

Senator COOK. Thank you very much.

Our next witness is Mr. Thomas A. Rothwell, special consultant to the National Small Business Association.

STATEMENT OF THOMAS A. ROTHWELL, SPECIAL CONSULTANT, NATIONAL SMALL BUSINESS ASSOCIATION, WASHINGTON, D.C.; ACCOMPANIED BY HERBERT LIEBENSON, LEGISLATIVE VICE PRESIDENT

Mr. ROTHWELL. Mr. Chairman, may I introduce Mr. Liebenson, legislative vice president of the client, the National Small Business Association.

Senator COOK. Nice to have you here, sir.

Mr. ROTHWELL. My name is Thomas A. Rothwell. I am an attorney with offices in Washington, D.C., and am appearing here as special consultant to the National Small Business Association. I wish to thank the committee for the opportunity to appear and testify in reference to S. 986.

National Small Business Association is a national organization of some 40,000 members doing business in over 500 distinct business categories.

S. 986 is a revised and reorganized version of S. 3074, the bill which was reported favorably by this committee during the last session of Congress and which was passed by the Senate.

S. 986 contains title II which was not part of the warranty/guaranty legislation considered in 1970 but which was a part of the class action bill, S. 3201.

Title I of S. 986, although similar to the amended version of S. 3074, is quite dissimilar as to the scope or coverage of the original approach embodied in S. 3074. It will be recalled that S. 3074 was originally

limited to products that functioned pursuant to electrical, thermal, or mechanical principles.

As a major suggestion we propose that the scope of S. 986 is undesirably broad and comprehensive.

After 3 years of consideration by Congress we finally have a legislative approach to the problem of guarantees and warranties of consumer products that seems sound and workable. We wish to endorse the legislative objectives embodied in S. 986 and make the following comments solely for the purpose of improving the legislation.

At the outset let us recognize that the serious consideration of this bill together with the passage of its predecessor, S. 3074, as amended by the Senate in 1970 is in effect an admission that competitive processes have not and are not working out in the marketplace to protect the legitimate interests of consumers of some categories of products.

The enactment of S. 986 will mean, among other things, that Congress chooses the consumer interest as having priority over the public interest in the maintenance of competition. It is palpable that S. 986 proceeds by way of affirmative regulation and at the expense of the free play of competitive forces.

It is also clear that the overwhelming majority of abuses and consumer complaints that have been brought to the attention of this committee and other study groups for the past several years have pertained to, for the most part, two categories of products—household appliance and automobiles.

It is also evident that this legislation has been drafted and has been analyzed, reviewed, and criticized with these product categories primarily in mind.

It may well be that the business of structuring, advertising, and discharging warranty obligations is too important a matter to be left solely to businessmen—at least in the product categories that have been the source of an overwhelming majority of consumer complaints.

What we are suggesting is that the consumer interest would be served most adequately by limiting the scope and application of S. 986 to household appliances, automobiles, and any additional categories of products where there are significant warranty/guaranty problems.

The $5 limitation contained in S. 986 includes a broad spectrum comprised largely of consumer product categories as to which there are today no substantial warranty/guaranty problem areas.

The $10 limitation proposed by the administration lessens this problem of comprehensive coverage but itself is not a forthright approach to the question.

Let me illustrate this concern with an example that contains two problems, one of a policy nature and one concerning interpretation of S. 986.

A producer of dinnerware sells his products in sets on an open-stock basis and advertises that his product may be safely washed in a dishwasher. The policy problem for Congress is "Do we want this legislation, S. 986, to extend to dinnerware?" And this in turn would depend on the question "Are we encountering considerable consumer dissatisfaction in this area?"

Our answer to the above questions would be negative. The answer of S. 986 would seem to be affirmative. That is to say, as presently

proposed Congress is asked to presume that there is a problem in the area of dinnerware serviceability and to presume that existing laws and consumer remedies are inadequate to deal with the problems.

We respectfully suggest that such legislative presumptions are unwarranted, yet they seem to be embodied in S. 986.

Turning now to the second problem of interpretation using the same hypothetical case, if one plate costing $1 cracks or crazes in a dishwasher, does S. 986 apply? The consumer would argue that the plate was purchased as part of a set costing $19.95 and that now the set is spoiled because it is incomplete. The lawyer advising his client in advance of the event concerning the propriety of advertising that the dinnerware is dishwasher proof would have a perplexing problem in trying to decide whether S. 986 applied. And the mere existence of a class action remedy would add a dimension of great peril to this legal determination.

The same problems exist with respect to such products as spark plugs costing $1.25 each. These are usually purchased in sets of six or eight by the consumer.

Even food products such as fresh fruit that may be purchased by the bushel in season at a cost of more than $5 may be subject to the scope of this proposed legislation.

Is this the congressional intent? Is there any need to have S. 986 applied so broadly to so many categories of consumer products?

It is suggested that a prudent respect for, and in anticipation of, the lessons of future experience, that S. 986 be specifically limited in its application to the product categories that are responsible for the problems. Otherwise we may be making a major change in an undesirable direction. In many product categories present experience with warranties seems to be most satisfactory.

The second major point we wish to make relating to S. 986 relates to the effects on competition and is offered in additional support to our plea to limit, at least initially, the breadth and scope of this measure.

S. 986 permits a producer with a nationally organized service system to offer a full warranty pursuant to section 103 of the measure. This necessarily discriminates against the producer, especially the small producer that is not organized on a national basis.

Although section 107 would permit the firm that is not nationally organized to designate service representatives, this privilege or alternative may turn out to be more theoretical than practical.

There are no presently existing organizations of such representatives willing and able to undertake the discharge of warranty obligations. Such representatives may be difficult to obtain, train, and especially retain. If so, the option set out in section 107 may prove to be illusory.

It must be emphasized that this second major point is not offered as an argument against the enactment of this measure in a properly limited and precise form. It is rather offered as a further compelling reason as to how the scope and breadth of the regulatory remedy should be limited to those areas where there now exists a demonstrable need.

We have but one comment to make in respect to title II of this measure. Title II would greatly enhance the role of the FTC as prosecutor

and its function as a watchdog agency for consumers. This brings into sharper focus the many recent comments concerning the need to remove from this body its judicial functions.

It is anomalous to place both the discharge of the prosecutor's function and the judicial functions in respect to the same issues in any one individual or one agency. Existing proposals to place the quasi-judicial functions of the FTC in a trade court will become much more urgent should title II of S. 986 become law.

Thank you.

Senator COOK. Thank you, Mr. Rothwell.

I have a couple of questions. As you know, you heard one bell.

To carry out what you said on the last page—I refer you to page 17, section 8, which gives the Commission the right to initiate civil actions in the district courts of the United States and asks for civil penalties up to $10,000 for each violation. In regard to your comment on the judicial functions and the prosectorial functions of the FTC I read you the following language:

"The Commission may compromise, mitigate, or settle any civil penalty if that action is accompanied by a public statement of its reasons following a public hearing at which interested parties may be heard."

Now, do you consider this to be an authority vested in the FTC over and above the authority of the Federal court who imposed the civil penalty?

Mr. ROTHWELL. Yes. This type of authority I have never known to be exercised by the Federal courts.

Senator COOK. May I say, isn't this carrying the judge and the jury routine beyond the Federal court? After the Federal court decrees a civil penalty against the defendant, it then becomes the authority of the FTC, over and above an order issued by the Federal court, to compromise, mitigate or settle a civil penalty, regardless of the order of the Federal court, based on a hearing that it holds and not that the court holds is that correct?

Mr. ROTHWELL. Senator, I want to make a responsive comment to that. I was asked to prepare a statement relating to the warranty/guaranty bill. I picked up a copy of S. 986 and as I went through title II, in the context of circumstances, Senator, I simply find it difficult to take title II seriously.

I don't mean that as a frivolous comment, but it seems to me that an agency which is so beleaguered with criticisms from within and without should not be entrusted with broader functions.

If, as the reports—and there have been many of them, and I think we know their names and there is no need of detailing them—if the reports have any merit in reference to the present state of the Federal Trade Commission, is it any remedy to give them broader powers and more money?

I can't believe there is that kind of attitude on this committee or in the Congress generally.

Thus I note from the contents of the statements of the preceding witnesses that I may have taken the wrong tack. Perhaps I should have emphasized the substantive and critical testimony on section 2 much more fervently. But I simply cannot bring myself to believe

that when you have Mary Gardiner Jones at the FTC saying 3 weeks ago in a college out at Indiana that she has come now to the point of view that the judicial functions of the FTC are inapposite and inappropriate and that perhaps something should be done to divest these from the Commission, when we have learned articles appearing in *Harper's* and *Atlantic Monthly* to the effect that one of the major problems of Government today is to bring the agencies and the departments under control, I simply find it difficult to believe that the Senate of the United States would launch such a vehicle as title II.

As I say, I am sorry if that expression seems cruel. It is certainly not stated frivolously.

Senator COOK. Thank you very much.

We will recess these hearings right now. I have some questions I want to ask you, but I will submit them to you in writing, if you don't mind.

Mr. ROTHWELL. We will be glad to take them in any form you wish.

Senator COOK. We stand in recess until Monday next.

(Whereupon, at 4:10 p.m. the hearing was recessed, to reconvene Monday, March 22, 1971.)

CONSUMER PRODUCTS WARRANTIES AND IMPROVEMENT ACT, 1971

MONDAY, MARCH 22, 1971

U.S. SENATE,
COMMITTEE ON COMMERCE,
CONSUMER SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 10:35 a.m. in room 1318, New Senate Office Building, Hon. Vance Hartke, presiding.

Present: Senators Moss, Hart, Hartke, Cook, and Pearson.

Senator HARTKE. The committee will come to order.

The Consumer Subcommittee of the Senate Commerce Committee resumes hearings on legislation designed to improve consumer product warranties and to provide the Federal Trade Commission with better tools to protect American consumers. The three bills under consideration are S. 986, S. 1219, and S. 1221.

The testimony on these measures to date has been mixed. On March 9, Chairman Kirkpatrick testified that the Federal Trade Commission favored the enactment of S. 986, which is the Magnuson-Moss Consumer Product Warranties and Federal Trade Commission Improvements Act. On March 15 and 16 industry representatives presented their views. Opposition—some fanciful, some sincere and constructive—focused primarily on the rulemaking and consumer redress procedures given to the Federal Trade Commission in title II of S. 986.

This morning the Consumer Subcommittee will receive the views of the administration on these important consumer measures. The subcommittee is pleased to welcome Mrs. Virginia Knauer, the President's Special Assistant on Consumer Affairs and Mr. Richard McLaren, Assistant Attorney General.

It would seem that the administration and Congress are committed to legislation improving consumer product warranty practices and strengthening the enforcement capabilities of the Federal Trade Commission. So, there only remains the legislative task of forging the exact details of these bills.

We understand Mrs. Knauer and Mr. McLaren would like to present their testimony in total before questions are asked, and we certainly will agree to that procedure.

STATEMENT OF THE HONORABLE VIRGINIA H. KNAUER, SPECIAL ASSISTANT TO THE PRESIDENT FOR CONSUMER AFFAIRS; ACCOMPANIED BY LEWIS ENGMAN, GENERAL COUNSEL

Mrs. KNAUER. Mr. Chairman, members of the subcommittee, I am pleased to appear before you today to comment upon the bills before your subcommittee dealing with warranties and with enhancing the authorities of the Federal Trade Commission; S. 986, and the administration bills, S. 1219 and S. 1221.

I will first discuss proposed warranty legislation. I know that you are aware of the substantial problems which warranty practice has presented to consumers. Warranties apply to a wide range of goods; from radios to automobiles. They deal with a vital element of the bargain between the buyer and seller: whether the product works after you have bought it—and for how long, and who will make good if it does not. But too often warranties are difficult to understand, poorly performed, and deceptively limited—sometimes taking away more right than they give.

The market has fallen well below its potential for the American consumer. It is lacking in information, in competitiveness as to warranty terms, and in consistency between promise and performance.

Both the administration and Congress—and, may I say, many suppliers—have tried to do something about this. We are here today to create legislation which will make the market more nearly measure up to its potential. We are here today to make a commitment to the American consumer, a commitment that states that henceforth warranties will contain meaningful terms, and not empty promises. I am gratified to see that at this point we are in substantial agreement on the basic form the legislation should take. Some differences of opinion remain. I think we should resolve these differences as expeditiously as possible, and enact good, sound warranty legislation soon.

Now, let me turn to the specific purposes of title I of S. 986 and S. 1221. The major aim of both bills is to improve the disclosure of warranty terms to consumers. This would be done principally by giving the Federal Trade Commission authority to spell out requirements for disclosure. In addition, both bills would explicitly foreclose a particularly troublesome practice frequently causing deception; using express warranties to disclaim implied warranties.

What do we hope to accomplish by this?

First, we think that consumers will make choices which they find more satisfactory if they have a better understanding of what postsale service obligations they are buying. Second, a clearer understanding of postsale service obligations will cause them to become a more important part of the bargain between buyer and seller. Third, greater comparability of more clearly understood warranty obligations should lead to closer competition between sellers, to the consumer's advantage.

In sum, we should achieve more efficient consumer markets, in which sellers offer, and buyers make, choices better suited to consumer needs, and to the overall terms of the bargain between buyers and sellers are more equitable and just.

With this preface, let me now turn to provisions of the bills before you.

Section 4 of the administration bill and section 102 of S. 986 give the Trade Commission authority to issue regulations requiring specified types of disclosures concerning warranty terms. The two lists of types of disclosures are similar in overall coverage, differing somewhat in detail. The administration bill specifies that regulations will in all cases require certain disclosures, and will be directed toward bringing about simplicity and clarity in statements of warranty provisions. We think this is important from the consumers point of view, and commend it to your attention.

Section 5 of the administration bill and section 108 of S. 986 deal with disclaimers of implied warranties. The administration bill provides that if the terms "warranty" or "guarantee" are used, implied warranties cannot be disclaimed. If a supplier wishes to disclaim implied warranties, he must forego the use of these terms, and, in addition, must clearly signal the limitations on any postsale service obligation he does offer by terming it a "manufacturer's (or supplier's) limited obligation."

S. 986 would prohibit disclaimers of implied warranties if any written "express warranty" is given. Here, "express warranty" has a very broad meaning, including not only postsale service obligations, but also affirmation of fact concerning, or description of a consumer product, which becomes a part of the basis of the bargain. Many, perhaps most, sales will be based to some extent on a written description of, the product. Thus, a supplier would be put to a choice of doing away with written descriptions of his product and statements of fact about it, or foregoing the market option of offering a limited obligation to those buyers who want to buy it.

This would be an unwanted and possibly unanticipated side effect of controlling warranty disclaimer abuses, and, in our view, we need to deal with the problem somewhat more precisely. The abuse of disclaimers of implied warranties arises primarily when a written document called a warranty or quaranty is used to block out implied warranties. This tends to deceive the consumer, who is led to think he is getting something, but may actually be losing protection. This deception should be stopped. But we think sellers should be able to offer, and buyers purchase, a wide range of postsale service obligations; and that something short of the implied warranties may advantageously be agreed upon between buyers and sellers, if buyers know clearly what they are getting, and decide that this is what they want. The well-known "as is" sale is an example of this.

Thus, to recapitulate, the administration bill would handle the problem on three levels. First, the prohibition of disclaimers of implied warranties when the terms warranty or guarantee are used would deal with the primary abuse. Second, we would require additional, mandatory language to warn consumers when a supplier does undertake to waive implied warranties—the supplier would be required to call his post-sale service assurance a "limited obligation." Third, the general FTC authority to regulate disclosures concerning postsale service obligations would enable that agency to require additional disclosures concerning disclaimers if and as those disclosures are needed.

We think the administration's approach deals thoroughly with the problem of disclaimers of implied warranties, and does so without the

side effect of unnecessarily complicating or blocking off a wide range of potentially useful information transfers and bargain terms between buyers and sellers.

Sections 6 through 10 of the administration bill, and section 110 of S. 986, deal with enforcement of the bill's requirements. I note that both bills give both Justice and the Federal Trade Commission enforcement roles; and I think this is appropriate. I will leave detailed discussion of these sections to Mr. McLaren, however.

Let me mention a feature of the administration bill not included in S. 986; the mandate to the Trade Commission to further study and report on the warranty situation within 2 years. Neither S. 986 nor the administration bill deals in any comprehensive way with problems of warranty performance or nonperformance. Our efforts to probe nonperformance of warranties have not as yet produced clear, firm guidelines concerning the best course of action to deal with this problem. But we do not think the problem should be dropped because no clear answers to it have yet emerged. Rather, we should pursue this matter, and a Trade Commission study is a convenient and potentially fruitful means of doing so.

One provision in S. 986, not in the administration bill, distinguishes between "full" and "partial" warranties, and defines full warranties as including the obligation to repair or replace within a reasonable time without charge. The full warranty would be deemed to meet "Federal minimum standards."

This has appeared attractive to many persons. But I suggest that it may not be as useful as it may appear. We should aim, primarily, for a close matching of consumer need and buyer offer. A chrome plated power can opener with a full warranty for 5 years will not suit all tastes. If the FTC disclosure rules are successful in giving consumers a good, clear understanding of what they are and are not getting in warranty protection, they can, as a group, be expected to choose a variety of warranty protections. This is as it should be. They have a variety of needs and capacities to pay.

The S. 986 provisions would appear to be an attempt to focus attention on, and thus bias market choices toward, a particular kind, or level of warranty protection. It is an attractive level for many of us, for many purchases: but we would prefer to let the buyer choose what he or she needs in each instance without such bias.

If we find that consumers do need short-form name distinctions between types of warranties, the general rulemaking authority given the FTC should permit it to require such distinctions when and as circumstances indicate there would be considerable utility in the action. The general, sweeping—may I say rather blunt edged—legislative approach of S. 986 does not seem particularly appropriate.

Section 110(a) of S. 986 declares a policy of encouraging informal settlement of consumer disputes, through mechanisms supervised by a governmental or otherwise impartial body. We favor the general goal of encouraging informal settlement of disputes. We expect to get additional guidelines on the most desirable mechanisms to be used, and the means of supervising them, from the work of the National Institute for Consumer Justice, and therefore state no

opinion at this time how dispute settlement mechanisms might best be supervised.

I would now like to turn to the legislative provisions intended to increase the effectiveness of the Federal Trade Commission. Those provisions are title II of S. 986, and the administration bill, S. 1219.

Since many of these proposals deal with relatively specific law enforcement issues, and with allocation of responsibilities between the Department of Justice and the Trade Commission, I will leave much of the discussion to Mr. McLaren, and confine my comments to selected major issues.

Since title II of S. 986 covers a different subject area from title I, we have preferred to treat the different subjects in different bills, allowing each subject area to be taken up and disposed of on its own merits.

Both title II of S. 986 and S. 1219 would expand the jurisdiction of the FTC to transactions "affecting" interstate commerce, as well as those "in" interstate commerce. We favor this development. This would facilitate FTC action to deal with practices which, though committed at the local level, are repeated across the Nation, and significantly affect consumer welfare.

Both S. 986 and the administration bill authorize the FTC to go to court and obtain, in proper circumstances, a preliminary injunction restraining continuation of practices alleged to be unfair and deceptive to consumers, pending a full proceeding to determine the legality of the acts. We deem this an important provision.

If a supplier is engaged in a practice so likely to be a violation of section 5, and so detrimental to consumers, that an impartial judge would order it suspended pending final adjudication, consumers should not be forced, as they now are, to suffer the practice for months or years while adjudicatory proceedings grind on.

A third similarity between both bills is that they increase the penalties for the violation of an FTC cease-and-desist order from $5,000 to $10,000. This is a reasonable measure designed to increase the effectiveness of the Commission's orders.

I would note that, in addition, S. 986 includes a broad authority for FTC rulemaking. This has been a difficult problem to resolve. On the one hand, the market might be made more efficient, to the advantage of both consumers and suppliers, by explicit guidelines particularizing the requirements of section 5. On the other hand, the area to be covered by such rulemaking would be very broad, leading many to believe this is an excessive delegation of legislative authority; there are very few congressional guidelines for FTC action; and ill-conceived rules imposing excessive or poorly designed constraints could reduce the utility of the market to consumers, and limit the abilities of suppliers to employ reasonable and useful marketing practices.

We have not included a provision for rule making in our bill, upon the expectation that FTC exercise of such authorities as it now has, subject to court review, may gradually define an appropriate scope for action, or, failing that, better define what additional authority is required.

However, we appreciate the potential value of FTC rulemaking, and would not oppose an appropriately formulated rulemaking provision. We would suggest consideration of two possible means of guiding and qualifying the Commission's authority. First, the committee might wish to articulate criteria for any rules to be made, aimed at assuring that rules propounded would address situations involving a significant amount of fraud or deception—not trivial situations—improve information to consumers, and promote rather than impair competition; and that any burdens on commerce imposed by such rules, would not outweigh the benefits to consumers and the efficiency of the marketplace to be gained by the rule. Second, consideration might be given to providing that such rules would either be interpretive of section 5, or alternatively, be promulgated in accordance with procedural safeguards similar to those contained in title I of S. 986.

With the early start made in this Congress, we have every hope that we will soon see legislation to improve warranty practices, and to give the FTC greater authorities. I hope my comments, gentlemen, here today are of assistance in resolving any remaining problems, and that they facilitate prompt committee action on these bills.

Now, Mr. McLaren will present his testimony.

Senator HARTKE. Let me say to my distinguished colleague, Senator Hart, I am glad he has had an opportunity to join us; I know he has other commitments this morning.

Senator HART. I apologize for having to leave, Mr. Chairman. I did want to hear Mrs. Knauer and Mr. McLaren, however.

Senator HARTKE. Let me say I have agreed in advance and have committed myself to proceed with Mr. McLaren's testimony before any questions are asked. So, we will honor that commitment. Mr. McLaren, you may proceed.

STATEMENT OF RICHARD W. McLAREN, ASSISTANT ATTORNEY GENERAL (ANTITRUST DIVISION), DEPARTMENT OF JUSTICE; ACCOMPANIED BY BRUCE B. WILSON, CHIEF OF CONSUMER AFFAIRS SECTION

Mr. MCLAREN. Thank you, Mr. Chairman.

I have with me this morning, Mr. Bruce B. Wilson, Chief of our new Consumer Affairs Section at the Antitrust Division.

I appreciate the opportunity to discuss before this Subcommittee the Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971 (S. 986). In the course of so doing, I would also like to allude to the provisions of S. 1221, dealing with consumer warranties, and of S. 1219, a bill to amend the Federal Trade Commission Act. These administration bills were outlined by the President in his Consumer Message on February 24, transmitted to the Congress on March 8, and introduced on March 12 through the courtesy of the chairman of the full committee.

The Department of Justice strongly supports legislation designed to make adequate information concerning warranties and guarantees available to consumers; to prevent deception of consumers in connec-

tion with the marketing of warranties and guarantees; and to improve competition in the marketing of warranties and guarantees.

Both S. 986 and the administration's bill, S. 1221, are designed to achieve these goals. The bills differ somewhat in the means used to achieve these ends, and I will point out these differences in discussing the particular provisions of each bill.

Moreover, both S. 986 and the administration's bill, S. 1219, provide needed reforms and improvements in the FTC. S. 986, however, includes other provisions which we believe to be unnecessary and perhaps detrimental in the long run to the enforcement of consumer protection laws. I will comment further on that in a moment.

I turn first to the provisions of S. 986 affecting consumer product warranties.

There are at least three areas in which, I believe, significant problems exist today with respect to consumer warranties.

First, consumers have a right to fair, honest disclosure of the terms and conditions of warranties in language which they can readily understand. In the past, many warranties were set forth in legalistic language, containing words and embodying concepts which were intelligible to the lawyer but not to the layman. Other warranties employed this legalistic jargon as a means of effectively taking away from the consumer more rights than they in fact provided for him. Perhaps the most common form of this practice was to disclaim the traditional common-law warranties of merchantability and fitness, while according to the consumer a so-called express warranty limited both in scope and duration. If consumers are to exercise an intelligent choice between competing products in the marketplace, they must be given meaningful and understandable information with respect to consumer product warranties.

The second problem currently associated with consumer product warranties arises from the vastly unequal bargaining positions of the consumer and the increasingly larger business organizations with which he deals in the marketplace. Indeed, in many consumer transactions, the consumer's bargaining power as to the terms and conditions of warranties is nonexistent. Terms of warranties are set by the seller, and the seller's agents have no power to vary these terms. Moreover, these terms are frequently such to take away from the consumer rights which he would otherwise have under the law.

Contrasted to this is the typical transaction between business firms. If a contract is negotiated, warranty terms are likely to be the subject of negotiation. If, as probably happens more frequently, a transaction is arranged by an exchange of conflicting purchase order and acknowledgement forms, these forms have been carefully drawn by skillful lawyers so that each is likely to negate the terms of the other. The ultimate result is that the parties to the transaction are left with the same rights and obligations under the Uniform Commercial Code which they would have had if both parties had remained completely silent.

A third area of consumer complaints concerning warranties is that securing performance under the terms of warranties is difficult, even though the warranty itself is freely and easily given at the time of sale.

In a majority of cases, I suspect there is no intent on the part of the seller not to perform, but rather subsequent inability, for a variety of reasons, to perform. It has been widely suggested, for example, that with respect to a number of consumer products, there exists a shortage of personnel possessing the skills required for the making of successful repairs of the product.

Both S. 986 and the administration's bill attempt to deal in varying degrees with these three areas of consumer complaint. Both bills, for example, give the FTC broad powers to provide, by regulation, for the full, fair and conspicuous disclosure of important terms in warranties. Both provide that implied warranties otherwise arising by law may not be disclaimed in certain circumstances, though the circumstances giving rise to the prohibition on disclaimers differ. And, finally, both bills permit both the FTC and the Attorney General to institute injunction proceedings to put an immediate end to practices in the warranty area which result in deception to consumers. The Department of Justice endorses these objectives.

Having discussed the similarities of these bills, I would now like to point out the differences in approach and discuss some of the considerations which lead us to adopt one approach over another.

The administration's bill would apply to warranties of goods and services where the actual cost is more than $10. S. 986, on the other hand, would apply to all consumer products, however minimal their cost, except that the disclosure provisions of section 102 and the requirements with respect to the designation of warranties of section 103 would apply only to consumer products costing more than $5. Any dollar limitation is, of course, somewhat arbitrary. However, in drafting our bill, we adopted the $10 limitation contained in S. 3074 in the last Congress as representing a reasonable judgment as to the minimum expenditure which should be made before the requirements of the bill apply.

Both bills deal primarily with the area of greatest consumer concern today—that is, written statements of guarantee or warranty which accompany consumer products. This being the case, the inclusion in S. 986 of a definition of express warranty, taken substantially from the Uniform Commercial Code, is somewhat confusing. Indeed, the term express warranty is used only in section 108 and even there it is limited to a warranty made in writing. Moreover, the Uniform Commercial Code definition is clearly drawn to apply to warranties made prior to delivery, whereas the consumer warranty deals with what happens to a product after sale and delivery. Accordingly, we would suggest the deletion of this definition in section 102.

As I noted earlier, the disclosure provisions of the two bills are substantially the same, although the administration's bill explicitly authorizes regulations governing the disclaimer of warranties as well as the warranties themselves.

It is their treatment of substantive content of warranties that the two bills diverge most greatly.

S. 986 would require a supplier, for such period as is stated in the warranty, to agree to repair or replace, within a reasonable time and without charge, any defective product in order to permit that supplier to designate his warranty as a "full warranty." In addition, sec-

tion 108 of S. 986 would prohibit the disclaimer of implied warranties when any express warranty, of whatever type or duration, is made in writing.

S. 1221, on the other hand, would provide that if a supplier uses the terms "guaranty" or "warranty," any attempted disclaimer of warranties otherwise arising by law would be ineffective. In addition, it provides that a supplier who does disclaim warranties otherwise arising by law must designate his undertaking as a "manufacturer's (or supplier's) limited obligation."

In structuring these provisions of S. 1221, we were concerned not only with their effect upon consumers, but also with their effect upon competition. A bill which tends to give greater advantages to large and dominant firms than it does to their smaller competitors may in fact disadvantage consumers in the long run.

It may well be, for example, that only large and well-established companies, with existing national networks of repair facilities, would be able to undertake the obligation to repair or replace, within a reasonable time and without charge, defective warranted products as required in S. 986. If this is the case, then only these companies will be entitled to designate their warranties as "full warranties" under S. 986. It may also be that only larger and well-established companies will have the ability and experience factors necessary to enable them to give express warranties without disclaiming implied warranties otherwise arising by operation of law. Various provisions in both bills may have this anticompetitive tendency to favor large firms, but the problem is aggravated, we submit, under section 108 of S. 986 which prohibits disclaimer if any express warranty, however minimal in nature, is given. Its result could be to discourage some suppliers from giving any warranties at all, to the ultimate disadvantage of consumers. I understand that these possible adverse consequences were also noted by Chairman Kirkpatrick in his recent testimony before this subcommittee.

We believe that consumers are best served when they have available a wide range of choices between competing consumer products and competing warranties and guarantees given in connection with these products. We believe that consumers have a right to be well and fully informed as to the nature of that choice. Generally, so long as the consumer is informed of and adequately understands whatever warranties or services are offered, a supplier should be free to offer consumer products with no warranties, with comprehensive warranties, or with warranties limited in substantive content and duration.

S. 1221 seeks to accomplish the goal of improving the quality of warranties and guarantees offered in the marketplace, while at the same time minimizing any adverse impact upon, and indeed encouraging, competition in the sale of warranties. It provides that the terms of warranties must be clearly disclosed, as does S. 986. It further provides for a system whereby the words "warranty" and "guaranty" will become meaningful words, by prohibiting disclaimers of implied warranties when these words are used. These designations will tell the consumer that, if he buys a product accompanied by a "warranty" or a "guaranty," the supplier is not taking away more with his left hand than he is giving with his right. Where these words are used, the con-

sumer will be assured that he has all the rights otherwise provided under the Uniform Commercial Code.

Finally, I should point out that S. 1221 contains provisions authorizing the Attorney General to issue civil investigative demands to persons who are under investigation for violations of the act, while S. 986 contains no such authority. Since under both bills, a violation is not a criminal offense, authorization for the issuance of such demands is a real necessity if the Department of Justice is to be able to investigate potential violations. Absent such authority, our only investigative tool would be a request for information which would not be backed up by any compulsory process. Accordingly, I strongly urge including in any bill which is reported on the subject of warranties, and which gives the Department enforcement responsibilities, provisions authorizing the issuance of civil investigative demands.

I would like to turn now to title II of S. 986, which contains proposed amendments to the Federal Trade Commission Act. Several of the proposed amendments are also contained in S. 1219, the administration's bill.

Sections 201, 207, and 211 of S. 986, as well as section 2 of S. 1219, would broaden the scope of the Commission's jurisdiction from matters which are merely "in commerce" to matters which "affect commerce." The administration strongly supports this enlargement of the Commission's jurisdiction. Although many consumer frauds are unquestionably interstate in character, many others—such as fictious pricing, home improvement frauds, and bait-and-switch schemes—tend to be more localized in nature. Moreover, those who practice such schemes also tend to prey upon persons who are least able to suffer the consequences of consumer deception—that is, the poor, the black, and the old. Expanding the jurisdiction of the Commission will enable it to proceed to a greater degree than at present against significant areas of deliberate consumer fraud on a local level.

Section 212 of S. 986, as well as section 3 of S. 1219, would give the Commission explicit power to secure a preliminary injunction to bring consumer frauds to a quick halt. We strongly support these proposals also. In many areas of consumer fraud, quick action is the only effective action. Although the proposals are almost identical, S. 1219 would permit the Commission to seek a temporary restraining order after notice to the defendant, as well as a preliminary injunction. In addition, S. 1219 would require the Commission to file its complaint within such time as may be specified by the court which issues the temporary restraining order or injunction.

Section 206 of S. 986, as well as section 4 of S. 1219, would increase the maximum civil penalty for violating a Commission order from $5,000 to $10,000. We support this increase as a means of enhancing the quality of the Federal Trade Commission's deterrent.

Other proposed amendments contained in S. 986 would enable the Commission, in a proceeding charging a violation of section 5 of the Federal Trade Commission Act, to order a respondent to take such action as the Commission finds necessary to remedy a violation of section 5. They would also enable the Commission to be represented in the courts of the United States by its own attorneys rather than by the Attorney General.

Since another bill submitted by the administration, the proposed Consumer Fraud Prevention Act, authorize private suits on behalf of those injured by an unfair or deceptive practice after the Commission has entered a final order against that practice, we tend to believe that administration of consumer remedies by the Commission is unnecessary and may detract from the Commission's overall enforcement effort.

To give the Commission such powers would substantially alter the existing framework of the Federal Trade Commission Act. It would convert the Commission from a body whose orders are designed to operate prospectively into an instrument whose decisions are designed to redress injury and, in effect, to punish. It would effect this conversion without changing any of the procedures now governing the Commission's proceedings. If such a substantial revision of the Commission's purpose is to be made, we believe that it must be accompanied by a modification of the Commission's procedures to make them more like a court of law in order to protect the rights of parties appearing before the Commission.

Moreover, to authorize the Commission to be represented in the courts by its own attorneys, rather than by the Justice Department, runs counter to the governmental policy that litigation in the courts should be centralized in the Justice Department. It seems to us that this policy is important in order to assure that the United States and its agencies have an uniform policy with respect to positions asserted in the course of litigation; to secure objectivity in the filing and handling of cases; and to achieve and maintain better rapport with the courts.

I am aware that Chairman Kirkpatrick testified that "delay between the time when a matter is sent to the Department . . . and the date it is filed has become a serious and vexing problem." We are not unaware that on occasion in the past this period of time has been longer than desirable. However, I have looked into that situation and I have reached certain conclusions. I found that time was often consumed in discussions between the Department and the Commission as to the soundness of a particular proposed case; as to whether the Commission had proposed a realistic penalty; as to whether the Commission's evidence supported the allegations proposed to be made in the complaint; and in settlement negotiations. Candidly, within the past year, Commission personel have been doing a much better job, and the Department has, on its part, developed procedures which we believe will insure the speedy filing of sound Commission cases. We therefore oppose authorizing the Commission to be represented solely by its own attorneys in litigation.

Mr. Chairman, this concludes my prepared statement.

Senator HARTKE. Mr. McLaren, I want to thank you for giving us a fine statement.

I want to particularly draw attention to the fact that the administration appears to be working in tandem with the Congress in this matter to accomplish an extremely worthwhile purpose for the consumer.

May I ask you, Mrs. Knauer, on the basis of your statement, is it fair to say that the administration really now is strongly committed

to working toward the passage of warranty legislation and legislation which will strengthen the Federal Trade Commission?

Mrs. KNAUER. We are completely dedicated to that. As you know, last year we sent up warranty legislation, too, and we certainly reaffirm our position. We certainly want to work in tandem with Congress, and we hope that meaningful warranty legislation will be promptly passed.

Mr. Chairman, may I present Mr. Lewis Engman, the General Counsel of our office of Consumer Affiairs.

Senator HARTKE. Will you push for hearings this year? Will you push for Executive consideration and will you also push for the floor action on this legislation in the same fashion—maybe I could paraphrase the order of the day—as the administration has pushed for the passage of the SST?

Mrs. KNAUER. Yes.

Senator HARTKE. As hard as they have pushed for the SST, right?

Mrs. KNAUER. We hope so.

Senator HARTKE. What did you do to advance warranty legislation in the last Congress?

Mrs. KNAUER. Last year, as you know, President Nixon had a meeting of the ranking members of the committees before which our bills were being considered. He held this meeting at the White House. Senator Magnuson was there, also the ranking Republican members, and at that time we discussed our proposed administration warranty bill. It was sent up to the Senate as an amendment to Senator Magnuson's bill as a result of that meeting. Then it was sent to the House as a separate bill.

Senator HARTKE. Did you testify before the House on that legislation?

Mrs. KNAUER. I am sure I must have. I was up here about 25 times last year.

Senator HARTKE. I do not think you did. Did you?

Mrs. KNAUER. Frankly, I cannot remember, but I will look it up, Senator. I frankly do not recall. I would have been had I been invited.

Senator HARTKE. I think maybe the best way to do that is to have our colleagues in the House supply that information for the record at this point. I think you did not, but I am not going to challenge you on this point.

(Subseq to the hearing the committee received the following response to its letter of March 25, 1971, to the chairman of the House Interstate and Foreign Commerce Committee:)

U.S. SENATE,
COMMITTEE ON COMMERCE,
March 25, 1971.

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

DEAR MR. CHAIRMAN: In hearings before the Consumer Subcommittee of the Senate Commerce Committee, Senator Hartke asked Mrs. Knauer if she had testified in support of warranty legislation in House hearings on that subject in September of 1970. Mrs. Knauer responded that she thought she had testified favorably for such legislation.

Senator Hartke understood that Mrs. Knauer did not appear before the Commerce and Finance Subcommittee of the House Interstate and Foreign Commerce Committee. It was also his understanding that Mrs. Knauer had indicated to members of the Subcommittee that she did not wish to be invited to testify on warranty legislation at that time. Would you be able to provide us with the information concerning Mrs. Knauer's appearance or non-appearance?

This information would enable us to clarify a point of confusion existing in our public hearing record. Thank you.

Sincerely yours,

WARREN G. MAGNUSON, *Chairman.*

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
ROOM 2125, RAYBURN HOUSE OFFICE BUILDING,
Washington, D.C., April 1, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of March 25, 1971 relative to the public hearings held by our Subcommittee on Commerce and Finance September 29, 30, and October 1, 1970 on numerous warranty bills.

Mrs. Virginia Knauer did not appear in person as a witness during those hearings; however, you will find a letter on pages 64, 65 and 66 from Richard W. McLaren, Assistant Attorney General, Antitrust Division, and Virginia Knauer, Special Assistant to the President for Consumer Affairs. A copy of the public hearings is enclosed for your information.

I will contact the Members, who were members of the Subcommittee on Commerce and Finance in 1970, to ascertain if Mrs. Knauer indicated to any of them that she did not wish to be invited to testify on warranty legislation at that time, and if I get any affirmative answers I will so notify you by another letter.

With kindest personal regards,

Sincerely yours,

HARLEY O. STAGGERS, M. C., *Chairman.*

(The following information was provided as an additional statement by Mrs. Knauer:)

Mrs. KNAUER. If I remember correctly, Senator, the House did hold hearings last fall. I was not able to testify in person, but I did send comments to the committee supporting the administration's bill.

Senator HARTKE. Whether you did or did not, I suppose at this moment it may be moot.

Do you agree with Chairman Kirkpatrick that these legislative proposals would, in his words, "accomplish more to achieve consumer protection in the marketplace than any other possible action which could be taken"? Would you agree with that?

Mrs. KNAUER. I would certainly think that strengthening the FTC, as we suggest this year, and also making warranties more understandable to the layman would be a big step forward on behalf of consumers.

Senator HARTKE. Specifically, I will come to this disclaimer of implied warranty, Mrs. Knauer. In your testimony you argue against the disclaimer formulation in section 108 of S. 986 because you fear, in your words, it would restrict "useful information transfers." In lieu of section 108 you urge the committee to adopt section 5 of S. 1221, which is administration bill.

Now, I think your criticism of that section may be misdirected. If you will read section 108 of the bill, it discloses—do you have it there with you?

Mrs. KNAUER. I have it.

Senator HARTKE. Section 108(a) on page 11, starting there at line 13, "There shall be no express disclaimer of implied warranties to a purchaser if any express warranty of a consumer product against defect or malfunction is made by a supplier to a purchaser in writing."

In other words, this deals only with the questions of defect or malfunction. In other words, affirmation of fact or a promise, whether they are oral or written, which do not relate to defect or malfunction may be made simultaneously with a disclaimer of implied warranties.

In other words, isn't it true, and I ask both of you together, Mr. McLaren, since both of you testified quite at length on this matter, isn't it true that both bills do take care of the question of useful information transfers?

Mr. MCLAREN. I think the answer to your question, Senator, is in the very broad definition of express warranty that is contained——

Senator HARTKE. You are a good lawyer now. Let's come back and not omit it as you did in your statement, "express warranty on malfunction and defect"—defect and malfunction—an extremely limited question now.

Mr. MCLAREN. Express warranty under the definition of this bill means any kind of a possible statement in that regard.

Senator HARTKE. Limited to those two factors.

Senator COOK. If it malfunctions, it malfunctions. If it doesn't work. it doesn't work. That is not limited, that is not precise.

Mr. MCLAREN. Suppose the advertisement said something to the effect that this is a reliable company and you can count on their product. Under this bill I think you have an express warranty.

Senator HARTKE. That may or may not be a warranty.

Mr. MCLAREN. That is the definition.

Senator HARTKE. That is not a warranty in terms of this bill that would then exclude disclaimers of implied warranties. It is not a warranty that deals with malfunction or defect.

Mr. MCLAREN. The express warranty as defined in this bill is any kind of a statement at all.

Senator HARTKE. That is true, that is the express warranty definition.

Mr. MCLAREN. If it says "reliable," that is an express warranty.

Senator HARTKE. We are dealing now with section 108. That is the section to which you and Mrs. Knauer directed your criticism. You spent most of the testimony on that. In other words, any statement which is made which does not relate to defect or malfunction would be permissible.

Mr. MCLAREN. I think that, under the language of that provision, which incorporates the term "express warranty" from the Uniform Commercial Code and the definition of an express warranty runs from the middle of page 2 over to the middle of page 3, it is any affirmation——

Senator HARTKE. You are a better lawyer than that. Let's come back to the question. We are not defining express warranty. This is a statement which has a specific relation to the utilization of the term "express warranty" of a consumer product against defect or malfunction.

Now, you have to read the term express warranty in with the qualifying words to "defect or malfunction."

Mr. McLAREN. No, you don't have to use the word——

Senator HARTKE. The section says that.

Mr. McLAREN. No, Senator, I beg your pardon. The section says that if there is an express warranty, and over in 101(2) an express warranty is created by any affirmation of fact or promise made by a supplier to the purchaser.

Now, that says to me that any affirmation of fact with regard to the operation of a device or an appliance, whatever it is, is covered, and you can be sued because you have given an express warranty against defect or malfunction.

All I am saying is it is too broad.

Senator HARTKE. It is too broad?

How could you limit it so we can say what we mean here? I think you understand what is meant.

Mr. McLAREN. The basic difference between our bill and this bill is this bill endeavors, I think, to tell industry what kind of warranties it shall give.

Senator HARTKE. Oh, no, I don't think it does that at all. Let me ask you, what if, under your bill a supplier or a manufacturer used the word "promise" instead of "warrants"?

Mr. McLAREN. I don't follow you.

Senator HARTKE. What if he used some other words instead of "warranties"? Instead of designating this as a warranty, he designated it as a promise or used some other word?

Mr. McLAREN. The difference is we don't tell him what kind of warranty he can give. We say if you use the term warranty or if you use the term guarantee, you can't disclaim the implied warranties that arise by law. Our emphasis is on disclosure and fair disclosure, whereas 986 really tells industry what kind of a warranty they shall give.

Senator HARTKE. Limited only to the question of defect or malfunction. Would you want to eliminate that? In substance is that what you are saying?

Mr. McLAREN. No, not at all. We would have industry make them as complete or as partial or as nonexistent as they determine was best in their particular situation.

Senator HARTKE. In other words, you permit a person under such circumstances to disclaim any type of his implied warranties; is that correct?

Mr. McLAREN. Absolutely, but he couldn't call it a guarantee or warranty in that event.

Senator HARTKE. What would he call it then?

Mr. McLAREN. He would have to call it a manufacturer's limited obligation.

Senator HARTKE. What if he called it a promise, would that put him sufficiently outside the law?

Mr. McLAREN. Our bill would require that he designate it a manufacturer's limited obligation if he disclaimed implied warranties. Then he could use promise or any other word. But it would have to be spelled out.

Senator HARTKE. In other words, you could leave that false impression then?

Mr. MCLAREN. No, I think you give much more of the false impression under S. 986 when you let a man say he is giving a partial warranty.

Senator HARTKE. As to the question of malfunction or defect?

Mr. MCLAREN. As to anything else, too.

Senator HARTKE. All right.

Mrs. Knauer, in your testimony you state:

> Neither S. 986 nor the Administration bill deals in any comprehensive way with problems of warranty performance or nonperformance.

Let me direct your attention to section 110(d) of title I: If a supplier breaches any express or implied warranty or any service contract obligation, he can be sued by a consumer, and if a consumer is successful, the court is to award the consumer court cost and reasonable attorney fees based upon the actual time expended.

Under this provision it makes it possible for an individual consumer to go into court. He can economically and feasibly for the first time have a very positive effect on the warranty performances.

Would you care to comment in regard to that?

Mrs. KNAUER. We have no objection to this provision in S. 986 which does provide for these consumer suits, but we think that the provision is a very limited remedy, and that it does not seem to provide for aggregating consumer claims to reach the $10,000 amount. As we know, very few consumer products cost $10,000 or more.

We feel that very few consumers under this provision would get into court unless they bought a Rolls-Royce. The average consumer would not be able to. I am sure this may not have been the intent, but I think that this should be looked into. It would seem to prevent the aggregation of claims up to $10,000, which would then restrict the benefits of the provision to someone who bought a Rolls-Royce rather than a toaster.

Senator HARTKE. Would you suggest, then, that we proceed to authorize and put into this legislation class action authority?

Mrs. KNAUER. Well, we have provided for class actions in Senate bill 1222, which is our Consumer Fraud Prevention Act, for deceptive warranties.

Senator HARTKE. Would you then advocate that we include such provision, and since you are ready and have gone on record approving the general approach, should we include such a provision in this legislation to make sure that in the event that the class action bill did not pass that at least in this regard it would be in the authority for the Federal Trade Commission to act?

Mrs. KNAUER. We feel that there could be this provision for consumer suits. We would still go back to our provision as we described it in S. 1222, providing for prior action by FTC or the Department of Justice.

Senator HARTKE. Would the administration oppose class action legislation inside this bill?

Mrs. KNAUER. No, I don't think we would oppose it, provided it was the type of class action that we recommended in S. 1222.

Senator HARTKE. Generally speaking, you can't have it two ways. You can't say on the one hand that this does not provide in any comprehensive way for the problems of warranty performance or nonperformance and that the mere right of an individual to sue is restricted to the Rolls type operation and then say at the same time that you would be opposed to——

Mrs. KNAUER. I did not say we were opposed.

Senator HARTKE. You are implying that you are opposed to an effective means of class action suits.

Mrs. KNAUER. No, I said we would not be opposed to class action, but I think at this point we had better let Dick McLaren answer that.

Mr. MCLAREN. Aside from the S. 1222 bill which has to do with fraud, we are talking here mainly about a disclosure bill which is designed to inform consumers as to the precise rights that they are getting and to do away with, so to speak, trick defenses that arise under a State law. It is not the intention under this bill to try to create extensive new Federal remedies. It is intended to expand the FTC's powers and to put the power in the Department of Justice to go after people who are using deceitful warranties.

Senator HARTKE. Is that the purpose of the law, to provide new legislative authority for the FTC and the Justice Department, or is the purpose of the law to provide protection for the consumer?

Now, you see there is a great difference in approaches, as to whether you are going to increase the power of big brother or whether you are going to increase the rights of people. If you are going to approach this matter so as to simply extend the power of the FTC and the Justice Department, and if that were the intent, I, for one, would be one of the first to be opposed to this type of action.

I thought the purpose of this bill was to provide for the individual, for the consumer some remedy from what is an obvious difficulty in the marketplace today.

Mr. MCLAREN. The bill is designed to benefit the consumer by improving the quality and character of warranties and guarantees. We find that the deterrent that has developed by the Justice Department and FTC enforcement tends to provide some pretty good results along those lines.

Now, if it is desired that consumers also be entitled to go into court under these particular provisions, then, we need to consider whether they should go into State court or whether we are going to further burden the Federal courts. We have to decide whether there is going to be a class action, and, if so, whether it is going to be an unlimited class action. There are a lot of tradeoffs to be made here.

Senator HARTKE. Tradeoffs, for what reason, Mr. McLaren? What do we have to trade off here?

Mr. MCLAREN. A lot of weighing costs against advantages. If a bill like this establishes additional causes of action in the Federal courts—I don't know whether you are aware of it, but, for example, it takes something like 4 years to get to trial in a case now in Philadelphia and about 6 years in Federal court to get to trial on the West Coast—I think you are going to put further burdens on the Federal courts. This could be a drawback to this legislation that might have great and broad implications.

Senator HARTKE. Let me say first, the bill presented by Mr. Magnuson and Mr. Moss, does not limit itself just to Federal courts. The State courts are permitted to assume jurisdiction. But you see in the first place you have argued against the FTC having the authority to seek redress in its own right, that this is unnecessary, right?

Mr. MCLAREN. No, we have suggested that they be allowed to have preliminary injunction authority to go into court, but we also find on the basis of experience that there is a need for the Justice Department to coordinate litigation in the Federal courts on behalf of Uncle Sam.

Senator HARTKE. But in relation to the consumer again——

Mr. MCLAREN. In relation to the consumer——

Senator HARTKE. I think we are at a real differing point in approaches here. In relation to specific consumer redress, you have taken the position that this power shall not be given to the FTC. Isn't that true?

Mr. MCLAREN. The important power insofar as the consumer is concerned is to have a preliminary injunction put into effect to stop the practice until the FTC can decide the case.

Senator HARTKE. But as far as specific redress for the consumer aren't you opposed to giving that power to the FTC?

Mr. MCLAREN. As far as making the FTC a court of law to determine damages and that sort of thing, we are opposed to that.

Senator, if I might add, I think that the way the bill is drafted, it probably is in conflict with the Administrative Procedure Act, and I suggest that it raises very serious constitutional questions.

Senator HARTKE. Let's go back though. Let's see where you want to go, how far you want to go for the consumer.

As far as specific consumer redress is concerned, the FTC has said that they think it will enhance the power of the FTC, isn't that correct?

Mr. MCLAREN. The Federal Trade Commission, I understand, has asked for rather broad powers of rulemaking resulting in issuance of regulations, which would in effect make it a court of law.

Senator HARTKE. And to also to proceed with specific redress for the consumer. You have said as far as you are concerned that this would detract from the FTC. There is a difference of opinion, is there not?

Mr. MCLAREN. I doubt it. The FTC at present is not constituted so that it could handle that function.

Senator HARTKE. It is not a question of procedures. I am talking about the whole substantive approach. You are saying they are not qualified to handle it. They might disagree with you and say that Justice Department may not be qualified to handle it. There is a difference of opinion. I don't think that gains anybody anything.

The question certainly is——

Mr. MCLAREN. You must understand, Senator——

Senator HARTKE (continuing). We are talking about procedures.

Mr. MCLAREN. I don't think any of the agencies are presently constituted or probably can be to handle small claims resulting from purchases from Maine to California.

Senator HARTKE. You see you are saying that the consumer, in your testimony here, should not have the right to proceed in his own right. You basically say that the class action approach——

Mr. MCLAREN. No, no, don't interpret my statement that way, please.

Senator HARTKE. You interpret it for me then.

Mr. MCLAREN. The consumer would certainly have all his rights to proceed for any violation of the warranties or limited manufacturers' obligations that would be set up in his favor under this bill. He would have a right to go into court and enforce his contract right, which is what our State and local courts have done for 200 years.

Senator HARTKE. You say it will take 4 years to go through the courts; is that true?

Mr. MCLAREN. I said it takes 4 years to get to trial in Federal court in Philadelphia at the present time.

Senator HARTKE. If you give this authority to the FTC, couldn't we eliminate the problem of the 4 years in the courts?

Mr. MCLAREN. The time to trial in the State and local courts, particularly in small claims courts, is very, very much less than 4 years, Senator.

Senator HARTKE. What I am trying to really find out is who you want to give this power to? How is the individual going to move? He can't move through class action. He is limited to moving individually, and you don't want the FTC moving to give any opportunity for consumer redress. How is he going to move?

Mr. MCLAREN. In this particular bill we are trying to deal with disclosure and fair dealing with the consumer, and we are trying to eliminate some more or less spurious defenses that are raised under the current state of the law. We are not trying in this bill to create extensive new machinery for filing lawsuits or proceeding to recoveries.

Senator HARTKE. Let me just state in conclusion, that what you are saying in substance is that we are providing for a lot of new words, maybe in labeling and things of that sort, but without much in the line of actually giving the consumer an opportunity to proceed to take advantage of that. That is my conclusion, and I wouldn't expect you to agree with that.

Let me come on to another question, Mrs. Knauer. In your testimony, you argue that the designation provisions in S. 986 require a warrantor to label any warranty he gives as either partial warranty or full warranty which thus biases market choices toward a particular kind or level of warranty protection.

As you read S. 986, is there anything that requires a supplier to give any particular kind of warranty?

Mrs. KNAUER. No.

Senator HARTKE. None; isn't that right?

Mrs. KNAUER. That is right.

Senator HARTKE. How then will designations bias the market choices?

Mrs. KNAUER. Because we think that only the largest companies with a network of repair facilities would be able to give a full warranty under the definition that you use in S. 986. A partial warranty would be

a second-class type of guarantee. We feel that this would injure certain suppliers in that people would certainly prefer a full warranty and, therefore, not perhaps want to buy a product that might be just as good with a partial warranty because the smaller companies would not have a nationwide setup of repair shops to perform as you have spelled out in S. 986.

Senator HARTKE. You say that is true. But is that necessarily true? Don't many firms today give full warranties although they don't call them that?

Mrs. KNAUER. In my experience, Senator, warranties tend to confuse laymen. Consumers are worried about them, they are not explicit, they seem to promise more than they really do. I think the whole purpose of both bills is to give consumers easily understandable warranty protection. I think we both agree on that. Both of our bills point in that direction.

Senator HARTKE. You say they are confused at the present time, but wouldn't they be less confused for the first time under this bill if they had a designation of exactly what they were going to be confronted with? In other words, if they have a full warranty, they know it is a full warranty, and if they want to buy a product with a full warranty, they would buy it with a full warranty.

Mrs. KNAUER. But this seems to favor the bigger companies.

Senator HARTKE. Not necessarily. Let me ask you this: Isn't it true in a lot of cases today individual repairs are made by contractual arrangements with independents? They don't have nationwide networks all over?

Mrs. KNAUER. The big ones do. Open the yellow pages of your phone book, and you will see where GE and Westinghouse and the others have accredited networks. Therefore, you tend to buy the big ones so you are sure there will be proper servicing at these localities. We feel that this certainly would injure the smaller manufacturer who might come up with a very fine product but because he didn't have this facility would be forbidden by S. 986 to give a full warranty.

Senator HARTKE. They are not required to give any full warranty.

Mrs. KNAUER. He would be afraid of being violative of the law.

Senator HARTKE. Isn't that the whole purpose? If you are going to give a full warranty, you expect to get a full warranty. Let me ask you this: If you have an accredited service, say, for GE, that doesn't mean that GE owns it, does it? The term "accredited" means that they are an organization which has been authorized by them, which at least they say is the one to which they give credit for having the authority to make their type of repairs; they are not owned by them, they just give them accreditation, isn't that true?

Mrs. KNAUER. We raised this point so that the committee in its wisdom will look twice in this area.

Senator HARTKE. I understand. At the present time, isn't it true a lot of people say I prefer GE over brand X? Why do they buy the GE? Why do they go for the brand names today?

Let me answer my own question. They buy GE for the simple fact that they feel that this is a reputable outfit and that they have brand X over here which they are not quite sure about at the present time. If they both have on their article "full warranty" isn't that really a great

benefit to the smaller man today which they cannot achieve today? Doesn't it give him an opportunity to go into the marketplace and say, look, now you can talk all you want to about this radio which is GE and this one which is not GE, which is a Knauer Special, and it has a full warranty, too. Then, you know, a Knauer Special is right up with the other one. Isn't that a great boon for the small outfit?

Mrs. KNAUER. If he could guarantee the performance of the repair afterward. If he could.

Senator HARTKE. That is exactly the point.

Mrs. KNAUER. In my estimation, it would be the smaller company who would be put at a disadvantage because he could not possibly take the chance of being violative of the law because he did not have this network of repair services.

Senator HARTKE. In other words, his whole secret is in building a better product; and he may be able to put that warranty out there even where a big company might not want to do it. This is true.

Mrs. KNAUER. This may be.

Senator HARTKE. One thrust point of this legislation is to get away from this obsolescence operation and come in and have a more reliable product in the marketplace.

Mrs. KNAUER. Senator, we agree on giving the consumers more information on their warranties and a better break. Just consider the items that are sold without warranty, "as is," as long as they know what they are getting for this "as is"——

Senator HARTKE. But this legislation doesn't do anything to that. If you want to go out and sell your product without a warranty, you can still do so.

Mrs. KNAUER. I think it puts them in an unfairly competitve position.

Senator HARTKE. You go on to argue that the FTC should be given the authority to make short form name distinctions between the types of warranties.

If you look at section 109 of S. 986—that is on page 12—on line 7, isn't the Commission there given the authority to do just that?

Mrs. KNAUER. Yes.

Senator HARTKE. What you refer to as a rather blunt-edged approach is apparently not so blunt after all?

Mrs. KNAUER. It is a point of view, Senator. That is all I can say.

Senator HARTKE. All right, we will go ahead.

Mrs. Knauer, in your prepared testimony, as I understand you, you are not opposed to conferring rulemaking authority on the FTC if it is done with precision as to scope and with certain due process guarantees; is that correct?

Mrs. KNAUER. Yes; we do not feel that Congress should completely well, do it in such a way that it is excessive delegation of legislative authority. We think that the rulemaking should be spelled out by explicit guidelines, and we think this is safer.

Senator HARTKE. I am not opposed to that. I think it makes good sense.

Do you have any limitations that you would envision, any specific ones?

Mrs. KNAUER. Not at this time.

Senator HARTKE. You do make a statement that you would make a differentiation between interpretive and substantive rulemaking. Would you care to elaborate on that?

Mrs. KNAUER. Not particularly.

Senator HARTKE. Would this be all right——

Mrs. KNAUER. Our general counsel wants to make a comment on that.

Senator HARTKE. All right. Otherwise, I was going to make a suggestion if you and staff would draft some legislative language along this line and give it to us, we would be glad to give it consideration.

Mr. ENGMAN. Mr. Chairman, I think that our thinking with respect to the distinction between interpretive and substantive rulemaking went as follows: That a substantive rule would be a rule which would have been arrived at in accordance with certain procedural safeguards and with certain guidelines, and this type of rule then should have the force of law and be enforced accordingly.

On the other hand, a rule which might be derived through more informal procedures which did not have some of these procedural safeguards should be interpretive in its focus only, meaning that an individual once he was charged with a particular violation would have an opportunity to challenge that particular interpretation.

Senator HARTKE. If you will work with the staff on that, I think it will have some merit, and we will certainly try to work out something out along that line.

The expert has returned. Chairman Moss is here; I should turn over the proceeding to him. I will ask one more question.

Senator Moss. You go right ahead.

Senator HARTKE. Mrs. Knauer, in your testimony you do not comment on title II of 986, concerning the Federal Trade Commission's ability to order specific consumer redress.

Would you favor that power if it were very carefully prescribed and if it were limited to the power to rescind a contract or to order the refund of the purchase price?

Mrs. KNAUER. I am going to pass that to my general counsel.

Mr. ENGMAN. I think we would consider that favorably if there were adequate safeguards involved in the proceeding.

Senator HARTKE. I am going to relinquish the chair to Chairman Moss.

Senator Moss (presiding). I thank Senator Hartke for chairing this subcommittee.

As it happens here, we get spread a little thin and have other assignments. I understand he has an appointment that he is already late for. So, that is the only reason I have assumed the chair here at what will soon be the close of this morning's session. I understand my colleague, Senator Cook, has not had an opportunity yet for questioning. So, since I was deprived of the opportunity of hearing the statements that were made, I should pass the questioning over to Senator Cook which I am glad to do right at this point.

Senator COOK. Thank you, Senator Moss. You now realize how long you have to wait being on the minority side.

Mr. McLaren, let me focus my attention on title II because I think it is all right, as Senator Hartke so eloquently did, to get on that white

horse and charge right down the middle of Wisconsin Avenue, I guess, but we do have such a thing as due process, don't we, and that applies to everybody? That applies to the individual as well as it applies to the manufacturer.

Do you have a serious question about due process when the Senator asked questions in regard to only the rights of consumers and the rights of no one else?

Mr. McLaren. Yes. I think I indicated particularly that to the rulemaking power as it is now spelled out in the bill raises constitutional problems.

Senator Cook. For instance, former Commissioner Elman in a major speech—said there is no question that the FTC needs more authority. I don't think there is any question about that. But he said that such authority should be vested explicitly.

Let me read you the language on page 17 starting at line 11: "including any rule or regulation promulgated by the Commission under section 6(g) of this act . . . " That is not very explicit; is it?

Mr. McLaren. No.

Senator Cook. Also, turn your attention to page 19, at the bottom: "Whenever it appears to the Commission to be in the public interest, the Commission shall promulgate rules and regulations defining unfair or deceptive acts or practices in a manner sufficiently specific to reasonably inform affected persons of the acts or practices prohibited. Such rules and regulations shall be promulgated in accordance with section 553," and then it proceeds to establish rules and regulations for which it can impose a civil penalty up to $10,000 for each violation. It seems to establish a procedure for hearings that denies due process, that denies discovery, that denies the ability to cross-examine, that denies, as a matter of fact, the district court that reviews its rules, even a full and complete record if the FTC does not wish to propound a full and complete record for submission to the court.

Is that not true?

Mr. McLaren. That is the way I understand it, Senator, and I might add that is not confined to consumer matters, but it is a broad as section 5 of the Federal Trade Commission Act which deals with unfair methods of competition and the entire package of law which comes under the heading of anti-trust.

Senator Cook. As a matter of fact, we are treading very carefully between consumer activities and anti-trust activities; are we not?

Mr. McLaren. We should be, but I don' think this bill does.

Senator Cook. Maybe the real answer to this would be to continue these hearings and proceed to develop a proposal to establish a separate trade court, whereby we establish a separate jurisdictional facility to try these matters. I refer to Commissioner Elman when he said the jurisdictional facilities of the FTC should not be there.

Maybe this is the time to look into that.

Mr. McLaren. I express no opinion on that at all, sir. I think the Commission, particularly as reconstituted in the last 8 months, is quite a different organization from what it was some time ago. I think it can make a great contribution in the area of consumerism.

Senator Cook. What were some of its major deficiencies 8 months ago, and prior to that time?

Mr. McLaren. Senator, I would prefer not to get into that, if you don't mind.

Senator Cook. You would not plead the fifth, would you?

Mr. McLaren. No, sir.

Senator Cook. Senator Hartke asked you if we should put class actions in here.

With the broad rule-making authority in title II, maybe that right is already in here.

Would you think with an unlimited authority to promulgate such rules and regulations as it deems necessary, that maybe in fact the FTC could promulgate those rules within the framework of title II of this act?

Mr. McLaren. I take it you mean rules providing essentially class actions to be brought before the Commission. But I don't think they could provide for such actions in court if that is what you mean.

Senator Cook. Under subsection (7) of 202:

> The Commission is further empowered and directed to order such persons, partnerships or corporations engaged in any act or practice which is unfair or deceptive to a consumer and is prohibited by Section (a)-(1) of this section, to take any other action necessary to redress the injury caused by such acts or practices to consumers.

To consumers. Let me ask you, is there any other agency in the Federal Government that has such broad authority?

Would this be the first time in legislative history that a Commission would be given almost unbridled authority to promulgate such rules and regulations as it sees fit, to impose civil penalties, and as a matter of fact, to create new causes of actions that the Federal courts would immediately have to recognize?

Mr. McLaren. This would certainly be extremely broad, Senator. I don't think I can make a comparison with other legislation.

Senator Cook. Is it not your opinion that under section (8) on page 17 that the Commission even has greater authority than the Federal District Court once it goes in the Federal courts. I read you this language:

> The Commission shall initiate civil actions in the District Courts of the United States in addition to any other action or order under this section, to obtain a civil penalty of not more than $10,000 for each such violation.

And then I read, continuing on line 20—"The Commission—" after it has gotten this penalty, after it has gotten into the Federal courts, after a judge has issued an order, after a judge has levied a penalty—

> The commission may compromise, mitigate, or settle any civil penalty if that action is accompanied by a public statement of its reasons following a public hearing at which interested parties may be heard.

A public hearing, not in the Federal courts, which, apparently, the Commission holds itself. With such a procedure, the Commission can take a Federal order, mitigate it, compromise it, settle it, and it can hold a hearing outside of the Federal court and make a determination on its own. Isn't that giving to the Commission more authority than the Federal court has itself?

Mr. McLaren. Well, I take it that this is a matter of accepting something less than the court has ordered. Certainly, that situation

could be cured by requiring the court to approve any settlement under the decree. But again, I agree with you, it is very broad.

Senator COOK. Suppose the court decides that there is a real violation, and suppose the court decides that it wants this penalty to be imposed, and suppose the court issues a direct order. Doesn't this section say that the Commission can proceed, after an order of the court, to hold its own hearings and make a determination which is different than the determination which has been made by the Federal courts?

Mr. MCLAREN. Perhaps it could, but it would have to go back into court, I would think, to enforce anything.

Senator COOK. All the bill stipulates is that it must be accompanied by a public statement of its reasons. That is not a court order.

Mr. MCLAREN. No.

But in order to collect a penalty that they might assess, I would think they would have to go into Federal court.

If I were counsel for the defendant, I certainly would not step up and pay it just because they said so, after they had been thrown out of court.

Senator COOK. Let me return to one other thing, because, Senator Hartke said that somehow or other there is no authority under law today for class actions.

Apparently we seem to have forgotten about rule 23 of the Federal rules of civil procedure. Certainly we have forgotten about the Pfizer case which is probably one of the most significant settlements of a class action that was ever made.

I have repeated on several occasions, but I think it ought to be a part of this record, that in the brief that Judge Wyatt submitted to the plaintiffs suggesting that they compromise, he stated that they should accept a settlement because, if tried separately, their chances of securing a judgment was 50–50 if not less.

If we are saying that a settlement has to be made in a class action when the chances of recovery for the plaintiff are 50–50 or less, aren't we really imposing serious strike actions?

Mr. MCLAREN. Strike actions, of course, are a problem any time you create an action and provide for attorneys' fees.

I think it at least ought to be a two-way street.

Aside from that, I think the $10,000 limitation in Federal court would militate against most consumer class actions, but this does not mean that consumers couldn't go into State courts or other local courts. I think 30-odd States have class action provisions.

Senator COOK. As a matter of fact, isn't this what we are really talking about on page 14, subsection (d): the right to go into State courts, because the right to go into the Federal courts would not exist under section (d), because there is an absolute prohibition, under section (e), starting on line 19, that the rules of 1331, title 28, shall prevail?

You can bring an action in State court unless your individual complaint is in excess of $10,000, and then you can avail yourself of the jurisdiction of 1331, title 28, isn't that really it?

Mr. MCLAREN. Yes.

Senator COOK. If we really want to solve the class action problem, the only thing we would do is to abolish the limitations under 1331

and then we could turn the Federal courts into magistrate courts. We could let anybody go into Federal courts, and this was not the basis of their creation, and not the basis of their jurisdiction. Is that correct?

Mr. McLaren. That's right, sir.

Senator Cook. Lest you think I am totally and fully in agreement with you, I want to say that I agree with the Federal Trade Commission that it should know that it can get into court. The fact that it is now encumbered after it holds a hearing, after it takes testimony, after it establishes a record, that it summarily turns it over to the Justice Department and the Justice Department can make a decision whether it will or will not file an action in the Federal courts, I think deserves a lot of exploration. I think that there ought to be a limitation. I think that the Federal Trade Commission, once it has established a sound record, once it has taken testimony—and secured preliminary or temporary injunctions—that they should have access to the courts within a reasonable period of time.

Mr. McLaren. If I might say very briefly, my review of the last several years of activity in relation to cases which FTC asked Justice to bring for penalties in Federal courts, illustrated to me the very beneficial effect of the Justice Department's reviewing the proposed cases.

Senator Cook. I would honestly like to see some of those reviews, because if what we find is that the FTC has presented very poor cases to the Justice Department for prosecution in the Federal courts, then this enlarges my feeling that we ought to separate the judicial function of the Federal Trade Commission and set up a trade court so that a full and complete record can go into the Federal district courts rather than what you have indicated has been a rather poor job on the part of the Federal Trade Commission, in making a case before it goes to Justice.

Mr. McLaren. This is on a separate penalty suit. They draft up a proposed complaint, and they bring in the evidence.

Our people review this evidence for its sufficiency and for whether or not the defendant violated the original FTC order. Many cases, we found, weren't cases that should be brought to the Federal courts.

That frequently, resulted in further investigations, and sometimes the matter would be worked up to a point where additional information and evidence was obtained, and then it could be brought into court.

But my review of penalty cases proposed in the last several years indicated that there is a very good reason for Justice to be reviewing these cases.

Senator Cook. What you are saying is that if it continues, and the authority under title II is vested in the Commission, a great many of their complaints are going to be dismissed in the Federal court?

Mr. McLaren. I would not say that, because I think they have upgraded their performance tremendously in recent months. In addition, we have changed our procedures, and we have a very effective system, I think, at the present time.

I might add, we have the same procedure with a number of other agencies—the Food and Drug Administration, for example. We bring

all their cases; they have devised good procedures over at their department; they send a solid case over, and it goes through in very short order and it is filed. We have no great problem with that.

We had a great problem with FTC. I think we have it no longer.

Senator COOK. Mrs. Knauer, let's talk about the provisions of title I. I am not as disturbed about the provisions of title I except in regard to phraseology. I think the consuming public has gotten used to the terms of warranty as to "parts only" and "parts and service".

I am wondering if they are going to understand a full and a partial warranty as distinct from the warranties that have been given throughout the years.

Mrs. KNAUER. I think if this bill becomes law, Senator, that this is the responsibility of both Government and manufacturers to illuminate them, to teach them the differences in this.

I think if business makes warranties clear enough, they will understand them.

Senator COOK. You see, I disagree with Senator Hartke, because I think the reason people buy—for example, GE products—is because GE carries a year-round, a multimillion-dollar advertising campaign and other companies do not have that same advertising capacity.

I think they obviously know a product by reason of having seen it many times before.

I think if we go as far as this bill goes, we might even deny to the consumer the freedom of the marketplace.

Let us take comparable products. Let us take a washing machine that is manufactured by GE, and one manufactured by any other company in the United States. GE has an entire system, an entire price control from the time of manufacture to the time of sale.

The other company, which doesn't have that price control, has a suggested retail price. It sends the washer to a supplier, the supplier sends it to the retailer, and the retailer sells it to a consumer.

This bill makes the manufacturer, if he warrants—assume liabilities which he is not capable of assuming. Thus he may very well choose to forego a warranty on that product. Thus the consumer may be in a poorer position, and not a better position. Isn't that true?

Mrs. KNAUER. Yes; that is true. This is why we don't think the definition of full or partial was a good approach.

Senator COOK. Let us get back to our two washing machines.

The company that has no control over the cost, under this bill, is liable for the actions of the wholesaler and retailer over whom he has no control.

Now, if the manufacturer must refund the purchase price, he must pay the profit of the distributor and the profit of the retailer. It is then his responsibility to recover these mark-ups from the distributor and retailer.

Now, what position does this put him in? Does he increase the price of his product? Does he price himself out of the market?

Or, does he decide to go to no warranty at all?

Mrs. KNAUER. I am not sure; but I would think he would tend to go to no warranty at all.

Senator COOK. It seems to me that if we are going to implement the language of title I, the only companies that will be able to offer war-

ranties are the GE's, the Sears, Roebucks, the Montgomery Wards, and no one else.

Mrs. KNAUER. That is why I said when I replied to Senator Hartke, that as the bill is now written, with full or partial warranties, it certainly favors the larger firms as against the smaller ones who could not guarantee service as outlined by the bill.

Senator COOK. Let's take the broadest of all warranties that I can think of; those offered by Sears, Roebuck: "Complete satisfaction or your money back."

How many retailers can say that?

Mrs. KNAUER. Very few.

Senator COOK. And the competitive factor is going to weigh very heavily on those, isn't it?

Mrs. KNAUER. Yes.

Senator COOK. Let's take small towns all throughout my State. If they are not fortunate to have a Sears, Roebuck, Montgomery Ward, a Western Auto, or a GE outlet, the retailer is going to be in a pretty difficult position, isn't he?

Mrs. KNAUER. Yes, he is.

Senator COOK. I return to my remark, that we may be denying to the consumer the freedom to the marketplace, as a result of our great desire to protect him. This bill does it in a very negative way. It says "if you do this, you must do it this way, but you don't have to do it in the first place." I feel we should work on legislation that would encourage warranties and their fulfillment.

Mrs. KNAUER. I think the thrust of our bill was to provide for a warranty or a guarantee, and then if there was this limiting factor, that the manufacturer would be required to call it a "limited obligation."

Senator COOK. Let's consider the legislative process that is starting to blossom throughout the country. The California statute, for instance, says that defects must be corrected within 30 days, and they must be corrected within the State of California.

It is my understanding that the State of Georgia is about to adopt an identical law.

Would this, in your mind, mean that a manufacturer would have to set up a very extensive system of points of repair, and sources of supply, possibly to the detriment of his entire manufacturing process. Or does it mean that the only people who will be able to comply would be the majors that already have a system.

Let's take a major corporation like Whirlpool. They don't have such a setup. We are saying to them that they must set up a facility in each of these areas so that if something goes wrong with the product, it can be repaired in that area within 30 days. Don't you feel that the expense involved here might force manufacturers to forgo warranties?

Mr. MCLAREN. It is shocking to me, Senator. I hadn't heard of that California law, and I can't help but wonder if it isn't an undue burden on interstate commerce.

Senator COOK. I think you are going to find a lot of manufacturers who feel that way right now.

Mr. MCLAREN. I would certainly think it would be tested.

Senator COOK. As a matter of fact, I might state that we have had a great deal of testimony before this committee that this is one field where the Federal Government should preempt, because of such legislation; and there ought to be Federal preemption, so that this would not be different in all of the States. Do you feel that maybe this is a field for preemption?

Mr. MCLAREN. I think that certainly the Federal law should set a floor. Perhaps additional provsions—constitutional ones, incidentally—could be established by State law, but I think you are right, that to a certain degree that should be preemption. But I again come back to the proposition that, in order to maintain competition and the chace for the little manufacturer as well as the big one, I think that we should focus on full disclosure and a clear disclosure so that people know what they are getting.

If they want a full warranty and it says full warranty, then the law ought to require that they are getting a full warranty. If it says guarantee, they shouldn't be able to disclaim the implied warranty of fitness of the use for which it was sold which otherwise arises under the Uniform Commercial Code.

Senator COOK. This is one of the places where I disagree with you. I don't think there ought to be a $10 limit. I don't think there ought to be a $5 limit. The Uniform Commercial Code sets no limit. Billions and billions of dollars are spent by consumers every year on items below $5 and on items below $10.

Are we saying that because you are not spending enough, you shouldn't have some kind of warranty, or shouldn't be able to depend on a product? By the way, you stated that under S. 3074, as introduced last year, there was a $10 limit. I want to make a correction. It was a $5 limit, and it was set forth in section 3(a), in order to improve the adequacy of information available to consumers to prevent deception and improve competition in the marketing of consumer products. Any supplier warranting or guaranteeing a consumer product actually costing more than $5. So, it was $5.

Mr. MCLAREN. That was in the administration's bill?

Senator COOK. You referred to S. 3074 of last year. In the administration bill last year it was $25, by the way. But I don't think there ought to be this distinction. I think if you buy something—let's say you buy that can opener. You don't want a chrome can opener that costs you $17.95, and if somebody has one at $4.95 and puts it out as an automatic can opener and it works, then by golly, he ought to be made to make it work. I don't think we ought to have the $5. I don't think we ought to have the $10. I think if we are going to protect consumers, let's protect them. As a matter of fact, we find tremendous imports have come into this country by the millions that people buy every day—that unfortunately my children buy every day—and they last 3 or 4 hours and it is broken, and it is through and it is finished. And I think there ought to be a decree in the marketplace on those items as well as the larger ones.

One other question, Mr. McLaren, and then, Mr. Chairman, I thank you.

Do you know of any other department, any other agency in the Federal Government that deals directly with the public, that would have,

or today possesses, anywhere near the broad legislative authority that title II of this bill proposes to give to the FTC?

Mr. McLaren. No; I really don't.

Senator Cook. As a matter of fact, may I even ask you, does the Department of Justice, in its creation and the statutes that apply to them, have the authority to promulgate such other rules and regulaions as it deems necessary?

Mr. McLaren. No; I don't think we have any such power that I know of.

Senator Cook. Let me say one other thing. Mrs. Knauer, in regard to the limitation of $5 or $10; I think it is important to remove this limitation, because quite frequently you will get a flyer through the mail, or you will see something at a discount store, that says "manufacturer's suggested retail price $12.98, normally sold for $9.98, reduced on sale for $4.98."

Now, how many times do you see this? Actually, the consumer thinks when he pays $4.98 that he is really getting a $12.98 product, when in fact he is probably not getting a $4.98 product. It was probably manufactured for $3.02.

Mr. McLaren. I am sure the committee will address itself to this subject.

Senator Moss. I know it is very late. I have just two or three questions that I would like to ask. First of all, Mr. McLaren, the *Pfizer* case preceded *Snively* v. *Harris*, didn't it?

Mr. McLaren. *Pfizer* doesn't raise the question of aggregating claims. Is that the one that you refer to, Mr. Chairman?

Senator Moss. Yes.

Mr. McLaren. *Pfizer* is still continuing, and I think that the settlement is still being administered. But there is a definite problem, as to whether or not you can aggregate claims.

Senator Cook. That is the reason for S. 3201 last year. I don't think there is any question about that.

Mr. McLaren. *Pfizer*, of course, arose under the Clayton Act, and there is no monetary limitation there.

Senator Moss. I was just just trying to put those in sequence since the later case seems to me is the one decided saying that you could not aggregate small claims in order to meet the limitation for Federal jurisdiction.

Mr. McLaren, Mrs. Knauer, I understand, has indicated she would give the committee her comments on proper rulemaking authority. I wonder if you could submit the same sort of a statement to us.

Mr. McLaren. We will be glad to review that, Senator. I don't want to be understood, by my prior testimony, to oppose rulemaking authority in FTC. I think it has a very definite place. I think we can go wrong, though, by making FTC rules substantive law. I think that that was the thrust of Mrs. Knauer's testimony, too, and I think if there needs to be an expansion of the interpretive rulemaking authority, we raise no serious objection to that. I will be glad to review that and be in touch with the committee.

Senator Moss. Thank you. We would appreciate that. The administration's class action bill allows class action after the FTC acts.

To that extent, the alleged ability of the FTC to order class action remedies in S. 986 is consistent with the administration's proposal, is it not?

Mr. McLaren. The administration's proposal, yes, does provide for class actions following a successful Justice or FTC proceeding—this is the so-called triggering—so as not to lose the value of those proceedings, but so as also not to dump all these cases in the Federal courts, undigested and en masse.

Senator Moss. The Justice Department is the digestive factor, then, that decides whether class actions should go in or not?

Mr. McLaren. The theory would be that, when you have worked up the case in Justice or in FTC, the work is done and the judgment is returned, so that this is not going to be the same kind of a burden on the courts as an unlimited class action would be.

It is going to be effective for the consumer, because the work has primarily been done and it is going to be fair to business. We don't find that those three tests are met if you create an unlimited class actions right. We have done a lot of thinking on this question and I know a lot of others have. We recognize there are drawbacks to this solution, but I think all I can say is that there are fewer drawbacks to this one than to the others that have been suggested.

Senator Moss. In your testimony you state, "Moreover, to authorize the Commission to be represented in the courts by its own attorneys rather than by the Justice Department runs counter to the Government policy that litigation in the courts should be centralized in the Justice Department."

Does any department or agency at the present time represent itself in court?

Mr. McLaren. Yes. There are certain exceptions. We suggest an exception here for FTC on preliminary injunctions. I believe in certain cases the NLRB and the SEC are the two agencies that do have certain rights to go directly into court.

Senator Moss. FTC, having some authority to do it, how strong then is the policy that it all be centralized in Justice?

Mr. McLaren. I think I have named the only two major exceptions since the policy went into effect back in 1870.

Senator Moss. Perhaps you could maybe clarify that a little more for the record. If you have the time to run it down, as to the exceptions, to show to what extent that policy is less than universal.

In your testimony you asked that the power to issue civil investigative demands be given to the Department of Justice.

How would the Department use this power? Is it important for an agency undertaking investigations to be able to back up its requests for information through compulsory process and why?

Mr. McLaren. This would be comparable to the power we have under the anti-trust laws. We have no investigative authority other than the grand jury. This not being a criminal case, we really have no investigative authority beyond sending someone around to ask questions, and there is no reason that the person being asked the questions couldn't refuse to answer them. FTC, of course, has very broad powers under sections 6 and 9 of the FTC Act. What I said in my testimony was that if the Justice Department is to be

given the responsibility to some extent for enforcement in this consumer field, we will need some tools to get the job done.

Senator Moss. So, you think you do need the investigative process?

Mr. McLaren. Yes. This would be to obtain documents and to get written answers to certain questions.

Senator Moss. In discussing the new cooperation between Justice and the Commission, you state that "The Department has developed procedures which we believe will insure the speedy handling of sound Commission cases."

What is a "sound Commission case?"

Mr. McLaren. It is a case in which we have evidence that the proposed defendant violated a valid FTC order. It is one in which we and FTC mutually agree that this will result in a finding of violation and the assessment of a penalty.

Our problem before was that the FTC was sending us cases that weren't sound.

Senator Moss. Does the use of the word "sound" betray the policy-making the Government might engage in in refusing to act as a lawyer for the Commission?

Mr. McLaren. No. Under our new procedures, we have some consultation betwen our new Office of Consumer Affairs and the General Counsel's Office of the FTC. Thus far, I think that it is working very well and I think that the FTC people would agree on that. The major problems have been in the past.

Senator Moss. What assurance, though, does the Commission have that its judgment will not be set aside by the Attorney General who may be marching to the beat of what the Commission might think are political drums?

Mr. McLaren. Well, of course, this isn't the area of disagreement. The area of disagreement is whether or not the Commission's order as issued is a valid one and whether or not there is evidence to support a case in court that would show that the order had been violated.

Senator Moss. Isn't that what the courts are for though? Isn't the court to decide whether or not there is a cause for action and whether or not it should render a judgment?

Mr. McLaren. That is certainly true. The Attorney General, however, has since 1870 been the officer in the Government who has screened cases for the Government to see that the Government, different arms of the Government, or different attorneys for the Government don't take into court cases that are not sound cases.

Senator Moss. Don't you have faith in the court, that it would give rather short shrift to the Commission if it came in with a case that was not sound?

Mr. McLaren. We have not only great faith in the courts but great respect for the courts, and we feel there is an obligation on the part of the Federal Government not to bring cases into the Federal courts unnecessarily.

Senator Moss. Mrs. Knauer, in your testimony you talk about "It may well be that only large and well-established companies with existing national networks of repair facilities would be able to undertake

the obligation to repair or replace within a reasonable time without charge defective warranted products."

I am wondering how many of these small suppliers sell consumer goods that we are talking about. Could you perhaps supply for the record the number you think would not be able to meet that standard?

Mrs. KNAUER. We will try to supply that.

Senator Moss. I am concerned about that. We have talked about a few of the giants, and there are a lot of small suppliers. I was just wondering how many there were. We have kept you a very long time.

Senator Cook?

Senator COOK. One question, Mr. McLaren, because we have put emphasis on the jurisdiction of the Federal courts, Wouldn't it be rather difficult for the court system here in the District or anywhere else, on an appear of a rule of the Federal Trade Commission, to hold that such rule was arbitrary and capricious if, in fact, the language of this act, which gives to the Commission broad powers to do any and all things necessary to enforce this act, along with the fact that it had a cursory record under the rulemaking procedures really, to hold that a regulation propounded by the FTC would be arbitrary and capricious?

Mr. MCLAREN. As I understand it, and I am far from being a constitutional lawyer, once the court had held that the statute didn't involve an unconstitutional delegation of congressional power, I would think there would be very little opportunity for the courts to overrule regulations that the FTC would issue.

Senator COOK. As long as that authority had been vested in them by the Congress and it was not unconstitutional?

Mr. MCLAREN. Yes.

Senator COOK. Thank you.

Senator Moss. Thank you, Mrs. Knauer, and gentlemen for your testimony. I was sorry that I was not here during the whole morning. But it has been very helpful to the committee, and we do appreciate your appearance and testimony.

We have witnesses to hear this afternoon. We will be in recess until 2:30.

(Whereupon at 12:45 p.m., the committee was adjourned to reconvene at 2:30 p.m. this same day.)

DEPARTMENT OF JUSTICE,
Washington, D.C., April 15, 1971.

Hon. FRANK E. MOSS,
Chairman, Subcommittee on the Consumer,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: As requested during the hearings on S. 986 on Monday, March 22, 1971, I am enclosing herewith five copies of a memorandum concerning the control by the Department of Justice of litigation involving the United States and its agencies. This memorandum discusses the historical and current considerations which underlie control of litigation by the Department of Justice and, as requested, sets forth the existing exceptions to that principle.

I trust that this memorandum will be helpful to you with respect to the question of whether the Federal Trade Commission should be authorized to litigate in the courts of the United States independently of the Department of Justice.

Sincerely yours,

RICHARD W. MCLAREN,
Assistant Attorney General,
Antitrust Division.

SUMMARY

At the beginning of our national government, three Departments (War, Treasury, and Post Office) were created. In addition, the President was authorized to appoint, with the advice and consent of the Senate, an Attorney General. For the first 80 years of that office, the Attorney General lacked staff, permanent offices, and control over most of the legal affairs of the Government of the United States.

In 1870, primarily because of the high cost of retaining competent outside counsel to handle the Government's litigation, the Department of Justice was established with the Attorney General as its head. Under this Act, law officers in other Departments were transferred to the Department of Justice and the Attorney General was given supervisory authority over the conduct of all litigation involving the interests of the United States.

The Act did not put to rest the problem of achieving unified control over the Government's litigating efforts because the Attorney General still lacked permanent office space, forcing the agency attorneys placed under his supervision to remain in their agency offices. Further, the statutes authorizing agencies to hire their own attorneys were not repealed. Hence, two sets of Government attorneys continued to operate.

In addition, Congress has from time to time carved out exceptions to its directive that supervisory authority over all litigation involving the United States be lodged in the Department of Justice, by giving some agencies control over their own litigation or leaving the statute silent with respect to the control of litigation. In other instances the statutes are not clear on this point, giving agencies the right to conduct litigation under the "supervision and control of the Attorney General." In the last situation, the Department has worked out agreements with the agencies on the handling of litigation but these have not been entirely satisfactory. The need for uniformity in the litigating positions of the United States, the desirability of informed selectivity in the filing and presentation of cases, and the demonstrated preference of the Federal judiciary for unified litigation control under the Department of Justice all provide substantial reasons for continuing the current practice.

I. THE HISTORICAL DEVELOPMENT OF UNIFIED CONTROL

The Attorney General started out as a lawyer for the President and the chief law officer of the Executive Branch only to the extent of giving advice when asked and arguing cases on behalf of the United States in the Supreme Court. 1 *Stat.* 93 (September 24, 1789). He had no control over legal proceedings in the lower Federal courts or over the men who did—the district attorneys. Nor was he given any resources to strengthen his position, such as an adequate salary, clerical help, permanent offices, or a library.

Complaints over these shortcomings began in 1790 with the report of the first Attorney General, Edmund Randolph. They were to be reiterated by all of his successors for the next 80 years. During this period, the legal affairs of the Government were fragmented, with each executive department handling its own business by outside counsel and by its own legal officers.

Following the Civil War, there was a great expansion in the Government's legal business, due mostly to claims arising out of the war and its aftermath. By 1870, the Congress was ready to establish a Department of Justice and did so. 16 *Stat.* 162 (June 22, 1870). Section 3 of that Act transferred law officers of all other departments to the Department of Justice, to exercise "their functions under the supervision and control of the head of the Department of Justice." Section 5 gave the Attorney General the power to send any officer of the Department of Justice to conduct and argue any case in which the United States is interested in any court of the United States as well as to "attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State[.]" By virtue of Section 16, the Attorney General was given "supervision of the conduct and proceedings of the various attorneys for the United States in the respective judicial districts . . . [and] of all other attorneys and counsel[l]ors employed in any cases or business in which the United States may be concerned." Section 17 prohibited the heads of the existing departments from employing attorneys or counsel "at the expense of the United States [.]" These provisions are currently codified with minor revisions in 28 U.S.C. §§ 516–519 (See Appendix).

The debate preceding the enactment of this statute makes clear that its primary purpose was the elimination of highly paid outside counsel, and the substitution of qualified government attorneys, capable of representing the interests of the United States in all sections of the country. Other objectives were to insure uniform interpretation of the laws of the United States, and to give the Attorney General some authority over proceedings in the lower courts involving the United States, so that he would be better able to represent the Government's interests effectively before the Supreme Court, if the matter came before that Court.

The objectives of the 1870 statute were sound, but the results left much room for improvement. The Attorney General still was not given sufficient office space to accommodate the necessary staff, and the laws authorizing the employment by various government agencies of their own legal staffs were not repealed. Hence, the desired unified control and responsibility was not achieved.

The next significant effort to centralize responsibility for the legal affairs of the Government was achieved through Executive Order No. 2877 (May 31, 1918), issued by President Wilson. The President stated that in order to avoid confusion in policies, duplication of effort, and conflicting interpretations of the law, unity of control in the administration of the legal affairs of the Federal Government was essential. Accordingly, he placed all law officers and all governmental litigation under the supervision and control of the head of the Department of Justice, and further directed that opinions of the Attorney General were to be binding upon various government agencies. This order expired six months after the Armistice, however.

In 1928, the Attorney General recommended legislation to Congress to consolidate all the legal activities of the Government under the supervision of the Attorney General. The objectives were again to secure uniformity of interpretation of the laws and to establish unified responsibility and control of all the litigation of the United States and its departments. The bill was never enacted. Pursuant to powers granted to him to reorganize executive agencies by the Treasury and Post Office Appropriations Act of 1933, 47 *Stat.* 1517, President Roosevelt issued Executive Order No. 6166 on June 10, 1933. Section 5 of the Order provided:

> Claims by or against the United States. The functions of prosecuting in the courts of the United States claims and demands by, or offenses against the Government of the United States and of defending claims and demands against the Government, and of supervising the work of the United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any claim referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Thus, by statute and by Presidential order, control over all litigation involving the United States has been entrusted to the Department of Justice.

And when the issue has arisen, the courts have given effect to this grant of supervisory authority to the Department of Justice. In *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888), the Supreme Court declared the impact of the 1870 statute to be that:

> He [the Attorney General] is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government. 125 U.S. at 279.

See also Perry v. *United States*, 28 Ct.Cl. 483, 491 (1893); *cf. Kern River Co.* v. *United States*, 257 U.S. 147, 155 (1921).

Judge Learned Hand, in *Sutherland* v. *International Insurance Co.*, 43 F.2d 969 (2d Cir. 1930), emphasized the importance of lodging unified litigation control in the office of the Attorney General, and the necessity for clear evidence of contrary Congressional intent before it could be presumed that litigation involving the interests of the United States could properly be conducted by someone other than the Attorney General:

> The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its courts . . . Congress, having so provided for the prosecution of civil suits, can scarcely be sup-

posed to have contemplated a possible duplication in legal personnel. The cost of this one consideration, but far more important is the centering of responsibility for the conduct of public litigation. The Attorney General has powers of "general superintendence and direction" over district attorneys . . . , and may directly intervene to "conduct and argue" any case in any court of the United States" . . . Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be co-extensive with his duties. And so, quite aside from the respectable authority that confirms our view, we should have no doubt that no suit can be brought except the Attorney General, his subordinate, or a district attorney under his "superintendence and direction," appears for the United States. 43 F.2d at 970–71.

In 1955, after an extensive survey of the organizational needs of the Executive Branch, the Hoover Commission concluded and so recommended to the Congress that:

> The Department of Justice should be recognized as the chief law office of the Government. It should conduct all litigation before the courts on behalf of the Government and its executive departments and agencies, except as Congress authorizes otherwise.[1]

II. STATUTORY EXCEPTIONS TO THE ATTORNEY GENERAL'S SUPERVISORY AUTHORITY OVER ALL LITIGATION INVOLVING THE UNITED STATES

Even though it has exclusive control over Federal criminal litigation, the Department of Justice does not supervise the conduct of *all* litigation involving the interests of the United States. There are many areas of civil litigation outside the Attorney General's supervisory authority.

For example, there are two courts of the United States in which the Attorney General has no authority to designate who shall represent the United States—the Tax Court and the Court of Military Appeals. Prior to December 30, 1969, the Tax Court was an independent agency in the Executive Branch of the Government (26 U.S.C. § 7441). By 26 U.S.C. § 7452, the Secretary of the Treasury was represented before the Tax Court by the Chief Counsel of the Internal Revenue Service. By Section 951 of the Tax Reform Act of 1969, P.L. 91–172 (December 20, 1969), the Tax Court was raised to the status of an Article I court. Since this change in status was accomplished by an amendment to 26 U.S.C. § 7441 with no mention of 26 U.S.C. § 7452, the Chief Counsel of the Internal Revenue Service continues to represent the United States in this court. The Court of Military Appeals is an Article I court (10 U.S.C. § 867(a)(1)). Appellate counsel selected and detailed by the Judge Advocate General of each military service represent the interests of the Government before this court. 10 U.S.C. § 870.

In addition, on occasion Congress has expressly given certain agencies the authority to control litigation arising out of their activities. For example, Congress has authorized the Interstate Commerce Commission, the National Labor Relations Board, the Federal Home Loan Bank Board, the Equal Employment Opportunity Commission and the Federal Power Commission to employ attorneys to represent the agency in litigation involving such agencies.[2]

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[1] *Legal Services and Procedure*, Report to the Congress by the Commission on Organization of the Executive Branch of the Government (6 March 1955).

[2] I.C.C.—49 U.S.C. § 16(11)—The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the commission . . . or for proper representation of the public interests in investigations made by it . . . or to appear for or represent the commission in any case in court.

F.P.C.—16 U.S.C. § 825m(c)—Substantially similar language as Interstate Commerce Commission's grant of authority.

Federal Home Loan Bank Board—12 U.S.C. § 1464(d)(1)—The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder . . . the Board is authorized to act in its own name and through its own attorneys. . . .

Equal Employment Opportunity Commission—42 U.S.C. § 2000a4(g)—Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

NLRB—29 U.S.C. § 154(a)—Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.

Where the statute has been silent as to agency legal representation, it has been the Department's position that the Attorney General controls the litigation. For example, many statutes authorize an *agency* to invoke the aid of a court in requiring the attendance of witnesses and the production of documentary evidence.[3]

In such cases, the Department of Justice has claimed the right to represent the agency involved in the court proceedings, and that claim has most often been upheld in the courts. *Federal Trade Commission* v. *Guignon*, 390 F. 2d 323 (8th Cir. 1969); *cf. Federal Trade Commission* v. *Continental Can Co.*, 267 F. Supp. 713 (S.D.N.Y. 1967). *But see Securities and Exchange Commission* v. *Collier*, 76 F. 2d 939 (2d Cir. 1935) (legislative history indicates that SEC can properly conduct and control civil actions in district courts to enjoin practices violative of its statute or its rules or regulations).

There are also some instances where government agencies, despite the absence of express authority in the statute to so do, have assumed full responsibility for the conduct of litigation. The Attorney General has not contested the assumption of such control over litigation by the Tennessee Valley Authority or the Federal Deposit Insurance Corporation, for example, for the following reasons. Both agencies are independently financed. Neither depend upon government funds for continued operation. They are truly independent agencies engaged in commercial enterprise, and as such, appear to be entitled to manage their own legal affairs.[4]

Some statutes fail to make clear, however, the extent to which agency litigation is to be subject to the Attorney General's actual control. For example, the Fair Labor Standards Act of 1938 created a Wage and Hour Division of the Department of Labor, and provided:

> Attorneys appointed under this Section may appear for and represent the [Wage and Hour] Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. 52 *Stat.* 1060, 29 U.S.C. § 204(b).

A question soon arose as to whether the Department of Labor or the Department of Justice was in charge of litigation stemming from the Act. The two Departments agreed to divide the responsibility for the Fair Labor Standards Act's enforcement, with the Department of Labor taking the responsibility for handling litigation arising under the Act at the trial level, and the Justice Department handling all appeals to federal Courts of Appeals or the state supreme courts. This agreement is expressed in a letter dated January 18, 1939 from Attorney General Frank Murphy to Elmer Andrews, Administrator, Wage and Hour Division.

In *Lowell Sun Co.* v. *Fleming*, 120 F.2d 213 (1st Cir. 1941), the court held that the statutory expression "under the direction and control of the Attorney General" was permissive and not mandatory, and, therefore, that the Attorney General had the option of delegating responsibility in this fashion to the Department of Labor. This allocation of enforcement resources was approved in another case, in which the court observed:

> If the consent of the Attorney General to file this petition was necessary, which this court does not hold that it was, consent was clearly given by the Attorney General to the Administrator. It was the evident intention and purpose of Congress to place the ultimate responsibility with the Department of Justice. The advantages of placing litigation under and subject to the control of the Attorney General lie in thus avoiding a conflict of policy between various commissions and administrative offices, and placing the ultimate responsibility in the proper Department of the Government. *Fleming* v. *Cudahy Packing Co.*, 41 F.Supp. 910, 913 (S. D. Cal. 1941.)

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[3] The statutes are:
Federal Trade Commission—15 U.S.C. § 49;
Civil Aeronautics Board—49 U.S.C. § 1484 (c), (d);
Federal Aviation Administration—49 U.S.C. § 1487 (a), (b);
Federal Communications Commission—47 U.S.C. §§ 401, 409(f);
Federal Maritime Commission—46 U.S.C. § 1124(b);
National Mediation Board—45 U.S.C. § 157(h);
Secretary of Health, Education, and Welfare (Social Security investigations)—42 U.S.C. § 405(e);
Small Business Administration—15 U.S.C. §§ 687a(d), 687b(a); and
Subversive Activities Control Board—50 U.S.C. § 792(c).

[4] In 1939 and again in 1954 the Department determined that it would be inappropriate to contest the right of government-owned agencies such as the various farm credit corporations and the FDIC to be represented by their own counsel.

Supplementary agreements between the Department of Justice and the Department of Labor have similarly allocated litigating responsibility between the two departments in cases brought under the Age Discrimination in Employment Act of 1967, 81 *Stat.* 602 (see letter dated March 29, 1968 from Assistant Attorney General Weisl to the Solicitor of the Department of Labor), and under the Equal Pay Act of 1963, 77 *Stat.* 56 (by agreement of Assistant Attorney General Douglas and the Solicitor). Although the agreement set forth in Attorney General Murphy's letter called for the Department of Justice to control litigation at the appellate levels, the Department of Labor developed such manifest expertise in the field involved that, by mutual and unwritten consent, Labor Department attorneys have written the briefs and argued cases in the various courts of appeals and in the Supreme Court.

The Congress, with respect to all final orders of the Atomic Energy Commission and the Federal Communications Commission, and with respect to certain designated final orders of the Secretary of Agriculture, the Federal Maritime Commission and the Federal Maritime Administration, has authorized the agencies to appear and be represented in any proceedings to review such order in the appropriate court of appeals, but provided that the Attorney General "is responsible for and has control of the interests of the Government in all court proceedings under this chapter." (28 U.S.C. §§ 2342, 2348, 2350) The Department has not contested the right of any of these agencies or the Department of Agriculture to handle appeals from their final orders, either at the appellate or the Supreme Court level, since the United States is a separate statutory respondent in such review proceedings, and is thus represented by the Department of Justice.

III. CONCLUSION

The foregoing history demonstrates that there were several sound reasons for lodging supervisory authority and control over all litigation involving the interests of the United States in the Department of Justice. These reasons have equally compelling validity today. First, unified control of all litigation would insure that the United States speaks with one voice in the courtroom. Effective enforcement policy requires that significant differences on important legal issues be resolved prior to the courtroom stage so that inconsistent or contradictory positions do not arise to confuse the public and hamper enforcement efforts. Second, centralized decision making permits greater objectivity and selectivity in the filing and handling of cases, as well as a more effective use of test cases as devices to clarify or modify existing law. Finally, unified control of litigation stimulates greater rapport with Federal judges, many of whom have openly and candidly expressed their desire to have government cases presented by Department of Justice attorneys. A former Attorney General has provided an excellent summary of the case for unified control of all litigation involving the Government of the United States:

> Many considerations require this result. Uniformity of interpretation of the laws, the necessity of centralized responsibility for the contacts of the executive with the judicial department, and economy, among others, have forced an organized administration of federal justice. Moreover, attorneys of the Department of Justice, because of their very detachment from the business of administration, are equipped to interpret the laws and gauge the temper of the courts. There are also many objections often made to a system whereby an administrative agency with the aid of its own attorneys first acts in a semi-judicial capacity in deciding the scope of its authority and then becomes a litigant in the courts to maintain the validity of its own proceedings.
>
> Greater variety of experience, increased resources, more numerous assistants, and the nation-wide network of district attorneys, marshals, and special agents versed in the local practice before the courts and local conditions have been made available to all government agencies through the Department of Justice. These, plus a tradition dating from the foundation of the government itself, could not be duplicated by single departments or agencies of the government. Without them no large program of law enforcement could succeed. Cummings and McFarland, *Federal Justice* 490–91 (1937).

These reasons are as persuasive today in the light of the Government's current litigating needs as they were when written in 1937.

APPENDIX

28 U.S.C. § 916. CONDUCT OF LITIGATION RESERVED TO DEPARTMENT OF JUSTICE

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 517. INTERESTS OF UNITED STATES IN PENDING SUITS

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 518. CONDUCT AND ARGUMENT OF CASES

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the Untied States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

28 U.E.C. § 519. SUPERVISION OF LITIGATION

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

AFTERNOON SESSION

Senator Moss. The hearing will come to order.

We will resume now by hearing from Mr. Winston H. Pickett, associate general counsel of the General Electric Co. He is appearing as chairman of the legislation and policy subcommittee of the consumer issues committee of the Chamber of Commerce of the United States.

STATEMENT OF WINSTON H. PICKETT, ASSOCIATE GENERAL COUNSEL OF THE GENERAL ELECTRIC CO. AND CHAIRMAN OF THE LEGISLATION AND POLICY SUBCOMMITTEE OF THE CONSUMER ISSUES COMMITTEE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES; ACCOMPANIED BY KENNETH F. STINGER, STAFF ATTORNEY FOR THE CHAMBER'S CONSUMER ISSUES COMMITTEE

Mr. PICKETT. Thank you, Mr. Chairman.

I am associate general counsel of the General Electric Co. and do appreciate the opportunity to appear on behalf of the consumer issues committee of the Chamber of Commerce of the United States. With me is Kenneth F. Stinger, staff attorney for this chamber's committee.

Senator Moss. We welcome you, Mr. Stinger.

Mr. PICKETT. Since you have a copy of my prepared remarks, may I request that it be made part of the record of these hearings and that I then briefly summarize the contents of the statement before responding to any questions that may be of interest to the committee or its staff.

Senator Moss. That may be done.

Without objection, the statement in full will appear in the record.

Mr. PICKETT. The chamber, in common with other witnesses who have already testified, affirmatively supports many of the basic principles of both title I of S. 986 and S. 1221, as well as their common objective of providing for clear and complete disclosure of essential warranty terms. Warranties should say what they mean and mean what they say, thus helping consumers to make a more informed judgment at the time of their purchase.

Were warranties the sole subject of S. 986, we would be confident that with some needed changes, the proposed legislation would become an effective vehicle for better warranty protection. Some of the areas that still concern business regarding the language of title I, have already been the subject of extended testimony by previous witnesses.

The chamber urges thoughtful consideration of the points already thus covered, such as those dealing with the issues of preemption, oral warranties, the somewhat distressingly intricate and detailed types of disclosure apparently contemplated in section 102, the mandated use of the phrases "full" and "partial" warranties, and the like.

As set forth in my prepared remarks the chamber additionally stresses its particular concern with those definitional problems inherent in the present language of section 986 as well as the need for making crystal clear the legislation is not meant to affect the substantive content of the warranties, apart from the provisions of section 104(a). With respect to section 104, prescribing the substantive content of a "full warranty" (referred to in section 103(a)), we also ask Congress to consider carefully the potential anticompetitive consequences on different size companies of these statutorily prescribed Federal minimum standards.

Finally, and for the reasons set forth, we request the committee revisit the language of section 110(e). We urge first that it be deleted and reserved for separate consideration when the committee takes up the entire question of private class action suits, as now pending before it in S. 984.

In the event, however, section 110(e) is to be retained, we recommend at least amendments which will make clear the obligations there mentioned are limited to "repair or replacement obligations" assumed under an "express warranty in writing against defect or malfunction."

Title II of S. 986 is a horse of entirely different hue. So far-reaching are its proposals to change the nature and extent of FTC regulatory power that we strongly urge, as have other witnesses, this title be separated from the rest of the bill for the purpose of eliciting the fullest possible debate.

Specifically, we are deeply concerned with:

First: The proposal to endow the Federal Trade Commission with almost unlimited power to legislate the substantive law unfair or de-

ceptive acts and practices by means of rules developed at nonhearings, on the basis of nontestimony, by nonwitnesses in any judicially accepted sense of those words. Coupled with this, moreover, would be the ability of the Commission to sustain its legislative fiats in appellate review proceedings if there was "substantial evidence" to support its conduct * * * a very low hurdle indeed under current decisional law, as so ably explained by the distinguished practitioners of the trade regulation law who appeared before you last week, Messrs. Weil, Dunkelberger and Kintner.

Second: The proposal to give the virtually unlimited authority to grant any type of redress to consumers which conceivably may have been caused by any type of unfair or deceptive act or practice.

These are extraordinary grants of power to be given five fallible mortals, unaccountable to the electorate, and who can operate across the entire spectrum of American industry—indeed, as Mr. Weil pointed out—as a majority of two! The range of unanswered questions that springs from such a legislative proposal is staggering.

Some of them are listed in the statement. Frankly, we do not believe that anyone yet is in a position to provide balanced and persuasive answers. We therefore most respectfully urge that all these issues be explored with the care and thoroughness that is merited by any such new and sweeing jurisprudential proposals.

Thank you for your attention. I will be happy to try to answer any questions that you may care to ask.

Senator Moss. Thank you, Mr. Pickett, for your oral statement. I have been able to leaf through and read in part your prepared text which is more complete and refers to the points that you made orally. I gather that your chief criticism is directed toward title II which you think makes too great a change in our present system of enforcement of the requirements of fairness and nondeception as governed by the FTC?

Mr. Pickett. That is correct, Mr. Chairman.

Senator Moss. Do you favor the administration's approach of requiring the submission to the Justice Department and having action only after the Justice Department has cleared the matter for action in court?

Mr. Pickett. I personally, sir, have no strong feelings on that. I believe that that is a matter probably for interagency concerns. Personally, we have no objection to the Federal Trade Commission being able to go into court and, as I indicated in my opening statement, we favored the injunctive powers, the increased scope to matters affecting commerce and the like.

I see personally no concern if the FTC has authority to take action on its own behalf rather than through the Department of Justice, though I leave that to wiser heads than my own.

Senator Moss. Do you have objection to the informal rulemaking provision that would be provided for the FTC?

Mr. Pickett. On the basis of the informal rulemaking which does not constitute a substantive violation of law, I commended strongly the treatment that this committee gave to it at the time it considered S. 3074. Specifically, for example, under title I of the present bill S. 986, the language that you have in the section 109 I think is adequate and

we would endorse and give approval to that type of procedure as set forth in section 109 and then repeated again in section 112(b) insofar as the warranties and guarantees are concerned.

Senator Moss. When hearings were held last year before the judiciary committee, Mr. McLaren appeared then and said that the Justice Department favored the informal rulemaking procedure.

Mr. Pickett. The reason I responded that way, Mr. Chairman, was I thing this committee helped significantly when it put in section 109 and section 112(b), the reference to "upon a public record after the opportunity for an agency hearing structured so as to proceed as expeditiously as practicable."

These were not substantive rules. They were also giving opportunity for the establishment of a record, some type of limited cross-examination that was within their discretion and control, and provided those due process safeguards, that seem to be so essential in that warranty context.

Senator Cook. Thank you, sir, for your statement.

Mr. Picket, I hope you don't mind if we put two hats on you today. We have heard a lot about GE at all of these hearings. So, I would like to ask you a question relative to your position with GE, in particular. Would you say if title I of 986 were passed into law that GE would be able to offer a full warranty?

Mr. Pickett. Well, you mean does it have the resources to do so? I would, of course, unhesitatingly answer yes.

Senator Cook. Do you think many of GE's competitors, both large or small, would be able to offer warranties comparable to or competitive with GE's?

Mr. Pickett. Of course, Senator, it is hard for me to put myself in the position of companies with which I am not intimately concerned, but I do note and respect the kind of testimony that has been given on behalf of smaller manufacturers. The National Association of Small Businesses appeared and stressed their inability to compete on an equal basis with the larger companies. The Association of Home Appliance Manufacturers, which represents both large and small manufacturers, made a similar point. The Electronics Industry Association, its consumer products division, which again has a blending of large and small, reiterated the point. The chamber, of course, which represents an extremely wide spectrum of large and small businesses, also expresses deep concern.

So what I am merely trying to expose is the basis for my view that the smaller manufacturers may well be handicapped in this situation.

Senator Cook. Even someone as large as GE, if we have a proliferation of legislation such as we presently have in the State of California, wouud face a difficult situation, would it not?

Mr. Pickett. That is an extremely difficult situation, and if you get this proliferation of separate warranty legislation in the States—and I noted your calling attention to Georgia, which is true, and a number of others which we try to follow as best we can—this would present an almost insuperable difficulty for us to deal with.

Senator Cook. For instance, if the California act were construed to be constitutional and not be in violation of the antitrust law, would

it be necessary for GE to proceed to restructure its entire—I guess you would kind of call it—complaint department——

Mr. PICKETT. Servicing and operation——

Senator COOK (continuing). Even in the State of California?

Mr. PICKETT. I admit in candor we are fortunate there because in California we have company-owned service organizations. So in that particular State it in fact did not impact on us the need for locating our own service outlets. There are many States where we do not and where, for example, because of the population or the brutal economics of the situation, there isn't sufficient business to warrant it, where we would have to deal with the situation in an extremely sensitive manner.

There would also be one possibility, and that is as some of the speculation came out, that you would have to go to some kind of service contract arrangement. But in a national distribution pattern, it is very vexatious and almost impossible to address yourselves to different warranties for different products in different States.

Senator COOK. Mr. Pickett, you really have no serious objection to a warranty-guarantee bill as such?

Mr. PICKETT. No, indeed, sir.

Senator COOK. Your real objection is to title II, as I take it, from your remarks?

Mr. PICKETT. That is correct. As we suggested in the opening statement, we felt there were some helpful things that we could suggest for consideration of the committee, confident that they could be worked out amicably on title I. Title II is our deepest concern and for the reasons broadly indicated.

Senator COOK. As associate general counsel of the General Electric Co., if the authority vested under title II were given to the FTC by the Congress, if it promulgated its rules and regulations based on the record procedure that is set out in this bill, and if you as a complainant took that question to the District of Columbia court, would you consider it rather difficult to get the court to rule on arbitrary and capricious power of the Commission if in fact the statute in fact rendered the power to the Commission and Congress had in fact given the authority to the Commission?

Mr. PICKETT. Indeed I would, sir, and I think we have somewhat bitter experiences in the past 25 years I have been with the General Electric Co., and so come to feel that that is not an idle concern.

Senator COOK. But aside from that, you have no objection to vesting the authority in the FTC of preliminary injunctions, of temporary injunctions; you have no objection, as I understand it, to authorizing some basic authority in the FTC that they do not have to stand subject to—I hate to use the word "whim," but I guess it's all right—the whim of the Justice Department as to whether it will or will not prosecute the action?

Mr. PICKETT. That is correct, sir.

Senator COOK. I think we have some basis, Mr. Pickett, that additional authority could be extended to the Federal Trade Commission but not as broad as title II may indicate.

Mr. PICKETT. That is our deepest concern. That was why I tried to sharply distinguish between informal rulemaking power for war-

ranties and guarantees versus the howitzer that is brought to bear under title II across all unfair or deceptive acts or practices.

Senator COOK. Let me ask you just one more question, if I may: Under 104(a) it says:

> Any supplier warranting consumer products in writing against defect or malfunction must undertake at a minimum the following duties in order to have deemed to have incorporated the Federal minimum standards for warranties:
> (1) To repair or replace if repair is not possible or cannot be timely made, any malfunctions or defective warranted product;
> (2) Within a reasonable time; and
> (3) Without charge.

Do you feel that within the business community that this would almost constitute a nationwide local service center which in essence would really be reinforcing the kind of language that we now find in the California statute?

Mr. PICKETT. Of course, the statute——

Senator COOK. Or contracts?

Mr. PICKETT. Well, I think the latter is the point that I was going to emphasize, Senator. Yes, it would require the contracts, certainly, not necessarily the location of your own service center, but you could contract out that responsibility with appropriately franchised people. I think one of the concerns on the part of the smaller businesses is where they do contract that responsibility. This act still makes clear if there is a failure of performance the manufacturer is ultimately liable. Now, in the case of smaller businesses you may have contracted out that responsibility and paid for it in the form of higher margins and thus in effect paid for a responsibility which the franchisee fails to fulfill. Then under the bill you come back to the manufacturer.

I think they are quite concerned about that. In other words, you may never completely contract away your responsibility for these warranties, and I think that is a concern that a lot of the smaller business people have because there are different ways, you know, that they do pay them for assuming that obligation.

Senator COOK. Let's get to the phrase "full" and "partial" warranties, because I think this is one thing that, when we get into committee, we are going to have a very difficult time with.

Let me give you an example. I think maybe the reason that, let's say that someone buys one of your refrigerators and, in fact, let's take a particular element of it. Let's take the cooling element. Let's say that you give an extended warranty on the cooling element for 2 years, 3 years, whatever the case may be. You offer full guarantee on that element, in other words, parts and labor. In other words, if something happens you come and get the refrigerator, you take the cooling element out and you put a new one in.

It is full as to that, but it is partial as to the whole. I think the bill makes an attempt to cover this by saying that we can have both warranties within the framework of a single warranty. But I wonder what reaction the consumer is going to have when he sees a partial warranty that really is a full warranty on one, two, three, or 10 or 20 things, and a partial warranty on a number of other items.

Do you construe this bill to say that you have to set out every item in the warranty on which there is a full warranty. and every item in

the warranty on which there is a partial warranty; and also in that same warranty, set out those things on which the warranty will be a year, 2, or 3 years, and those on which there will be 90 days? Because if, in fact, this bill calls for making a warranty a readable, intelligent document that a consumer can read and understand, it seems to me in items such as this we might have to put out a small book.

Mr. PICKETT. Of course, that was one of our concerns about the 14 items listed under section 102 as well, the potential for the FTC in the disclosure area to go into that detail coupled with the problems that you have just mentioned, which are in fact presently existing. For example, we will give a 1-year warranty on a refrigerator but with respect to the sealed-in mechanism, that is, the cooling unit, you get 4 additional years under the terms of which we agree to repair or replace that free of charge if something goes wrong with it.

Senator COOK. This is also very true in the automobile industry, isn't it, where you will guarantee the steering mechanism or something of that nature with a full warranty, full replacement, and yet it will be a longer time than some other item.

Mr. PICKETT. That used to be the way it was in the automotive field. I am not up to date, but I remember years ago that Chrysler, for example, made quite a to-do about their extended warranty for certain parts of the car, the transmission or some particular parts that went beyond the normal period of 1 year or 12,000 miles.

Senator COOK. Thank you very much, Mr. Chairman.

Senator MOSS. Thank you, Senator. Thank you, Mr. Pickett, for your fine statement. I appreciate Mr. Stinger's appearance with you today. You have been helpful to the committee.

Senator COOK. I must say, Mr. Chairman, I have been allowed to submit a series of questions to the witnesses, and I would hope if you feel so inclined, Mr. Pickett, that we would like your answers to them so that we might put them in the record.[1]

Mr. PICKETT. Thank you so much, Senator. We would be happy to oblige. Is there any particular time limitation?

Senator COOK. Yes; it is my understanding that the record closes on March 29. Is that right?

Senator MOSS. Yes; the record will be closed on March 29.

Mr. PICKETT. So the replies should be in to you on or before that date?

Senator MOSS. Yes.

(The statement follows:)

STATEMENT OF WINSTON H. PICKETT

Mr. Chairman, my name is Winston H. Pickett. I am Associate General Counsel of the General Electric Company, and chairman of the Legislation and Policy Subcommittee of the Consumer Issues Committee of the Chamber of Commerce of the United States. It is in this representative capacity that I appear before you today. Accompanying me is Kenneth F. Stinger, staff attorney, for the Chamber's Consumer Issues Committee.

The Consumer Issues Committee was created four years ago to help develop the National Chamber's posture on issues affecting the relationships of business and the consumer as well as to bring about an increased level of business at-

[1] See p. 303.

tention to consumer needs and wants. The committee is comprised of a broad spectrum of business leaders including executives of manufacturing, retailing, and service companies, large and small, as trade associations and state and local chambers of commerce.

The National Chamber had the privilege of last appearing before this Committee in January, 1970, to testify with respect to the original version of S. 3074 entitled, "Consumer Products Guarantee Act." Subsequently, that bill went through thoughtful consideration and extensive revisions, emerging as a much improved document. As recommended by this Committee and passed by the Senate in July, 1970, S. 3074 now appears substantially as Title I of S. 986.

VIEWS ON TITLE I

Were warranties the sole subject of S. 986 we could appear before you today with support for many of its provisions and with confidence that Title I—with needed changes—could well become a vehicle for providing consumer protection in the warranties area. The National Chamber has long been in favor of disclosure of essential warranty terms in order to make them clearer and more understandable. Indeed, we support the basic principle of this legislation to assure that warranties say what they mean and mean what they say. We support as well, in the context of this legislation, a ban on disclaimers of implied warranties of merchantability when express warranties are given.

Despite careful deliberations of this Committee with respect to the warranty portion of the present bill, there are still significant areas of concern to us which we believe deserve a thorough examination before final action is taken. For example, one of these is the definition of "express warranty" which appears in Section 101(2).

This definition, taken from the Uniform Commercial Code, is far broader than the declared purpose of the legislation set forth in Title I of the bill which recites in part that it seeks "to provide minimum disclosure standards for written consumer product warranties against defect or malfunction."

Unfortunately, Section 101(2) is not limited to written statements and written undertakings. This is an omission which we believe could be appropriately corrected by adopting the definition of "guaranty or warranty" as set forth in S. 1221 recently introduced on behalf of the Administration by Senator Magnuson. Such a definitional amendment would cure the over-breadth of the present language by assuring suppliers that verbal and other claims do not come within the purview of an express warranty as used in the provisions of this Act.

Still another important suggestion is that Section 101 be amended to include a definition of "warranty in writing against defect or malfunction", a phrase which now repetitively appears in Section 102 (a) (b), Section 103 (a), Section 104 (a), section 104 (d) (2), Section 109 and section 112 (b). This term obviously has a different meaning from the broad definition of "express warranty" set forth in 101 (2). Because most of the operative provisions of the Act noted above relate to such written warranties against defect or malfunction, this term requires its own precise definition to distinguish it from other types of representations which could become part of the basis of the bargain when a consumer product is sold.

Specifically, it might well be made clear that a "warranty in writing against defect or malfunction" means a specific written undertaking by a supplier to preserve or maintain the performance of a consumer product, or to repair or replace it, as applicable, if there is a failure in such performance.

As so defined, it is further urged that Section 110 (e), if it is to remain in the bill, make clear that the obligations assumed under the warranty there referred to be ones which are limited to those "in writing against defect or malfunction". As presently drafted, the language of section 110 (e), referring to any obligations assumed under the broad definition of an express warranty, could activate the suggested private remedies for a technical violation of the disclosure regulations set forth in Section 102 (a). For example, under the looseness of the present language, there is concern that actions could be brought under Section 110 (e) if the warrantor inadvertently reversed the street number in his address, [Section 102 (a) (1)], or where the warrantor inadvertently stated he would perform his obligations between 8 a.m. and 5 p.m. when he meant to say 10 a.m. and 5 p.m. [Section 102 (a) (11)].

While on the subject of Section 110 (e) we state, too, our basic objection to retaining it in this Act at all. In effect, Section 110 (e) may make available class action suits for Federal causes of action in state court proceedings for national classes which shop for a favorable forum even though they have no specific connection to a state. We suggest that such remedies merit at least the thoughtful consideration and detailed study they had in connection with the class action hearings held before the 91st Congress. It seems far preferable to make this whole subject of class actions, state and Federal, a matter of separate deliberation and treatment.

Still another provision of Title I of S. 986 to which we invite the Committee's re-examination is Section 104 prescribing the substantive content of the "full warranty" referred to in Section 103 (a) (1). We would hope Congress would not seek to regulate the substantive contents of warranties—as contrasted with regulations requiring adequate disclosure—without being fully aware of the anti-competitive impact of this form of Federal control establishing minimum standards.

As both the Chairman of the Federal Trade Commission and Assistant Attorney General McLaren have noted in presentations to the Committee, there is no escaping the fact that the kind of regulation contemplated in Section 104 of S. 986 might give an important competitive advantage to companies with the economic resources to afford the generous service required by a "full warranty". Companies without those adequate resources might not be able to afford more than "partial warranty" service, *regardless of the intrinsic quality of the product.* The smaller the business enterprise the more difficulty it may have in competing on a relatively equal footing with firms economically better able to provide "full warranty" service.

As Congress considers not only legislation governing warranties, but also other consumer matters, great care should be taken that requirements are not imposed on business in the name of consumer protection which would have the effect of placing undue pressures on small businesses, reducing competition or otherwise encouraging market concentration.

By providing only for effective disclosure of warranty terms and conditions, the substantive content of warranties and service would become, properly and legitimately, instruments of competition without one member of an industry enjoying a special advantage by virtue of size. We are confident that by providing for effective disclosure, the forces of the marketplace will assure to the consumer a fair choice among competing warranties and warranty service plans.

With respect to some of the other problems we have with Title I and about which other industry witnesses have ably testified, the National Chamber would be happy to offer specific language proposals in hopes of securing reasoned changes that would yield effective warranty legislation. Were warranties alone the issue, we would be hopeful and confident of this result.

VIEWS ON TITLE II

As Title II makes clear, however, S. 986 is not simply a warranty bill. Rather, it might well constitute some of the most far-reaching changes in economic regulation that have been seen for many years. For that reason, we would urge that this Committee would find it possible to treat Title II for what it is—a drastic revision of regulatory processes—and afford the subject the dignity and separate consideration to which any major revision of economic laws should be entitled. Certainly such a separation could not help but speed up the legislative process and avoid the delays inherent in the present combination of subject matters.

Title II of the bill deals directly with amendments to the Federal Trade Commission Act. Please understand that we have no quarrel with certain portions of Title II which are directed to strengthening and supplementing the authority of the Commission to function in its present regulatory context. Here, we support proposals to enlarge the jurisdiction of the Commission to cases "affecting commerce", to increase penalties for violation of Federal Trade Commission orders, or to afford the Commission the right to seek preliminary injunctions in appropriate circumstances. Rather, our concern goes to those proposals which would turn the regulatory process upside down. They are:

1. The proposal to have the Federal Trade Commission—virtually in its sole discretion—regulate in full detail any conduct by any business and, in the process, rewrite the entire law of competitive behavior.

2. The proposal to have the Federal Trade Commission—again virtually in its sole discretion—regulate the details of all contract rights and remedies between any seller and any buyer.

To illustrate, let me start with the amendments to Section 5 of the Federal Trade Commission Act which would confer upon the Commission substantive rule-making authority. These amendments appear to say that the Commission may write rules—as it sees fit—either in general terms or in complete detail with respect to any conduct by business which it decides may be unfair or deceptive. Once these rules are handed down violation would expose a party to penalties, damages, injunctions, and any other form of relief that the Commission or private parties can devise. In other words, the Amendment would make the Commission a true giver of laws.

In issuing these laws, there may or may not be "hearings"; there are no requirements with respect to the reliability and probative character of the evidence presented at hearings that might be granted; there are no means for contending parties to test the veracity of any statements made; and it appears that the Commission may, if it chooses, pay little regard to anything said at the hearings apart from what its own selected witnesses may have stated. We are, in short, faced with the prospect of having the minutest detail of business behavior determined by rules developed at non-hearings on the basis of non-testimony by non-witnesses in any judicially accepted sense of those words.

In this connection, we share many of the same concerns about "rule-making" and for similar reasons that have been expressed by several earlier witnesses. We would add, however, two additional points:

1. Under the language of Section 208 of S. 986, the grant of law-giving authority could be construed to apply to the whole gamut of competitive behavior. The first sentence of Section 208 confers upon the Commission the apparent authority to issue procedural and substantive rules under the full scope of Section 5 of the Federal Trade Commission Act. Section 5 embraces "unfair methods of competition", a term which covers not only violations of the antitrust laws but also acts which may "lead to" such violations. Given the history of the antitrust laws and the way in which Congress has jealously guarded their flexibility and development through the judicial system, it may well be that the amendment is too broadly drawn and that there is no intention to make the Commission the giver of laws for all conduct in the competitive arena. Accordingly, I simply call your attention to this.

2. Assuming that S. 986 confers the rule-making authority solely with respect to "unfair or deceptive acts or practices", I question whether appropirate attention has been paid to the content of these terms.

(*a*) First, we should bear in mind the depth of detail in regulation that is, in fact, being proposed: Based upon past Commission activity at least, this type of authority would permit rules delving into the mysteries of such matters as the terms to be used in advertising . . . the numbers of inches involved in sleeping bag lengths . . . the amount of time or space in an ad to be devoted to various types of disclosures . . . the particular place on a package where certain disclosures must be made . . . and ad infinitum.

(*b*) Secondly, we should also clearly focus upon the fact that the rule-making involves the broadest range of discretionary social and moral issues. What is, after all, an "unfair or deceptive act or practice"? We are here talking about any type of representation of any kind which, according to the Commission's standards, may tend to mislead anyone with respect to any product, service, practice or other form of commercial behavior. We are also talking of mores which may involve value judgments about gambling, prizes, or for that matter, any concept of market morality which the Commission would choose to endorse or deny.

We should hesitate to have the whole range of business practice prescribed by five Commissioners who would determine without an adequate record and a carefully determined need what size type to use on packages, what length of time ads should be run, what size boxes goods should come in and what quality control procedures must be followed. Regulations of this ytpe, at most, should be drawn pursuant to statutes that relate to highly specific and identifiable problems and circumstances.

Moreover, to assure the integrity of the decision-making process the decision-maker should be required to consider the facts, to expose those facts to the

crucible of cross-examination, and to be held to a decision based upon the weight of evidence and logic. No such procedure is required or suggested here.

The only justification proffered for sacrificing such safeguards is a concern, for possible "delays." The Federal Trade Commission—or Congress if necessary—is fully capable of devising a rational technique that would result in the conduct of hearings upon an expedited basis and still hold to a standard of decisions based upon the weight of reliable and probative evidence. Moreover, in the event of a real emergency the Commission would have authority to seek a preliminary injunction in the courts.

We fully understand Chairman Kirkpatrick's desire to be able to move as rapidly as he can. But we earnestly suggest that that is not an adequate reason for foresaking standards of fairness which in fact serve us all.

Let me next turn to those provisions of Title II which, in some ways, have been the least discussed and the most far-reaching of all. These provisions are the sections which confer upon the Commission the authority to require, where a practice is unfair or deceptive to a consumer, "any . . . action necessary to redress the injury caused by such acts or practices to cosnumers" [Section 202(7)].

A clue to the meaning of the language lies in the explication of the identical language in Section 103 of S. 3201 introduced last Session. There, these words, expressed in terms of court relief were defined to "include" orders requiring: "payment of damages, refund of money or return of property; restitution, reformation or recission of contract, repair or replacement of goods, proper servicing and public notification of violation."

Let us consider a few of the unanswered questions arising from this extraordinary grant of authority given to the Commission under Section 202(7). For example:

1. If the Commission is authorized to award damages, will it do so on some windfall basis or upon proof of some claim of injury?

2. If proof of injury is required, how will it be presented? Will the Commission designate examiners to receive claims? How many examiners will we need—10? 50? 100? 1,000? Where will they sit? In Washington or elsewhere?

3. What type of proceeding will be conducted in connection with the presentation of a claim? Will there be a record? Cross examination? And who will represent the claimant?

4. Will a decision by the Commission with respect to damages bind a defendant or a plaintiff or both, with respect to any subsequent actions in the courts? If the parties will not be bound, will they be collaterally estopped?

5. Is the net effect of the proposal to deprive the plaintiff or defendant of a right under the Seventh Amendment to trial by jury in certain civil matters, *e.g.* actions for common law fraud and deceit?

6. If Constitutional questions are not involved, would the act replace the state courts with an unspecified system of Federal Trade Commission jurisprudence?

Obviously, these are not all of the questions, but only a start. In the context of all the amendments proposed in Title II, the issues take on the nursery rhyme qualities of 'The House That Jack Built.' Will we really have a Commission that makes the law, that decides whom is hurt, that decides whom to prosecute, that prosecutes the chosen, that judges its own case, that decides the damages, that issues orders enforcing its decisions, and that makes new laws based on the case?

Seriously, we do not deprecate a proposal to provide new forms of remedies and new forms of jurisprudence. Rather, we underscore the extraordinary gravity of the measures proposed. At issue are basic considerations relating to our entire system of jurisprudence, the survival of the Uniform Commercial Code, the relationships between Federal and state governments and court systems, and the role of the Federal Trade Commission itself.

Congress may be prepared to travel the road of administrative remedies, but I suggest with all respect that no one can make an intelligent decision on these subjects on the basis of the scanty record and the analysis that has thus far been offered.

In the light of all of these unanswered questions, and of the problems we and others have outlined, we respectfully repeat our earlier request that Title II of S. 986 be separated from the rest of the bill for the purpose of eliciting a full discussion of its proposals on their own merits.

Senator Moss. Mr. Curtis Clark, on behalf of the National Association of Manufacturers. Mr. Clark is the assistant secretary and general counsel of Norton Abrasives Co.

STATEMENT OF CURTIS CLARK, ASSISTANT SECRETARY AND GENERAL COUNSEL, NORTON CO., WORCESTER, MASS., ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; ACCOMPANIED BY RICHARD D. GODOWN, ASSOCIATE GENERAL COUNSEL

Mr. CLARK. Thank you very much, Mr. Chairman.

I would like to present as my associate, Mr. Richard D. Godown, associate general counsel of NAM.

Senator Moss. We are glad to have you, sir.

Mr. CLARK. I appreciate very much the opportunity to appear in behalf of the NAM, a voluntary association of many thousands of manufacturing companies representing industry of all sizes, upon whom the burden of this proposed legislation may be expected to have its most profound and costly impact.

Our statement is directed solely to title II of S. 986, vesting novel powers in the Federal Trade Commission and altering in a number of highly irregular ways the regulatory procedures which govern many of the practices by which our members provide goods and services to the public.

The Congress and the FTC are well aware that while industry is often in disagreement with the various policies, procedures, and interpretations of the Commission, it has strongly supported the presence and the objectives of the Commission and the FTC Act in the marketing process.

Our association has adopted official policy encouraging the appointment of the most highly qualified and experienced personnel for this agency and we have testified to Congress in favor of providing ample funds for it to be an effective enforcer of laws against monopoly and unfair acts and practices which work to the detriment of consumers.

At the same time, we find several of the provisions of S. 896 so novel, vague, and excessive in their potential application that we are unable to support it in its present form.

We are forced to urge the Congress to seek other means to strengthen the effectiveness of the Commission. Our major objections to S. 986 may be summarized as follows:

1. Through indirect language, the bill would permit the Government to impose the results which would flow from class action suits on sellers at all levels. The issue of class action suits has been the subject of specific legislation in other bills in which the Congress, for many sound reasons, has not seen fit to enact.

2. As demonstrated below, the legislation so profoundly affects the structure and powers of the executive branch, and the division and responsibilities between the executive branch, the regulatory agencies, and judicial processes of our Nation that it warrants comprehensive study by the Judiciary Committees and possibly other committees of the Congress.

3. The newly delegated powers are so sweeping in nature that they give carte blanche to the Commission to subject individual and corpo-

rate citizens to arbitrary penalties of its own device directly affecting the property of business, and the right to do business and to earn a livelihood.

4. By delegation of real and pervasive legislative authority to a nonelected body, the Congress is surrendering its own vital right to enact laws and to serve as the ultimate representative of the people in the total regulation of commerce and trade. In this instance, the Congress would delegate the power to define by regulation what may constitute an "unfair" or "deceptive" act or practice in commerce, without setting forth any congressional standard or other constraint as it is constitutionally obligated to do. These same regulations would have the force and effect of law.

Our members wish to express the highest concern over that provision under section 202 which would empower and direct the Commission to order a corporation "to take any other action necessary to redress the injury caused by such acts or practices to consumers." We believe this express authority goes beyond any power heretofore possessed by any governmental body, except the courts, and amounts a grant of potential control over U.S. commerce and the lives of its citizens. We find no restrictions whatsoever over the redress which may be ordered by a Commission. This provision literally endows the Commission with the powers of any equity court.

Consider realistically the determination by the Commission of deception in an advertisement for a 50-cent cosmetic toy, or kitchen tool. Section 202 of S. 986 would conceivably provide first for a restitution of moneys applicable to all who are presumed to have been deceived or "unfairly" treated. Other forms of redress could follow such as: notification by advertisement, or by mailed notices to all trade channels; redress to the buyer for certain inconveniences or expenditures which flowed from the purchase; redress to distributors for the costs involved in accomplishing the refunds. In a transaction involving an article of substantial value, such as furniture or a major appliance, the redress ordered could encompass recall, refunds, and replacement of merchandise as well as repairs, freight charges, or any kind of related losses which might be claimed by a purchaser. In each instance the opportunity for fraudulent claims would be present, adding a burden of litigation costs upon the seller, to say nothing of the burden of investigation and determination upon the Commission and its staff.

Congress must presume further that, possessing such equity powers, the Commission may find that the seller has previously been in violation of the standard in question and its order may take the form of suspension of sales for a time period, or termination of the product line or business.

Under section 202, such action seemingly could be taken upon the record without reference to questions of good faith or intent to violate the law.

We ask the subcommittee to consider the potential for abuse of such power: for invention of excessive financial "remedies;" for uneven administration; and for rank injustice, considering the billions of transactions and the inexact and subjective nature of the evidence generally present in disputes between buyers and sellers. We submit that the result would amount to the right to levy fines and to ex-

propriate property. It could literally place the life of any business enterprise in the hands of an administrative body.

As cited in our specific example, it is immediately evident that the authority under section 202 could be used by the Commission to order redress to large bodies of buyers, thereby accomplishing the "class action" objectives of legislation which the Congress has declined to enact. We feel that such a result would be completely unwarranted.

With particular reference to paragraph (8) under section 202 this subcommittee should examine the implications of the final sentence "the Commission may compromise, mitigate or settle any civil penalty if that action is accompanied by a public statement of its reasons following a public hearing at which interested parties may be heard."

The decision to ameliorate civil penalties ought to be left to the discretion of the Commission. Public hearings on the matter would have a tendency to unduly interfere with this discretion, both by impeding civil negotiations and by opening penalty proceedings to inappropriate political, as well as other, pressures. In view of the severity of the penalties proposed, public hearings with participation by private individuals are as inappropriate here as they would be where criminal sentence was to be imposed.

The introduction of third party testimony—presumably consumer groups and public interest law firms calling for maximum penalties—will insure a "circus" atmosphere in situations critically affecting not only the success or failure of a business, but the livelihood of its employees and the economic well-being of the community around it. Congress may foresee the opportunities for compulsory disclosure of confidential marketing data and proprietary information, and the anticompetitive effects which may result from it. The entire concept appears clumsy and uncalled for.

The severity of the civil penalty of $10,000 provided by section 202 "for each such violation" should be recognized by the Congress as placing in the hands of the Commission, and the courts, the power of life and death over the largest and smallest of the Nation's business firms.

If it should be interpreted to consider "each" violation as a separate offense, and each day of violation as a separate offense, the market impact may quickly damage the strongest company or local economy. Coupled with marketing regulations having the force and effect of law, the penalty may be applied in a myriad of novel situations which are not known to Congress, and may even be unknown to sellers as a violation of any standard of law or ethics.

New doctrines of "unfairness" are daily being reported in the press as proposed by special interests or under experiment within the regulatory agencies. Members of Congress also are well familiar with the concept that an advertising "act" may be considered as an "offense" for each of hundreds of publications in which the advertisement may appear or localities in which it is broadcast, and for each day in which it is inserted or heard.

The penalty may be ordered in the face of market situations from which it is physically impossible for a company to withdraw quickly, or even over long periods. Likewise when goods are in a trade channel, the original seller may be helpless to retrive his position and continuing technical violations are inevitable.

We believe Members of Congress may realistically presume that a single $10,000 penalty scarcely would satisfy an administrative body—or a third party advocate—in an action against a substantial corporation. The alternative of multiple penalties of $10,000 is so frightening in its potential to destroy an enterprise that it should not be entrusted to either an administrative agency or the courts. As a minimum, if this provision remains in the bill, it should be modified to explain that an advertisement or broadcast of the identical message through no matter what number of outlets constitutes only a single offense on any given day.

For the same reasons, we ask the Congress to reexamine the language of section 206 of this legislation amending section 5(1) of the Federal Trade Commission Act and thereby increasing the existing penalty for violation of a final order of the Commission from $5,000 to $10,000. In this, the multiple penalties are spelled out. Again, we urge Congress to be alert to the consequences of this penalty in relation to other sections of the bill granting rulemaking powers, and to the vague standard of conduct which could be introduced into the regulatory process.

Much of the same caution should be exercised in considering the new language empowering district courts "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate"(section 206) in enforcing Commission orders. We ask why such further, unspecified equitable relief should be proposed, in the face of the new enforcement powers, and the new authority to promulgate standards which is contemplated.

Perhaps the heart of S. 986 is this delegation of legislative authority to the Commission whereby abrogation of its rules or regulations issued pursuant to section 208, automatically becomes a breach of section 5(a)(1) of the FTC Act and by definition an "unfair or deceptive act or practices."

Such a grant of legislative authority to the Federal Trade Commission, by authorizing rulemaking which has the effect of lawmaking, has given Congress pause for many years and we believe rightly so, for it takes a giant step away from representative government.

Such authority establishes, a de facto bureaucracy over the most vital single aspect of our society—the exchange of goods and services between and among citizens, and the means by which they make their living. That the Commission is now seeking many new powers is less a lack of legal deficiency in our opinion, than a lack of funds and manpower to exercise its existing power, heightened by a public agitation for action "right now."

Before surrendering its own legislative function to the members of a nonelective body, we believe that Congress should examine this specific need on its own merits, and probe every marketing consequence that is likely to flow from it. Rules over the marketplace are a different species from those governing social conduct of a violent or criminal nature.

We ask the Congress to consider the kind of individual human relationships, and social interactions, into which these governmental powers and decisions will intrude. In the vast majority, the "evils" to be corrected are not readily definable; they are not usually criminal,

or necessarily associated with traditional concepts of moral turpitude; they may not be legally definable even under statutes using such broad terms as "unfair and deceptive." In most instance, marketplace disputes are subjective, where the eye of the beholder is the determinant of the evil, and the whole truth is elusive.

Government officials have testified that the marketplace evils most frequently brought to their attention are those involving tardy delivery of goods, and dissatisfactions with the services of certain repairmen.

Under existing law, the Commission over many years has sought to define the concept of what constitutes unfair or deceptive action and courts have responded with differing interpretations. Where the Commission view has prevailed, it has been able to issue cease-and-desist orders, a powerful deterrent in the vast majority of cases.

Now cease and desist orders apparently are to be downgraded and monetary penalties which may irretrievably damage an enterprise or the economy are to be based upon these same undefined standards.

What definitions will the Commission now apply to "unfair" and "deceptive." To each person and group they have different meanings. To one group an advertising appeal to persons below a certain age is an "unfair" practice. To another it is a product that does not contain certain ingredients—either because they are removed or because they have not been added. To another, an appeal is "deceptive" if it recites the virtues, but not the shortcomings, of a seller's merchandise. To still others, all advertising itself is an economic waste and inherently unfair, and whole categories of products are "unfair" because they do not conform to a subjective evaluation of social good.

Under existing law, the Commission has applied the standards of "unfairness" and "deception" as a quasi-judicial body, considering the words in the context of the complex circumstances of each individual case before it.

Under this bill, the Congress will confer its legislative authority upon the Commission, so that rules having the force and effect of law will flow from the Commission's prevailing view of these broad concepts.

This is the critical difference between the use of such a standard as a measure of marketplace behavior in an instant case, and its employment as a universal market rule, to which all sellers must conform. And this is particularly true in view of the far-reaching consequencies which would attach under the bill to violation of an FTC regulation.

What rules shall the Commission promulgate under this carte blanche delegation of congressional authority? The Congress must presume that this will be an open invitation to seek immediately to convert to law each of the substantiative rules it has adopted over recent years—under procedures still being tested in the courts. It must be presumed that it likewise will seek to convert to law those same 11 practices—later expanded to 17—which were proposed in S. 3201 introduced in the last session of Congress.

Lest these presumptions appear to be overdrawn, we urge the Congress to examine the nature of protections this legislation ostensibly offers against excessive use of the rulemaking authority.

While the Commission's rulemaking is to be exercised under formal administrative procedures, a fatal defect again emerges in the absence of any limitations upon the power of the FTC to interpret the sweeping generalities of the section 5(a)(1) test of "unfair" and "deceptive."

It is true that under section 208 the Commission's rules and regulations are made reviewable but only in the U.S. Court of Appeals for the District of Columbia and only in accordance with chapter 7 of title V of the United States Code.

One may get the impression that the reason this provision is so stated is so that the Trade Commission, which would now be empowered to handle its own court cases instead of having to go to the Justice Department, would save travel time on the part of its attorneys since all appeal cases of this nature would be heard in the District of Columbia.

Although chapter 7 of the title V provides for fairly broad review, it does require that a person suffer "legal wrong because of agency action, or (b) adversely affected or aggrieved by agency action within the meaning of a relevant statute * * *"

We are wholeheartedly in favor of court review, of course, but would prefer to see such review available in any U.S. Court of Appeals for the circuit wherein an aggrieved person resides, and further would prefer to see review available to "any person who may be adversely affected by a trade regulation rule."

Similarly in the review procedure, whether a trade rule or regulation itself is being challenged or a finding by the FTC that some violation had occurred we feel that the Commission should be held to support its position by a preponderance of the evidence considered on the record as a whole.

In view of the sweeping power to engage in what amounts to legislating and further in view of the broad remedial powers here under consideration for entrusting to the Commission, we feel that no less a safeguard is reasonable.

In summary, we submit that this subcommittee before proceeding further with this proposed legislation, should look clearly at all the implications flowing from the circumstances we have outlined.

To summarize again: The bill grants rulemaking powers to an administrative agency which will have the full force and effect of a congressional statute without any defined congressional limitation * * * and any violation of such rule by any individual or business organization will constitute a per se violation of the FTC Act.

Upon finding a violation, the FTC would be empowered on its own right to sue on behalf of the Government in a Federal court, and to seek dollar penalties in amounts potentially capable of destroying the resources of the individual and the existence of the enterprise.

In addition to such penalties, the FTC could require the individual or corporation to redress the complaining buyers in any fashion and to any degree considered necessary.

And finally, upon the finding of a violation, even though technical and inadvertent, of a final order of the Commission, the FTC may seek a new dollar penalty, now double the existing amount, for each offense and for each day of violation.

In this situation, we ask the committee to move with great reserve in all of the areas discussed here, and to modify the bill accordingly so as not to injure irreparably the legitimate processes of the marketplace through the excessive powers and penalties contemplated by S. 986.

Mr. Chairman, that completes my formal presentation.

Senator Moss. Thank you, Mr. Clark, for that presentation.

You have directed your testimony to title II almost wholly, and I understand the objections that you have submitted to that.

Under the Administrative Procedure Act there is a section set out for the scope of review of administrative rulemaking. This is 60 Stat. 243, 5 U.S.C. 701 to 706.

I would like to read section (e), which is the Scope of Review. It says:

> So far as necessary the decision and where presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (*a*) compel agency action unlawfully withheld or unreasonably delayed; and (*b*) hold unlawful and set aside agency action, findings and conclusions found to be, (1) arbitrary, capricious or an abuse of discretion or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitation or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence of any case subject to the requirements of sections 7 or 8 or otherwise reviewed on the record of an agency hearing provided by statute; and (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determination, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

Any rule made by the Trade Commission would be subject to that kind of review.

Is it your position that even though it is subject to this kind of review as set forth in the statute that it would represent simply a whim, as the word has been used, that might come to the Commission in setting out a rule?

Mr. Clark. Mr. Chairman, I alluded in my presentation to the fact that there are many other statutes beside the administrative section that you have just read which really should be studied out to see the interrelation of these things, whether they do mesh properly or whether they overlap in fact, and whether they are inconsistent with each other.

One of the major problems that I have in looking to the section that you read as a possible control is the broad language of section 202, given the tremendous open-ended powers particularly in connection with remedies, and, of course, section 208 relates to laying down these rules by which the FTC is to be guided.

If you correlate the power plus the definition of rules, the self-perpetuating power the Commission has, I, for one, am certainly in no position to feel any certainty at all that the section that you read is going to provide the necessary control.

I think it is something that has got to be determined.

Mr. Godown. Mr. Chairman, may I add to that?

Senator Moss. Surely.

Mr. GODOWN. I think our main concern is that the bill under section 208 calls for substantive rulemaking to be promulgated in accordance with section 553 of title V, and this is section 4 of the Administrative Procedure Act, and although, of course, the section of the APA which the chairman just quoted would afford the guarantees contained therein, nevertheless, if you would allow me to refer to section 4(b) under Proceedings of the Administrative Procedure Act wherein we find these words, this is the last sentence in paragraph B:

> Where rules are required by the statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

We would submit to you, Mr. Chairman, that the reason that language appears in the Administrative Procedure Act is because that rulemaking which is conducted under section 7 affords greater procedural safeguards than rulemaking which is done in accordance with section 4 as specified for in S. 986.

Senator MOSS. Thank you for your contribution, Mr. Godown. I think I can understand what your objections are. They are similar to some that have been presented heretofore. I think it is perfectly clear now, so I will ask my colleague, Mr. Cook, if he has any questions.

Senator COOK. Thank you.

Mr. Clark, there is one thing that does seem to be a little inconsistent in your statement. If the Commission should not be entrusted with the power to impose a $10,000 penalty, should it be entrusted with the power to compromise, mitigate or settle any civil penalty, with or without a public hearing? In one part of your remarks you said it shouldn't be entrusted with the power to impose a $10,000 fine, and a couple of pages later you go into the fact that they can mitigate and settle, but you don't want the public hearing. That is the point I am trying to make.

But are you saying that you really want to maintain even a $5,000 penalty, if you don't have some kind of a record that comes to the conclusion that that penalty should either be paid, or it should be mitigated, or it should be settled?

Mr. CLARK. My answer to that would be it is not really the amount of the penalty that we are talking about that gives me the pause for concern. It is the multiplication factor over the things that we have concern.

Certainly, we don't raise in issue as to whether it is five or 10.

Second, I think both of those presentations have to be taken together and considered together.

Senator COOK. You have raised a very interesting point, and I hope I am not going way off base. But under section 212, the amendment of the Federal Trade Commission Act, it says, "Whenever the Commission has reason to believe that any person, partnership, or corporation is engaged in, or is about to engage in, any act or practice which is unfair or deceptive to a consumer, and is prohibited by section 5," then it goes on to say "the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice."

Let's carry this to possibly a ridiculous extent, and I hope I am not way out of line. But let's assume that the *Washington Post* is about to

carry a full page ad for an item offering a tremendous sale and offering tremendous guarantees or whatever they want to in their advertising and the paper is ready to be delivered out on the street. Do you think under this bill that it is conceivable the Commission could enjoin delivery of that newspaper?

Mr. CLARK. My immediate reaction is I think they probably could if it was found to be in violation of one of the rules that they had promulgated.

Senator COOK. Let's suppose that a major corporation had made a contract with a national television station for an hour-long program, that they had assumed the entire cost of it, that it had been 6 months or a year in the making, and that all the advertising spots had been prepared, and all of a sudden the Federal Trade Commission became aware of the fact that the spots that were about to be shown on television in support of this program were deceptive and unfair to the consumer. Could it enjoin the national broadcasting network or CBS from putting that program on, or asking for another advertiser or asking for another kind of advertisement; and could it ask that the advertisement that was contemplated not be used?

Mr. CLARK. I think it would be one of the most interesting cases that would have come up in a long time, because I am sure that you would have three other sections having jurisdiction over this type of control coming into play. But I must answer that under the broad context of this section, yes.

Now, as to its practical effectiveness, I think that that may have been overlooked. I don't see how where we contract, let's say, 6 months or a year ahead for advertising spots and once it gets into the mainstream, is linked in, it is a very, very difficult thing to stop those things from being reproduced and carried on which could be a technical violation after you had once been enjoined, and particularly you could call it even a willful violation.

Senator COOK. I don't really ask these questions with regard to the remarks this morning as to some of the complaints being "fanciful." The only point I am trying to make is I think we have maintained the attitude ever since the creation of the first amendment of the Constitution, that the various media—newspapers, radio, and television—are not censors of their advertising media——

Mr. CLARK. That is correct.

Senator COOK (continuing). And I know sometimes in examining witnesses that come before committees, maybe many of us tend to go to the ultimate extremes, but I do want to say to you that I have been here over 2 years now—that is not very long, I expect—but every law we have passed, whenever I have sat down to talk to somebody about it, they have always gone to the total and complete extremes of what can be done to get around it.

I am reminded of the young lawyer who went to work for the Federal Communications Commission and he told me the first thing they told him was, it is not your job to interpret the law, it is your job to expand the periphery.

The point I am trying to make is that when we create these kinds of things, we do look at the extremes. Do we honestly have an obligation to look to the extreme situations that a piece of legislation could

create, if in fact, five men decided that that was the authority they wanted to establish?

Mr. CLARK. Senator Cook, I couldn't agree with that position more, and I will merely add one further statement. In my practice of the law through the years, there is one thing that has appeared crystal clear, and that is that bad laws are unenforceable laws. We have had these laws on the books and it has become a very, very difficult thing to live within them, and particularly where penalties are involved it becomes very, very difficult for counsel to advise a client as to what a proper course of procedure may be.

When we are dealing with the mores of a community and the buying public, which is a changeable proposition—witnesses, the changes and many of them for the good in the last 5 years—but when we begin to apply penalties, give injunctive powers and this kind of thing in the light of this changing situation we have before us, I think we have to recognize that one would have to be a very, very much of a genius to advise a client as to his course of action under a law like this for the coming year.

Senator COOK. Let me needle you just a little bit, Mr. Clark, because in many respects I agree with you.

When you talked about bad laws, I want to tell you that bad warranties and bad guarantees are just as bad for the consumer. And these same lawyers that have to advise their clients—because I have practiced law long enough—they are the same lawyers that wrote warranties, and I want to tell you, you just had to look around Kelly's Bar to try to interpret what they meant.

I have a notion that there are a lot of people—I am not saying that the National Association of Manufacturers is infested with them or anything else—but there are an awful lot of manufacturers that tell their lawyers to write a warranty that is going to say a lot and do little. I honestly think this is the problem we face, and I am more concerned about title I, I am far more concerned about creating an atmosphere that will allow the business community to honestly warrant and honestly back up its product, rather than to scare them to death by giving unlimited authority to the Federal Trade Commission, which, in essence, might be able to get it done by scaring them to death, rather than trying to prevail on them to give a warranty and a guarantee to the consumer in this country that will really work, and that the consumer can really depend on.

Mr. CLARK. Speaking for myself, I couldn't agree with you more.

Senator COOK. I am delighted you feel that way.

Mr. CLARK. My comments have all been addressed to section 2, and I want to make that crystal clear. I think title I—and I am speaking only for myself because I haven't discussed this with the NAM—but from a company point of view I think this type of legislation clarifying this field is long overdue, and the only question now is how are we going to do it to make it a viable approach and examine it carefully just from that point of view and not raise any question about its validity? I concur.

Senator COOK. Thank you, Mr. Clark.

Senator MOSS. Thank you, Mr. Clark, for your presentation, and Mr. Godown for your part in it.

Before adjourning these hearings, I would like to draw public attention to the very fine statement of the Consumer Federation of America submitted to this committee. In its statement the Federation has pointed out several areas of deficiency in title I and title II, but in the main it supports S. 986 over S. 1219 and S. 1221.

In addition, I would like to place in the record a letter which I have received from Consumer Affairs Commissioner Bess Myerson Grant urging enactment of S. 986. In part she says, and I quote:

> The FTC wants and needs the authority that you have provided in title II of this bill; and the deletion of any of those powers would be most unfortunate. I trust you will give the needs of consumers everywhere your fullest consideration, and that you will do what you can to see that S. 986 is enacted and that title II is not crippled by disabling amendments.

(The letters follow:)

CONSUMER FEDERATION OF AMERICA,
Washington, D.C., March 19, 1971.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce, Old Senate Office Building, Washington, D.C.

DEAR CHAIRMAN MAGNUSON: The Consumer Federation of America is indeed pleased that you have again given high priority to legislation designed to afford consumers long-needed protection in the area of product warranties and to strengthen the hand of the Federal Trade Commission. CFA continually has urged that legislative efforts in these areas are deserving of serious, expedited consideration by the Congress and we are gratified that you share our view.

Through your efforts, and that of your Committee over these past several years, the Congress has been made to appreciate the gravity of the warranty problem. Indeed, no problem area receives greater attention in the voluminous consumer complaint mail received by CFA. If Congress has made anything clear in recent years it is its dedication to assuring honesty in the marketplace. In no area is honesty more sorely lacking than with respect to warranties, to the detriment not only of the misled consumer, but equally to the reputable businessman who cannot compete with the dishonest guarantor.

It is for this reason that CFA supports, and urges the quick enactment of legislation patterned after S. 986. It contains many of the basic requirements that are essential to guarantee honest merchandising and consumer understanding. We do feel it necessary, however, to point out several serious deficiencies which we hope can be rectified as the Committee deliberates on a final version.

First, we are greatly distressed by the requirement specified in Section 110(e) that conditions private causes of action upon the individual consumer's ability to satisfy the jurisdictional prerequisites imposed by Section 1331 of Title 28 of The United States Code. That section requires, as a condition precedent to district court jurisdiction, that the amount in "controversy exceeds the sum or value of $10,000, exclusive of interests and costs . . ." We would be hard pressed to think of any violation of S. 986 that would involve a claim exceeding that amount. The plain effect of conditioning consumer litigation on the satisfaction of Section 1331 is to flatly deny defrauded, misled, consumers access to the federal courts for the purpose of litigating their grievances, grievances which would be congressionally protected by S. 986.

Congress, in recognition of the fact that consumer complaints cannot meet the $10,000 jurisdictional requirement, has specifically and routinely exempted consumer causes of action from the satisfaction of that requirement. We have reference, for example, to the Truth-in-Lending Act, to the Interstate Land Sales Registration Act, and to securities acts generally.

The unfortunate reference to Section 1331 in S. 986 becomes even more distressing when consideration is given to the fact that had such a specific reference been omitted, the $10,000 obstacle would not arise. It would seem clear that under Section 1337 of Title 28 consumers would be free to prosecute violations of S. 986 notwithstanding the amount in controversy. Thus, the reference to Section 1331 not only represents a significant departure from the trend established, and recognized as necessary, in recent consumer legislation, it effectively

works a repeal of a jurisdictional basis that otherwise would be provided by Section 1337. We strongly urge that this difficulty be resolved and that the Committee again recognize the desirability and necessity of assuring free access to the federal courts to litigate congressionally sanctioned rights, particularly rights that have been guaranteed following the development of a long record of consumer abuse.

Further, we urge the committee to consider the desirability of providing for a minimum penalty should a consumer prevail in litigation efforts. Again, the Truth-in-Lending Act has recognized the need to provide for such and it is no less essential in the case of warranties.

We agree that both the Federal Trade Commission and the Department of Justice should be authorized to seek injunctions against deceptive warranty practices. We suggest, however, that history has demonstrated the need to grant no less of a prerogative to other public and private citizen representatives. In the area of environmental protection the greatest strides have resulted directly from the initiation of citizen lawsuits. Unfortunately, government agencies have not always moved ahead as vigorously as the public interest would seem to require. If that is so in areas where public agencies share the authority to litigate, one can only be most pessimistic about the aggressiveness that will be demonstrated should the agencies themselves have complete control over all litigation efforts. Undoubtedly it will be alleged that to extend the right to litigate would be to encourage frivolous suits. We can only respond by pointing out that the courts have a demonstrated ability to deal with that type of unfounded litigation. Again, in failing to recognize the importance of citizen injunctive actions, S. 986 represents a departure from recent congressional thinking of which the Clean Air Amendments of 1970 is the most recent example.

The Clean Air Amendments point to another difficulty with S. 986. Section 114 commendably makes the act effective six months after enactment. The real effectiveness of S. 986, however, is contingent upon administrative implementation action by the Federal Trade Commission. Unfortunately, no time limits are imposed upon the FTC. In the Clean Air Amendments, the Congress recognized that its good efforts would be rendered meaningless by administrative inertia and it imposed time requirements on the Environmental Protection Agency.

Finally, we have difficulty with disclosure standard of S. 986, being predicated, as it is, on the impression likely to be received by the "reasonable, average purchaser." Undoubtedly those who are in the greatest need of protection from misleading warranties are those who are more gullible than the "average" consumer. In recognition of this fact the courts, in dealing with the disclosure requirements of the Food, Drug and Cosmetics Act (which provisions no doubt are similarly motivated), have held that we must "postulate(e) a consuming public which includes 'the ignorant, the unthinking and the credulous' . . ." *United States* v. *An Article, Etc.*, 409 F. 2d 734, 740 (C.A. 2, 1969). We urge the committee to clarify, in its report, that similar standard is intended to be applied in measuring the legality of warranty disclosures.

For all its deficiencies, we wish to make it clear that S. 986 is far superior to S. 1221. All of the deficiencies in the former exist no less in the latter. In addition S. 1221 contains several additional, and in our view, fatal deficiencies. For example it neither provides a Federal private remedy to the injured consumer, nor for the recovery of attorneys' fees. Unless attorney' fees are provided, it is apparent that the consumer will be unable to find representation for the prosecution of these relatively nominal claims. In addition, S. 1221 does not require the disclosure of legal remedies that is required in S. 986. Moreover, it does not require a clear delineation of the steps which a consumer must satisfy in perfecting his warranty rights.

We are also troubled by the fact that S. 1221 does not provide minimum warranty standards, allows the disclaimer of implied warranties and fails to recognize that affirmations, descriptions and models around which a sale is perfected should themselves constitute express warranties.

For all of these reasons we urge the committee to reject S. 1221 as a totally unsatisfactory alternative and to turn its attention instead to the perfection of S. 986.

Finally, we wish to take this opportunity to express our strong support for title II of S. 986 which, unlike S. 1219, would give the Federal Trade Commis-

sion the tools necessary to enable it to protect the consuming public from unfair and deceptive trade practices. S. 1219 responds by authorizing the Commission to obtain preliminary injunctions; S. 986, while appreciating the absurdity of denying this basic power to the Commission, recognizes that if consumer protection is to become a reality the Commission must have the ability to impose meaningful sanctions.

Unfortunately the history of the FTC's efforts gives eloquent testimony to the folly of relying on injunctive relief. Wrongdoers are induced to stall the administrative proceedings and to continue questionable activities in full realization of that fact that if caught, and prosecuted, they will get by with a slap on the wrist and an admonition that has little effect.

Title II of S. 986 would rectify this shameful situation by providing monetary sanctions and permitting the Commission to take meaningful action on a broad rule-making basis, thus avoiding the delay and resource drain inherent in ad hoc proceedings. Finally, it recognizes that the Commission must be free to develop, indeed must be encouraged to develop, sanctions that realistically can afford the consumer protection from unfair and deceptive practices.

In recent weeks the Administration has given further expression to its view that the FTC should be the agency charged with principal responsibility for consumer protection. It follows, that the FTC deserves the ability to discharge that responsibility and therefore requires the enactment of Title II of S. 986 and not the grossly inadequate alternative which the Administration offered.

Respectfully submitted.

ERMA ANGEVINE,
Executive Director, Consumer Federation of America.

[From the Department of Consumer Affairs, Mar. 21, 1971]

COMMISSIONER MYERSON BACKS INCREASED FTC POWERS

Consumer Affairs Commissioner Bess Myerson has urged the U.S. Senate Subcommittee on Consumer Affairs to take action to strengthen the consumer protection powers of the Federal Trade Commission.

In a letter to Senator Frank E. Moss, (D., Utah), chairman of the Subcommittee, Miss Myerson expressed strong support for S. 986, a bill expending the Federal Trade Commission's jurisdiction over matters affecting consumer protection. In particular, Commissioner Myerson called for alertness so that Title II of the proposed bill would not be crippled by industry-sponsored amendments.

The bill, also sponsored by Senators Magnuson, Hart, Inouye, Kennedy, McIntyre, Pastore and Pearson, would provide minimum disclosure standards for written consumer product warranties, and amend the Federal Trade Commission Act in order to strengthen its consumer protection authority. Title II of S. 986, as it now stands, would give the FTC subpoena power and the authority to levy and collect fines from firms committing deceptive practices. "The threat to water down these powers in committee must be opposed vigorously," said Miss Myerson.

"From my experience in our consumer protection agency," the Commissioner wrote, "I have learned how important it is to be able to follow up on an investigation with prompt and effective civil action. An agency which can find the frauds but cannot penalize their perpetrators is an agency that only disappoints those whom it serves. The FTC wants and needs the authority that you have provided in Title II of this Bill, and the deletion of any of these powers would be most unfortunate."

The text of Commissioner Myerson's letter follows:

DEAR SENATOR MOSS: As Commissioner of the Department of Consumer Affairs of the City of New York, and on behalf of consumers in the United States generally, I am writing to you to express our strong support for S. 986 in general and its Title II in particular. This Department has long felt that the Federal Trade Commission would be far more effective if its powers to implement its consumer protection activities were greatly strengthened. Title II would provide these necessary powers.

From my experience in our consumer protection agency, I have learned the importance of the power to follow up on an investigation with prompt and effec-

tive civil action. An agency which can find the frauds but cannot penalize their perpetrators is an agency that only disappoints those whom it serves. The FTC wants and needs the authority that you have provided in Title II of this Bill; and the deletion of any of those powers would be most unfortunate.

At a time when the consumer is looking to agencies to protect and defend him against fraud and deception by manufacturers and retailers, a more effective federal agency in this area is certainly a necessity. To delete parts of Title II would, in effect, be to take a step backwards in consumer protection.

I trust you will give the needs of consumers everywhere your fullest consideration, and that you will do what you can to see that S. 986 is enacted and Title II is not crippled by disabling amendments.

BESS MYERSON.

Senator Moss. I think I can assure her that no portion of S. 986 will be crippled by disabling amendments.

This is the close of 4 days of hearings on the warranty FTC bill. We have heard from the Federal Trade Commission, we have heard from Justice, and from the consumer adviser of the administration. We have heard from many affected industry sources.

After reviewing this testimony and after reading the strong letters of support for this legislation from concerned citizens groups, the committee's responsibiilties appear to me to be clear.

First, both titles of this bill, the warranty provisions and the FTC enforcement machinery, represent fundamental consumer protection needs.

Second, while many industry witnesses have engaged in heated rhetoric, the hearings have succeeded in bringing to the committee's attention the need for tighter draftsmanship in several of the bill's provisions.

Third, the administration's position and its legislative proposals do not appear to be adequate to the task. The warranty provisions do not give the consumer the protection of minimal standards which are essential to rid the marketplace of deceptive corner cutting and small printsmanship of warranty practices.

The administration's FTC proposals, while commendable insofar as they support the need for preliminary injunctions and strengthened penalties, do not appear to go far enough to give the FTC the power it needs to inhibit predatory practices, that is, first, a penalty structure that will deter unfair or deceptive practices ab initio; and, two, the power to obtain restitution on behalf of consumers.

Industry witnesses have opened up the floodgates by attacking the substantive rulemaking procedures of title II. Yet these provisions have been placed in the bill not as a new grant of authority to the Commission, but simply to clarify the rulemaking powers which the Commission believes it already has.

Finally, I would like to compliment Senator Cook, who is the ranking minority member of this subcommittee, who has, in the language of the Hill, has really done his homework on these bills. He has raised questions concerning the drafting of several provisions of the bill which must be answered. I am confident, however, that these questions can be answered and the committee can proceed in the not too distant future.

Since the committee in the last Congress acted favorably upon bills embodying the essence of both titles of this bill, I see no reasons with

some modifications why we should not be able to report S. 986 in the not too distant future.

The hearing record, as I announced earlier, will remain open until March 29 for further submissions, answers to questions that have been submitted to witnesses, or others who have been witnesses and have further information that they believe should be brought to the committee's attention may submit those statements in writing up through March 29 when the record will be closed.

I don't know if Senator Cook has any final statement to make. If he does, I will ask him to do it now.

Senator Cook. Mr. Chairman, you kind of caught me off guard.

I do want to thank the chairman for the courtesies that have been extended in hearing all the witnesses. I don't really think that it was intended that the hearings would be this long, not for any reasons of wanting to cut them short, but because of the extensive hearings that were held last year.

I do want to say that there was a distinct difference of opinion in regard to S. 3201 and title II of this bill, and, consequently, the chairman has been most helpful, at least to this member of the committee, in allowing the record to express the opinion of many people throughout the country relative to the authority that would be vested under title II.

Senator Moss. So, this will conclude the oral part of these hearings with the record remaining open until March 29,

Senator Cook. As we conclude these hearings on S. 986 I would like to thank the chairman for his gracious cooperation during the 4 days of hearings. Although originally called as hearings simply on the bill S. 986, he has afforded witnesses from the executive branch an opportunity to appear and present their views not only with respect to that bill, but also with respect to legislation to accomplish the same objectives proposed by the administration—S. 1219 and S. 1221. By agreeing to keep the record open through March 29, other interested parties which have appeared at this hearing will be afforded an opportunity to comment on the administration bills.

The chairman has conducted these hearings efficiently and intelligently, and has provided an atmosphere which, I believe, has produced a valuable and comprehensive record regarding the questions of warranty laws and consumer protection. I have found the hearings illuminating and stimulating.

There are several observations I would like to make concerning the testimony before the Consumer Subcommittee. There has been, I believe, general support for the substance of title I of S. 986; namely, that warranties and guarantees be clear and concise, readily intelligible and understandable; and that manufacturers must comply with every covenant which they make in a warranty on their products. There has been general agreement that this is vital to the interest of the American consumer, and thus to the Nation.

Numerous questions have been raised concerning specific provisions of title I, and over the wording of some of the provisions. Objections have primarily been voiced over wording that could have an anticompetitive effect. For instance, it has been alleged that the words "full" and "partial" used in relation to warranties give an unintended quali-

tative implication to the product, rather than a factual representation of the extent of coverage of the warranty. It has also been suggested that these words would be more confusing and misleading than words "parts and service" and "parts only," which are currently standard terms of industry.

Objections have also been raised as to the use of words such as "conscionable," section 108(b), and "a reasonable man," section 110(c)(2), because they are nebulous and general, and are susceptible to wide-ranging definitions by legal bodies. I feel that such objections are well-founded, and that these questions warrant closer scrutiny by the subcommittee.

One final objection raised in connection with title I is that due to its stringent terms, specifically those of section 104(a), small manufacturers could be forced to forego the warranting of products or be forced to decrease the coverage of their warranties. This situation would be further aggravated by the uncertainty created by the broad definitions of "warranty" and "warrantor" contained in the bill as to the manufacturer's liability for oral representations of others which might be deemed to increase the coverage of the manufacturer's written warranty.

S. 986 was supposedly designed to promote "truth in warranties" rather than to dictate the contents of warranties. It has been contended during these hearings that title I would effectively dictate the contents of warranties or else force into an inferior competitive position, those companies unable to comply with the terms of title I. Once again, careful attention to the possible ramifications of title I is a necessity.

Unlike the testimony on title I, the record on title II indicates substantial opposition to both the substance and wording of many of its provisions. This opposition focuses principally on two aspects of title II; the proposals to assign a broad legislative rulemaking power to the Federal Trade Commission, and to allow the Federal Trade Commission to prescribe and direct remedies for violations of section 5 and of its rulings. There was also considerable sentiment in favor of separate consideration of the two titles, because they cover substantially different subjects, and because of the independent significance of each of the subjects covered.

I believe doing so would facilitate our consideration of this important legislation. As I have indicated there are relatively few problems with title I, most of which can be obviated by tighter legislative draftsmanship. This is not the case with respect to title II, however.

The primary objection to title II was that by granting the Federal Trade Commission the power to make substantive rules which would have the force of law, and the power to assign penalties to violators, the FTC would become legislator, executive and judge in regard to FTC questions. This increased power would not be accompanied by adequate checks. It was argued that the Congress should not abdicate its legislative authority and responsibility in this area to an executive agency without prescribing limits to the Commission's authority. I tend to concur with these sentiments.

However, I must say that I do support the concepts embraced by title I. I also endorse some extension of added authority to the Federal Trade Commission which would facilitate a more effective operation.

The extent of such added authority, however, is an issue on which I must reserve judgment at this point. I am convinced that such amendments to the Federal Trade Commission Act as are ultimately determined to be appropriate would best be handled as a separate bill, such as S. 1219 proposed by the administration. It is not clear to me at this point that authority, in addition to that proposed to be extended to the Commission under S. 1219, is either desirable or necessary.

These hearings have demonstrated to me that there are major shortcomings in S. 986. I urge both this subcommittee and the full committee to carefully examine the testimony given before this subcommittee, the answers received to questions which I transmitted to all nongovernmental witnesses by letter of March 19, and the comparable provisions of S. 1219 and S. 1221 before taking action in this area.

(Whereupon, at 3:45 p.m., the hearing was concluded.)

(The letter referred to follows together with the responses received from the various witnesses in the order in which the witnesses appeared:)

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C., March 19, 1971.

DEAR ———: At the March 15 and 16 hearing on S. 986 in which you participated printed copies of the Administration's bill were not available. At that time I requested each of the witnesses to submit their views for the record on Administration bills covering the same subject matter based on copies of the executive communications transmitting such bills for introduction which were furnished immediately before the hearing.

The bills have now been printed. I am transmitting herewith copies of S. 1221, the Administration's Fair Warranty Disclosure Act of 1971 (which is the counterpart of Title I of S. 986) and S. 1219, the Administration's Federal Trade Commission Act Amendments of 1971, (which is the counterpart of Title II of S. 986). I believe your comments will be more helpful if they are directed to the provisions of the printed bills. I would also like to take this opportunity to once again urge you to submit comments on the counterpart Administration proposed legislation.

As you may recall during the hearings, I requested the opportunity to submit written questions to certain witnesses. I have since become convinced that it would be extremely helpful to us to obtain the responses of all witnesses to a uniform set of questions concerning some of the more controversial aspects of S. 986.

Accordingly, I am transmitting herewith such a list of questions. At my request, the record will remain open for an additional 7 days, i.e., until March 29, 1971, to allow for the inclusion of your responses thereto. Your timely response to my written interrogatories will be appreciated.

Please send your reply to me to the attention of Henri F. Rush, Jr., Minority Staff Counsel, Senate Committee on Commerce, Room 5102, NSOB, Washington, D.C. 20510 as soon as possible.

Thanking you for your co-operation, I remain

Sincerely yours,

MARLOW W. COOK,
U.S. Senator.

QUESTIONS BY SENATOR MARLOW W. COOK ON S. 986

1. Would Title I of the bill be improved if "warranty" were defined in terms of a written promise or undertaking and "warrantor" defined in terms of a person making such a promise or undertaking?

2. Is there a better way than the above to ensure that oral representations of retailers and wholesalers will not become binding upon a manufacturer as oral additions to the manufacturer's written warranty?

3. It has been suggested that only a very few large nationwide manufacturers and merchandisers would be able to meet the requirements for offering a so-

called "full warranty" under this bill because of the apparent requirement of on-the-spot service and repair facilities. Would this requirement pose problems for the company or members of the association which you represent?

4. Would the amendments in Title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new section 5(a)(7) of the FTC Act (contained in section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

5. What limitations on the Commission's authority to issue remedial orders under the above would you propose?

6. Would you object to the proposed new section 5(a)(8) of the FTC Act (contained in section 202 of the bill), authorizing the Commission to go into court and seek civil pnealties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by section 5(a)(1) of the Act, if the phrase "including any rule or regulation promulgated by the Commission under section 6(g) of this Act" (appearing at lines 11–13 on page 17 of S. 986) were eliminated?

7. At present the FTC undertakes interpretive and rule making proceedings. Is it your position that the resulting rules are advisory only and not legislative? Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

8. If the rule making authority were eliminated and the section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the Commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease and desist orders?

9. Do you object to the expansion of subpoena power and delegation of the authority to issue subpoenas which would be accomplished by the revision of the Act proposed under section 209 of the bill?

10. If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

WEIL, LEE & BERGIN,
New York, N.Y., March 25, 1971.

Hon. MARLOW W. COOK,
New Senate Building,
Washington, D.C.
(Attention: Henri F. Rush, Jr.).

DEAR SENATOR COOK: Thank you for the opportunity to respond, as follows, to the questions posed regarding S. 986 via your letter of March 19, 1971.

Questions 1–3: No comment.

As stated during my appearance before the Subcommittee, shortness of time has precluded my studying any portions of S. 986, other than Title II, with the thoroughness necessary to responsible comment.

Question 4: Only slightly.

The courts appear to have allowed the Commission wide latitude in applying the amorphous substantive phrase of FTCA § 5(a)(1), ". . . unfair . . . acts or practices . . .", and almost unlimited scope in determining the factual issues in adjudicative procedures, based upon the reasoning that cease and desist orders—even where their factual and legal support may be flimsy—do not, in any event, entail any penalty or other detriment to the defendant beyond having to discontinue the activity involved. If this premise is to be changed, and business subjected to costly "redress" mandates, it should be only in conjunction with a more rigorous eye toward due process fairness in the underlying adjudicative procedure than has so-far prevailed, as described above. The justification for the courts' presently more relaxed approach to such considerations will have been taken out of the picture.

Beyond that, the addition of any "redress" capacities to the Commission's authority will head straight into the constitutional questions I described during my personal appearance: unlawful delegation of judicial power to the administrative agency, and rupture of the separation of powers principle in our constitutional law. These are such serious implications that attention to them by other appropriate committees of the Senate would seem to be called for.

Question 5: Total.

For reasons stated under Question 4.

Question 6: Yes.

I am far from confident, taking into acocunt the doctrine of "constructive" knowledge, and the bill's clause reading ". . . or knowledge fairly implied on the basis of objective circumstances . . ." that the business community would be adequately and fairly protected against the peril of heavy monetary penalties for violation of so ill-defined conduct as committing an ". . . unfair . . . act or practice . . ." [FTCA § 5(a)(1)].

Question 7: Yes.

As fully set forth in the supplement to the statement which I made before the Senate Judiciary Committee in the last session regarding S. 3201, and which the Chairman allowed to be included by reference during my appearance before the present Subcommittee, the rule making authority of the Commission at this time is limited to advisory rules with respect to the import of FTCA § 5(a)(1). My objections to converting this authority into a legislative one have also been set forth in my statements to the Senate Judiciary Committee with respect to S. 3201 in the last session and in my oral presentation on March 15, 1971 to the present Subcommittee considering S. 986.

Question 8: Yes.

Companies may, and often are, seriously injured by press or other publicity that FTC has "found" them guilty of unfair or deceptive acts or practices. Mere issuance of a complaint is usually given that construction. Lodging a complaint in court seeking substantial "penalties", whether criminal or civil, would carry even a greater impact than mere issuance by the Commission of its own administrative complaint. Therefore, such action should be subject to the more objective, impartial and unbiased review of the Justice Department before it is permitted to occur.

Question 9: Yes.

Broadly framed subpoenas can be a source of great burden, if not harassment, to the companies upon whom they are served. The proposals referred to in this question would remove such protections as presently exist in the Justice Department and the courts against over-enthusiasm on the part of the Commission in its utilization of subpoenas.

Question 10: No.

In a separate letter to the Chairman of the Subcommittee, a copy of which is enclosed herewith, I have addressed myself to a very important line of inquiry posed by Mr. Sutcliffe in his questions to me last Monday.

I trust that the above will be helpful to you, and wish to express my great appreciation for the interest you are showing in these matters.

Respectfully yours,

GILBERT H. WEIL.

ARENT, FOX, KINTNER, PLOTKIN & KAHN,
Washington, D.C., March 31, 1971.

HENRI F. RUSH, Jr., Esquire,
Minority Staff Counsel, Senate Committee on Commerce,
New Senate Office Building,
Washington, D.C.

DEAR MR. RUSH: The attached letter from Earl W. Kintner to you is submitted today pursuant to an extension of time agreement between Mr. Sutcliffe and me that though the record closed on March 29, 1971, the attached letter, if received on March 31, 1971, would be considered and included with the other responses in the printed record.

Many thanks for your attention.

Sincerely,

JETHRO K. LIEBERMAN.

ARENT, FOX, KITNER, PLOTKIN & KAHN,
Washington, D.C., March 31, 1971.

HENRI F. RUSH, Jr., Esquire,
Minority Staff Counsel, Senate Committee on Commerce,
New Senate Office Building,
Washington, D.C.

DEAR MR. RUSH: This is in response to Senator Cook's letter of March 19,

1971, requesting answers to ten specific questions on S. 986 and general comment on the alternative Administration bills, S. 1221 and S. 1219.

As I indicated two weeks ago, my comments on behalf of the Proprietary Association did not deal with Title I of S. 986. With the general policy behind Title I of S. 986 and S. 1221, concerning the fair disclosure of warranties, neither I nor the Proprietary Association can or do quarrel. The problems that exist in many industries with disclosures and terms of warranties do not appear to affect the members of the Proprietary Association. Accordingly, on behalf of the Association I respectfully defer comment on questions 1 through 3 and on S. 1221.

I am prepared, however, to respond to questions 4 through 10 and to comment generally on S. 1219 concerning proposed amendments to the Federal Trade Commission Act. These are matters of great importance to the Proprietary Association and to me personally.

Turning first to S. 1219, the Administration's alternative proposal to Title II of S. 986, I believe this bill would achieve a proper balance between the need for expanding the Federal Trade Commission's jurisdiction and the use of enforcement techniques and the equally important need for protecting American business from virtually unlimited agency regulation.

On the one hand, Section 2 of S. 1219 would provide for the expansion of Commission jurisdiction to acts and practices "affecting commerce." This parallels Sections 201, 207, and 211 of S. 986. Section 3 of the Administration bill would enhance the power of the Commission to seek preliminary injunctions against unfair consumer practices which violate Section 5 of the Federal Trade Commission Act. This proposal also has its counterpart, Section 212 of S. 986. In addition, the Administration proposal contains a proviso which would expressly authorize the court to condition preliminary injunctive relief upon timely issuance of a Section 5 complaint. We believe this is a wise proviso. It would require the Commission to act with dispatch without endangering the efficacy of the preliminary injunction tool. We continue our wholehearted, unreserved support for those legislative amendments to the Federal Trade Commission Act which would expand agency jurisdiction and preliminary injunctive power in the manner proposed by S. 1219. See my March 15, 1971 statement concerning S. 986 before the Senate Subcommittee on Consumer Affairs and the Proprietary Association's April 9, 1970 statement concerning S. 3065 before the same Subcommittee.

On the other hand, unlike Sections 202 and 208 of S. 986, S. 1219 does not contain the objectionable proposals that would delegate to the Commission legislative rulemaking power and would empower the Commission without limit to fashion consumer remedies and seek civil penalties for violation of its own rules. The exact nature of our objections and the reasons therefor are set forth in my March 15, 1971 statement concerning S. 986.

For the foregoing reasons, I conclude that S. 1219, the Administration counterpart proposal to Title II of S. 986, would substantially strengthen and improve operation of the Federal Trade Commission without delegating to the agency limitless powers to regulate American business.

QUESTIONS 4 AND 5

Undeniably, if the powers to redress consumer injury proposed in paragraph (7) of Section 202 were specifically delineated by statute and the exercise of such powers were controlled by full and fair hearings, the proposal would be less objectionable. However, I can suggest no practicable limitations which would make the proposal palatable. It is my position that the Commission's present enforcement tools, such as cease and desist orders, industry guides, enforcement statements, and advisory opinions are adequate to do the job given sufficient budgetary support and continued high caliber of staff. This is *a fortiori* so if the agency's present tools are buttressed by expansion of the preliminary injunction power and by ability to obtain civil penalties for knowing violations of Section 5, as distinct from violations of Commission-made rules. Redress of consumer injury should be handled through the courts, not through an agency which combines substantial investigative, prosecutorial, and judicial functions.

QUESTION 6

I believe that deletion of the phrase "including any rule or regulation promulgated by the Commission under section 6(g) of this Act" from paragraph (8) of Section 202 would render a substantial improvement in the proposal. The risk of arbitrary and capricious agency action under this provision would be greatly attenuated if the Commission were required to prove in a court of law that a particular respondent knowingly committed an unfair or deceptive act or practice to a consumer under Section 5 of the Federal Trade Commission Act. For such egregious misconduct, the civil penalty measure certainly appears justified. As indicated in my March 15, 1971 statement, a much different matter is presented by S. 986 as it now reads, in that the Commission would be able to seek civil penalties for violations of its own rules, the requisite element of knowledge being implied from the fact of rule-making proceedings and publication of the rule in the Federal Register.

QUESTION 7

It is certainly our position that the Federal Trade Commission has no general substantive rule-making power. Unlike provisions in such statutes as the Wool Products Labeling Act, 15 U.S.C. § 68(a), which carefully circumscribe narrow areas wherein the Commission is given specific authority to fashion rules with the effect of law, the Federal Trade Commission Act does not delegate to the Commission the general power to declare through rules acts or practices violative of § 5(a). That fact is at least implicit in S. 986 itself and Chairman Kirkpatrick's endorsement of it: new laws are not needed to supply power that already exists. As I emphasized in my March 15 testimony, we would object to provisions giving the FTC authority to promulgate rules having the force of law.

QUESTIONS 8 AND 9

With respect to the provisions in S. 986 concerning the Commission's power to go directly to court to seek enforcement of its cease and desist orders and subpoenas without relying on the Department of Justice, we see both advantages and disadvantages. The advantages are that proceedings might well be expedited by eliminating the need to involve the Department of Justice and that wasteful overlap in work might be avoided. A disadvantage is that adding such powers to an agency that already combines investigative, prosecutorial, and judicial functions eliminates an important check on governmental power that has heretofore existed. We would urge the Committee to weigh the pros and cons carefully before making a decision to alter the existing institutional arrangement.

QUESTION 10

S. 1177, the bill introduced by Senators Ribicoff and Javits on March 10, 1971, would establish a Council of Consumer Advisers in the Executive Office of the President and would also establish an independent Consumer Protection Agency. Broadly speaking, these bodies would be given power to investigate, collect information, make reports, intervene in legal and administrative proceedings on behalf of consumers, publicize consumer complaints, and work with the states to develop and fund state consumer programs. Since S. 1177 is a long and comprehensive bill, I hesitate within the limited time I have had to study it to make any specific comments on the desirability of its many provisions. It does seem, however, to deal with topics and concerns that go well beyond those proposed in S. 986 and S. 1219.

If I may reiterate what I said two weeks ago, it seems highly desirable to me to write two separate bills in place of the two titles in S. 986. In this regard I support the Administration's approach represented by S. 1219 and S. 1221. Extensive hearings have already been conducted relative to warranties, whereas the concepts of expanded trade regulation rule and remedial powers have been but briefly subjected to full hearings. These are separate matters. They should be in separate bills.

If you have any additional questions or would like more detailed analysis of the questions presented, I would be most happy to respond.

Sincerely,

EARL W. KINTNER.

COVINGTON & BURLING,
Washington, D.C., March 27, 1971.

HENRI F. RUSH, Jr., Esquire,
Minority Staff Counsel, Senate Committee on Commerce,
New Senate Office Building,
Washington, D.C.

DEAR MR. RUSH: In reply to Senator Cook's letter of March 19, 1971, requesting comment on some ten questions, I am offering the following responses. It will be appreciated that within the time afforded these must necessarily be somewhat succinct.

As a prefatory observation, we believe that there is good reason for dividing Titles I and II of S. 986 into two distinct bills, in order that, as Mrs. Knauer testified, "each subject area [might] be taken up and disposed of on its own merits."

In our view, these warranty protection objectives in Title I are well motivated. As far as the canning industry is concerned, the issues posed by Title I are not a problem. Nor are we sufficiently knowledgeable to make helpful evaluations of them.

In the second session of the 91st Congress, S. 3074, dealing with the warranty area, was passed by the Senate. Those desiring prompt action in this area may well feel that in the light of the extensive hearings held last year, consideration of Title I might go forward as a separate measure. This would permit the many major and serious issues raised by Title II to be more carefully considered.

An additional reason for this suggestion is that the relative impact upon the American economy that might be occasioned by Title I is insignificant compared to the far reaching and drastic impact which Title II will have.

Accordingly, we may deal with Senator Cook's specific questions beginning with Question 4.

QUESTION 4

The proposed addition of a subsection "(7)" to Section 5(a) of the Federal Trade Commission Act cannot be viewed in isolation. The title as a whole makes three basic changes in the entire structure of the Federal Commission ("the Commission"). By Section 208 the Commission is given virtually unlimited power to legislate, that is, to make its own laws. By Section 202, specifically by the proposed addition of a new subsection "(8)", the Commission is authorized directly to initiate civil penalty actions in the Federal courts for violation of "any rule or regulation promulgated by the Commission" under Section 208.

By the addition of the proposed new subsection "(7)", the Commission's authority is increased in those instances where it elects to proceed by issuing a complaint. (Elsewhere, in Sections 204 and 205, the bill converts a "cease and desist order" into a "Commission order.")

The proposed addition of a new subsection "(7)" must be viewed against this entire series of statutory changes. In the hearings it has been made clear that the phrase, "to take other action necessary to redress the injury caused", would permit the Commission where it determined to issue an "order" to include in that order a directive to the respondent covering payment of damages, refund of money or return of property, restitution, reformation or rescission of contacts, repair or replacement of goods, and public notification of violation. In short, what may be included in a "Commission order" following a Commission proceeding is vastly expanded.

No longer will it relate to the cessation of conduct which the Commission will determine to be unfair or deceptive to a consumer. Instead, it will apply, retroactively, a series of punitive requirements based on past conduct. That previous business conduct may not have been theretofore determined to be unlawful except where the Commission has by its delegated legislative powers by fiat made it unlawful.

Thus, Section 202 of the bill fundamentally changes the entire functioning and structure of the Commission. As I have endeavored to set forth in my testimony before the Subcommittee, this is a complete reversal of the entire Congressional concepts in creating the Commission. Without detailed repetition, the determination of what is *for the future* to become an unfair or deceptive practice was to be made on a complaint, a complete record on sworn testimony subject to cross-examination, and with adequate court review.

Section 202 runs entirely counter to this carefully developed Congressional delegation. If Section 208 is to convert the Commission into a legislature, and Section 202 "(8)" is to permit the Commission to by-pass its developed administrative processes and directly to bring a civil penalty action for violation of what is legislates, the effect of Section 202 "(7)" is to convert the Commission into a Federal court. The Commission thus can inform any business with respect to any of its operations what the law is to be, and then promptly either seek penalties for the failure to obey, or alternately enter "Commission orders" containing anything the Commission decides is necessary to redress the injury which it determines was caused by the violation of what the Commission in the first instance has legislated.

The deletion of Section 202 is not only necessary, but it would also only in part cure the incredible sweep of Title II.

QUESTION 5

We believe that the present system of the Commission implementing the meaning of "unfair method of competition or unfair or deceptive act or practice" should not be altered. As in every other branch of American law, the Commission's judgment, subject to court review, that a particular practice is henceforth to be deemed in violation of Section 5(a), and the order to cease and desist from that practice, operates as precedent and notice to all others that the law has developed to prohibit such practices.

We propose no limitation on the Commission's present power, as its law has developed, but we object to conferring upon the Commission the authority of a Federal court to issue any type of remedial order.

QUESTION 6

Whether the Commission should be authorized directly to seek civil penalties in the Federal courts, as proposed in Section 202 "(8)", or whether as at present the Department of Justice alone should be authorized to institute civil penalty actions, or whether as provided in Section 206, as an overlapping or duplication, *both* the Commission and the Department of Justice should be authorized to seek civil penalties, are questions of policy.

In the light of Assistant Attorney General McLaren's testimony, we would concur in his insistence that responsibility for Government litigation, particularly actions partaking of the nature of a penalty, should continue to be vested primarily in the Department of Justice.

QUESTION 7

It is true that at the present time the Commission issues *interpretive rulings*. The first type consists of Advisory Opinions covered by Sections 1.1 through 1.4 of its Rules of Practice. This type of interpretation is given in response to a request by an individual or company to the Commission for advice. On the basis of the facts submitted, the Commission sets forth its views and these are published by the Commission for the guidance of others.

The second type of *interpretations* are now known as *Industry Guides*, and were formerly known as *Trade Practice Rules*. These are promulgated by the Commission on its own initiative or in response to a petition by those interested. A recent and comprehensive example is contained in the so-called *Fred Meyer Guides* which the Commission issued following an opinion of the United States Supreme Court in *Fred Meyer, Inc.* v. *Federal Trade Commission*, 390 U.S. 341 (1968).

Neither of these two types of interpretations has the force of law. To make its views effective, the Commission must follow its conventional procedure of issuing a complaint, develop the facts by taking sworn testimony subject to cross-examination, issuing findings of fact, and entering a cease and desist order. Both the findings and the order are subject to judicial review.

In the a number of recent statutes dealing with specific subjects, the Commission has been authorized by Congress, within carefully prescribed limits, to engage in rulemaking. The specific statutory authorizations are contained in the Robinson-Patman Act, Section 6 of the Wool Products Labeling Act of 1939, Section 8 of the Fur Products Labeling Act, Section 5 of the Flammable Fabrics

Act, Section 7 of the Textile Fibers Products Identification Act, and Sections 4, 5, and 6 of the Fair Packaging and Labeling Act. In each instance, under these specific delegations of limited rulemaking authority, the subject matter is carefully prescribed. If the Commission goes beyond what is specifically delegated, the purported rule is invalid. See, *Textile and Apparel Group* v. *Federal Trade Commission*, 133 U.S. App. D.C. 353, 410 F.2d 1052 (1969).

Apart from its specific statutory authorizations, the Commission has additionally since 1964 sought to issue Trade Regulation Rules having the force of law as though they were Congressional enactments. These, the Commission insisted, could cover everything embraced by every statute it administered, including the FTC Act, the Serman Act, and the Clayton Act.

It based that asserted authority under Section 6(g) of the Federal Trade Commission Act. There is no basis for that authority in statute, legislative history, previous Commission practice, or position. The history of the Commission's own denial that it ever had such authority, and the analysis disclosing the irrelevance of Section 6(g) to the asserted authority, are set forth in detail in the *Supplement* to the Statement by Gilbert H. Weil, Esq., in the hearings before the Senate Judiciary Committee. See *Hearings Before Committee on the Judiciary on S. 3201*, 91st Cong., 2d sess., pp. 222–237.

Moreover, the Commission has taken the position that once it issues a Trade Regulation Rule it may, as specified in Section 1.12(c) of its Rules of Practice, "rely upon the rule" in any later adjudicatory proceeding which it institutes by complaint. In short, once it promulgates a Trade Regulation Rule, in the manner which I described in my testimony, the Commission asserts that in any later proceeding the legal validity of what it has substantively legislated by issuing the Rule may never be questioned. That power has never been judicially confirmed.

There can be no doubt that Section 208 is intended to make the substantive rules to be issued by the Commission the law of the land. A comparable provision in S. 3201, in the second session of the 91st Congress, was stated by the Senate Commerce Committee in its report as meaning that, "violation of any such [trade regulation] rule is made a *per se* violation of Section 5 of the FTC Act." S. Rep. No. 91–1124 (1970, p. 10).

Even more, the authority to be conferred by Section 208 is plainly "to make *substantive* . . . rules and regulations." That authority is not limited to matters affecting the consumer. It covers any substantive regulation the Commission deems desirable "for the purpose of carrying out the provisions of this Act." The Act involved is the entire Federal Trade Commission Act encompassing Section 5 which covers "any unfair method of competition" as well as "unfair or deceptive act or practice." Section 5 has been interpreted to include every type of business activity ranging from labeling to methods of distribution, promotion, advertising, franchising, as well as violations of the Sherman antitrust law and the Clayton Act. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966) ; *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953) ; *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922) ; *Grand Caillou Packing Co.*, Trade Reg. Rep. (1963–65 Transfer Binder) ¶ 16.927 (FTC 1964), *aff'd in part and rev'd in part sub.nom. LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966) : *R. H. Macy & Co.*, Trade Reg. Rep. (1961–63 Transfer Binder) ¶ 15,895 (FTC 1962), *aff'd*, 326 F.2d 445 (2d Cir. 1964) ; *Grand Union Co.*, 57 F.T.C. 382 (1960), *aff'd*, 300 F.2d 92 (2d Cir. 1962).

On the basis of the testimony which I was privileged to submit to the Subcommittee, and the testimony of all witnesses other than Chairman Kirkpatrick, we vigorously object to the grant of this unprecedented and unlimited authority. The proposed court review provisions are likewise plainly illusory as has been abundantly made clear in the hearings. Congress should not abdicate its lawmaking authority over this wide an area.

QUESTION 8

This again is a matter of policy turning on whether, on the basis of its past record, the Commission should be permitted to proceed directly to institute civil penalty actions, or that the basis for the proposed civil penalty action is well founded. In the past, not only has the Department of Justice found the Commission proposed litigation woefully inadequate, and so poorly prepared as to be a burden on the Federal courts, but in numerous instances the Solicitor General

has declined to permit Supreme Court review to be sought in other types of Commission litigation.

QUESTION 9

No demonstration has been made by the Commission as to the need for the changes proposed by Section 209. Their precise import is far from clear. If they are deemed necessary, the Committee should insist upon some factual demonstration of that need.

We do, however, question the desirability of permitting the Commission completely to delegate its power to issue subpoenas and its power to require the production of all documentary evidence to its attorneys.

QUESTION 10

We believe that the issues concerned in the varying proposals for the establishment of a consumer protection agency are separate and in large measure different from those involved in the proposed Title II of S. 986. What appears to be clear is that if any consumer protection agency is afforded the right to initiate Commission legislating under Section 208, the activity of the Commission in lawmaking by fiat will be accelerated and expanded.

If any of the suggestions and observations offered in this letter warrant further amplification and documentation, I shall be glad to undertake to do so if afforded additional time.

Respectfully submitted.

EDWARD DUNKELBERGER,
Counsel for the National Canners Association.

LEE, TOOMEY & KENT,
Washington, D.C., March 29, 1971.

Hon. MARLOW W. COOK,
U.S. Senate,
Committee on Commerce,
Washington, D.C.

DEAR SENATOR COOK: It is indeed with pleasure that I respond to your letter of March 19, in which you asked for comments on S. 1219 and S. 1221 and for answers to questions on S. 986. I shall answer your questions first.

1. Title I of S. 986 would be greatly improved if "warranty" were defined in terms of a written promise or undertaking, and if "warrantor" were defined in terms of a person making a written promise or undertaking. This might be done by making the following changes in S. 986:

(*a*) Eliminating Sec. 101(2), and substituting therefor the definition of the word as given in Sec. 3(a) of S. 1221; or

(*b*) by inserting the word "written" after "Any" as it appears in Sec. 101(2)(a) and (b); by inserting the words "in writing" at the end of Sec. 101(8); and inserting "in writing against defect or malfunction" after the word warranty in line 21, page 14 of the bill. (The words "or implied" should be deleted from lines 20–21 on page 14.)

2. I believe the suggestions made in response to the first question would accomplish the goal of limiting the bill to written warranties.

3. The possibility that the giving of a so-called "full warranty" could make it necessary for a manufacturer-warrantor to establish on-the-spot service and repair facilities throughout the country would pose problems for many members of the Association of Home Appliance Manufacturers. Even companies that maintain such facilities in heavily populated areas might find it uneconomical to try to maintain such facilities in less densely populated centers. Companies that rely almost exclusively on independent service facilities, either "franchised" or "authorized," would be faced with the same economic burden through a vastly larger geographic area.

4. The amendment to section 5(a) of the Federal Trade Commission Act by the addition of a subsection (7), as proposed by section 202 of S. 986, would be less objectionable if the type of wrong for which the Commission might order redress for consumers were specific in the bill, and if the kind of redress the Commission might order were carefully defined. I have great difficulty, however, in allowing the Federal Trade Commission to be changed into a kind

of small claims court without careful study by the Congress. Some of the questions that should be explored before such a grant of authority is made were posed by Mr. Winston H. Pickett on pages 8–9 of his prepared statement, presented to the Subcommittee for Consumers on March 22. I believe, too, that assigning the Commission duties it could not effectively carry out would only weaken the agency, and destroy public confidence in it.

5. It has been suggested that the Commission be limited to ordering rescission of a contract or the refund of a purchase price. I think any determination of the kind of order that might be appropriate would depend upon the type of offense for which the Commission might be authorized to order redress: areas the Congress should study carefully before expressing its will through legislation. Any such order should be subject to court review before enforcement.

6. I do not think the Federal Trade Commission should be authorized to institute action for the assessment of civil penalties for an alleged violation of Section 5 has occurred. Civil penalties should be assessed only for a violation of of a rule or regulation issued by the Commission. The Commission should conduct its own adjudicative proceeding and determine whether a violation of Section 5 has occurred. Civil penalties should be assesed only for a violation of a cease-and-desist order. Again Congress should make radical changes in the Commission's authority, this time to act as an attorney general in a limited field, only after careful study.

7. Under the present procedures followed by the Federal Trade Commission in issuing trade regulation rules, the rules are advisory only. They are not "legislative" in the sense that a violation of a rule is a violation of Section 5 of the Federal Trade Commission Act. Under the Commission's Procedures and Rules of Practice, § 1.12(c), when a violation of a rule is claimed to be a violation of Section 5 and a complaint is filed, a respondent must be "given a fair hearing on the applicability of the rule to the particular case." I would object to any statute that would give the Commission authority to promulgate rules having the force of law.

8. The Association of Home Appliance Manufacturers has taken no position on whether or not the Federal Trade Commission should be authorized to go directly into court, either before or after making a request to the Department of Justice, to otbain a court order to enforce a cease-and-desist order. We feel this is a matter to be resolved by the Congress, the Department of Justice, and the Federal Trade Commission.

9. I do not object to the changes in the Commission's subpoena power that would be made by section 209 of the bill. I express no opinion on whether the Commission should be authorized to act "through any of its attorneys designated by it" to obtain writs of mandamus for the compliance with a subpoena.

10. Even without the greatly expanded powers S. 986 would give to the Federal Trade Commission, which I oppose. I see no need for establishing another consumer protection agency such as that proposed by S. 1177 or related bills. I have long believed that the Commission has adequate authority under Section 5 to proceed against acts that are deceptive to consumers, and that the Commission should be strengthened by adequate appropriations and vigorous leadership. As you know, the Association of Home Appliance Manufacturers endorses the provision of S. 986 that would expand the Commission's authority to acts "affecting" commerce. We also endorse the provision that would enable the Commission to go directly into the federal district courts to obtain a preliminary injunction or temporary restraining order to halt the continuation of a deceptive practice, with the safeguards mentioned in my testimony and prepared statement.

Turning briefly to S. 1219 and S. 1221, we urge that the pattern set by these bills, of dealing with warranties in one bill and the Federal Trade Commission in another, be followed. To that end Title I of S. 986 should be made the subject of a bill separate from Title II. In general, we endorse S. 1221, though we have serious reservations about authorizing the Federal Trade Commission to require that warranties include the kind of information specified in Section 4(c). Reasons for this opposition were given in my prepared statement and in my oral presentation before the Subcommittee on March 15.

If I can provide you with additional information or comments, please let me know.

Sincerely yours,

GEORGE P. LAMB,
General Counsel,
Association of Home Appliance Manufacturers.

SIDLEY & AUSTIN,
Washington, D.C., March 23, 1971.

Hon. MARLOW W. COOK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: Thank you for your letter of March 19, 1971, in which you (a) asked for comments on the printed versions of S. 1221 and S. 1219, and (b) requested answers to a list of questions concerning S. 986.

The Consumer Electronics Group of the Electronic Industries Association, for which I am special counsel, supports and endorses (with minor exceptions) S. 1221, the Administration Fair Warranty Disclosure Act. As I stated in my testimony on March 15, we do not see how a manufacturer, without knowing the particular location and circumstances, can be expected to know and state (Section 4(c)(5)) the time at which the guarantor will perform his obligations. We also do not see how a manufacturer can be expected to know (Section 4(c)(6)) the period of time within which repairs will be made, in cases where the guaranty or warranty includes labor. We realize that these are only possible requirements which the Federal Trade Commission may prescribe.

We urge that S. 1219 be amended to provide for complete preemption of state laws relating to warranties. I covered this point in my March 15 testimony as follows:

"A major concern to all those who provide warranties is the growing number of State laws which impose a variety of new and onerous requirements. This is another factor which may cause many to refrain from offering warranties. This problem should be eliminated by revising Section 112(b) to read as follows:

'The provisions of this Act supersede any and all laws of the states and political subdivisions thereof insofar as they may now or hereafter establish any requirements or provisions with respect to warranties relating to consumer products.'

"We realize this is a far-reaching provision, but such total preemption was included by this Committee in the Radiation Control for Health and Safety Act of 1968. The granting of warranties by national concerns is of the very essence of federal commerce. The problem has up to now, been dormant because of the use of uniform laws by the states. But the various unrealistic state and local laws and ordinances which are being pressed and sometimes passed mean the applicable Uniform Commercial Code provisions are being superseded on a piecemeal basis. If there is to be a federal warranty law, it should provide total preemption."

The Consumer Electronics Group has no objection to Section 2 ("affecting commerce") or Section 4 (increased penalties) of S. 1219, the Administration Federal Trade Commission Act Amendments of 1971. I have not had an opportunity to obtain a policy determination on Section 3 (preliminary injunctions) from the governing body of the Consumer Electronics Group.

The Group does not take a position on the provisions of S. 1219 and S. 1221 authorizing the FTC to take court action with its own attorneys. We feel this is largely an intramural dispute within the government.

I am enclosing answers on behalf of the Group to the 10 questions you forwarded.

Thank you for the opportunity to comment.

Sincerely,

J. EDWARD DAY.

[Enclosure]

ANSWERS TO QUESTIONS SUBMITTED BY SENATOR MARLOW W. COOK ON S. 986

1. Would Title I of the bill be improved if "warranty" were defined in terms of a written promise or undertaking and "warrantor" defined in terms of a person making such a promise or undertaking?

Answer. Very much so. It would eliminate many troublesome problems of attempting to prove that a salesman in a retail establishment was not in fact the "agent" of the manufacturer. The manufacturer should not be exposed to liability for the unauthorized promises or undertakings of such salesmen or of others over whom the manufacturer has no effective control.

2. Is there a better way than the above to ensure that oral representations of retailers and wholesalers will not become binding upon a manufacturer as oral additions to the manufacturer's written warranty?

Answer. The requirement that the promise be in writing is the best way I have heard of to cope with this problem.

3. It has been suggested that only a very few large nationwide manufacturers and merchandisers would be able to meet the requirements for offering a so-called "full warranty" under this bill because of the apparent requirement of on-the-spot service and repair facilities. Would this requirement pose problems for the company or members of the association which you represent?

Answer. It would indeed pose such problems for many, if not most, members of the Consumer Electronics Group. A number of these members are relatively small and some are only regional in their marketing operations.

4. Would the amendments in Title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new section 5(a)(7) of the FTC Act (contained in section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

Answer. Proposed new section 5(a)(7) would still be highly objectionable even with these possible changes. Even with these changes section 5(a)(7) could change the entire purpose and function of the FTC to that of a consumer court with power to give redress as to past incidents. Such a critical proposed change in the role and powers of FTC should be the subject of a separate bill and should in addition involve a willingness to include a commitment for a vastly expanded budget for the FTC.

5. What limitations on the Commission's authority to issue remedial orders under the above would you propose?

Answer. At most, the FTC should only be authorized to petition a court to issue any such remedial orders affording all the protections of a court hearing and adjudication.

6. Would you object to the proposed new section 5(a)(8) of the FTC Act (contained in section 202 of the bill), authorizing the Commission to go into court and seek civil penalties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by section 5(a)(1) of the Act, if the phrase including any rule or regulation promulgated by the Commission under section 6(g) of this Act (appearing at lines 11–13 on page 17 of S. 986) were eliminated?

Answer. No.

7. At present the FTC undertakes interpretive and rule making proceedings. Is it your position that the resulting rules are advisory only and not legislative? Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

Answer. Yes to both questions. It is our position that the rules are advisory only and that, in order to prove a violation, the FTC must prove not only action contrary to the rule but also that action contrary to the rule violates Section 5. In this way, due process protections and key principles of separation of powers are preserved.

8. If the rule making authority were eliminated and the section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the Commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease and desist orders?

Answer. This is largely an intramural problem within the government. However, there is much to be said for the Department of Justice position that the Attorney General should be able to control and coordinate court actions undertaken on behalf of the federal government.

9. Do you object to the expansion of subpoena power and delegation of the authority to issue subpoenas which would be accomplished by the revision of the Act proposed under section 209 of the bill?

Answer. The subpoena power, in itself, entirely aside from a subsequent decision, if any, has so much potential for abuse and for unjustified damage to parties being investigated, that we feel it should not be expanded here.

10. If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection

agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

Answer. S. 1177 is highly objectionable regardless of whether all or part of Title II of S. 986 might be passed. S. 1177 would put a new overlapping agency of the federal government into the business of intervening in, and thus adding to confusion and delay in, matters pending before other federal agencies. Many of these matters are already enmeshed in endless complications and in major problems resulting from having multiple parties. Having a new federal "ombudsman" in many of these proceedings could well provide a devastating addition to existing hurdles to expeditious handling and feasible administrative procedure. It is true, in addition, that Title II of S. 986 represents an overlapping and cumulative approach to that proposed in S. 1177.

GAS APPLIANCE MANUFACTURERS ASSOCIATION,
Arlington, Va., March 29, 1971.

Attention: Mr. Henri F. Rush, Jr., Minority Staff Counsel, Senate Committee on Commerce.

Hon. MARLOW W. COOK,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR COOK: Your letter dated March 19, 1971 requested the views of Gas Appliance Manufacturers Association, Inc. (GAMA) in regard to two Administration Bills: S. 1219—"Federal Trade Commission Act Amendments of 1971" and S. 1221—"Fair Warranty Disclosure Act of 1971." Additionally, you desired our opinions relating to your ten specific questions on S. 986—"Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971."

We welcome the opportunity to comply with your request and attached to this letter are our answers in regard thereto.

Sincerely yours,

ALAN WEBER,
(*On behalf of Gas Appliance Manufacturers Association, Inc., and Attorney, Carrier Corporation*).

STATEMENT OF ALAN WEBER ON BEHALF OF GAS APPLIANCE MANUFACTURERS ASSOCIATION, INC.

Concerning:

I. S. 1219—"Federal Trade Commission Act Amendments of 1971";

II. S. 1221—"Fair Warranty Disclosure Act of 1971"; and,

III. Reply to Ten Questions Pertaining to S. 986—"Consumer Product Warranties and Federal Trade Commission Improvement Act of 1971" transmitted by Senator Marlow W. Cook by letter dated March 19, 1971.

I. S. 1219—"FEDERAL TRADE COMMISSION ACT AMENDMENTS OF 1971"

The Administration's bill, S. 1219, seeks to broaden the powers of the Federal Trade Commission in three ways:

A. Extending the jurisdiction of the Commission to include acts or practice "affecting" commerce and broadening the Commission's investigative powers as well as its powers relating to false advertisements of food, drugs, devices or cosmetics to include persons "in or whose business affects commerce";

B. Giving the Commission authority to obtain preliminary injunctions to restrain suspected violations of Section 5 of the Federal Trade Commission Act harmful to a consumer provided that the Commission issues its complaint within the time period specified by the court granting the temporary restraining order; and,

C. Increasing the civil penalty for a violation of a final Commission cease and desist order from $5,000 to $10,000. GAMA finds no fault either with the phraseology or purposes of this bill.

II. S. 1221—"FAIR WARRANTY DISCLOSURE ACT OF 1971"

S. 1221 is more limited in scope than Title I of S. 986. It contains many of the deficiencies which we noted in our testimony before the Senate Subcommittee

for Consumers on March 15, 1971, as well as others. As a result, we cannot support this bill in its present form.

We use this opportunity to bring to your attention several areas of S. 1221 to which we take exception.

A. Section 3—Definitions

Section 3 defines various terms used in the bill. We urge that the definitions in Sections 3 (b) and (e) be modified.

Section 3(b) defines the term "consumer products." We urge the adoption of the term "consumer goods" rather than consumer "products" and the use of the term "consumer goods" throughout the bill. Additionally, the term "consumer goods" should be defined in accordance with Sec. 2–105 and 9–109 of the Uniform Commercial Code. Our reasons for this change and the terminology to be used for the definition were set forth in Pages 4 and 5 of our March 15, 1971 prepared statement before the Subcommittee For Consumers concerning S. 986 and the marked-up S. 986 bill which was transmitted to the Subcommittee on March 25, 1971.

Furthermore, we urge that the term "supplier" as defined in Section 3(d) and whenever used in the bill, be amended to read "seller" and the definition made to conform to the definition we gave in Page 6 of the beforementioned prepared statement concerning S. 986 and, in particular, Sec. 101(7) of our marked-up Title I of S. 986.

B. Section 4—Disclosure of Guaranty and Warranty Provisions

This Section gives the Federal Trade Commission authority to issue regulations concerning the method, manner and procedure for disclosure of various terms and conditions of written guarantees and warranties. The Section further authorizes the Commission to issue regulations concerning several specifically enumerated terms and conditions of the warranty with discretionary power to issue regulations in regard to other aspects of a written warranty statement. The comparable Section in Title I of S. 986 is Section 102.

In regard to the discretionary regulatory provisions set forth in Section 4(c), we urge that Subsections (c) (5), (6) and (8) thereof be deleted from the bill.

Subsections (c)(5) and (6) of Section 4 are essentially the same as found in Subsections (a)(11) and (12) of Section 102 of S. 986. The aforementioned subsections would require the warrantor to specify the exact time he will perform. Our objections to this requirement are more fully set forth in Page 11 of our aforementioned prepared statement submitted on March 15, 1971.

It would be impossible for any warrantor to definitely specify such a time due to such varying factors as the location of a consumer's home, unavailability of servicemen, nature of the defect, and unavailability of spare parts—conditions over which the supplier may have no control. (See Page 11 of GAMA's March 15, 1971 prepared statement on S. 986 to the Senate Subcommittee For Consumers.)

C. Section 15—Other Laws Not Affected

Under Section 15 a very limited Federal pre-emption of state and local laws is provided. The comparable Section of S. 986 is Section 112(b). The same comments we made on Pages 17 and 18 of our March 15, 1971 prepared statement concerning Section 112(b) of S. 986 apply with equal force to Section 15.

GAMA stated:

"When the Federal law requires full disclosure of all warranty terms including disclaimers, and provides effective enforcement procedures, pre-emption of state and local laws is in order. Only through complete pre-emption can chaos be avoided in the writing and enforcement of warranties applicable in all 50 States."

Accordingly, we strongly recommend that Section 15 be amended to read: "No state or political subdivision of a state shall have authority either to establish or continue in effect any labeling, disclosure or other requirements with respect to consumer goods warranties."

III. REPLY TO SENATOR MARLOW W. COOK'S 10 QUESTIONS PERTAINING TO S. 986—CONSUMER PRODUCT WARRANTIES AND FEDERAL TRADE COMMISSION IMPROVEMENTS ACT OF 1971

1. Question. Would title I of the bill be improved if "warranty" were defined in terms of a written promise or undertaking and "warrantor" defined in terms of a person making such a promise or undertaking?

Answer. Yes.

Question. Is there a better way than the above to ensure that oral representations of retailers and wholesalers will not become binding upon a manufacturer as oral additions to the manufacturer's written warranty?

Answer. In addition to our answer to "Question 1" above, GAMA believes the legislation should clearly establish the basic principle that the person who makes the oral representation or description (e.g., manufacturer, wholesaler, dealer) is the one who should be bound by it and others should not be so bound. To this end, we recommend the bill specifically provide that the manufacturer may not be bound by oral promises or descriptions made by others which go beyond the terms of manufacturer's warranty.

3. Question. It has been suggested that only a very few large nationwide manufacturers and merchandisers would be able to meet the requirements for offering a so-called "full warranty" under this bill because of the apparent requirement of on-the-spot service and repair facilities. Would this requirement pose problems for the company or members of the association which you represent?

Answer. Yes. GAMA has many small company members which may be hurt by the requirements of a "full warranty"—not because they are unwilling to stand behind their product and their warranty but because the proposed "full warranty" concept could make the manufacturer bear responsibility for many matters beyond his reasonable control and unrelated to any malfunctioning of his product, such as, the distances to be travelled and other difficulties to be met in carrying out his warranty. Additionally and most important in this regard, the manufacturer could be responsible for the errors of the installer. As to those products which are installed in and become part of a system, the manufacturer could be required not just to replace or repair his malfunctioning product, but in some instances, at his own expense, to dismantle part of a system to make such replacement or repair. (For additional comment, please see Pages 6–9 and 11–13 of our written statement on S. 986 submitted to the Subcommittee For Consumers on March 15, 1971.)

4. Question. Would the amendments in title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new section 5(a)(7) of the FTC act (contained in section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

Answer. No. While the proposal contained in the question would be of limited value, GAMA is gravely concerned over the unfettered power granted to the Commission to "redress" untried issues of fact or law with no Constitutional procedural due-process safeguards. This deficiency would not be corrected by placing the order on a public record after an opportunity for a hearing because nevertheless, the Commission would not be required to prove its case.

The term "redress" is defined in Webster's New World Dictionary of the American Language, (College Edition—1966) at 1218 to mean: "to correct and compensate for . . ." and in Ballentine's Law Dictionary (3rd Ed.—1969) at 1073 to include: "remedy, compensation; reparation." Under these definitions and the power granted by Section 202, the Commission could impose fines, penalties, and any other remedial order upon persons who have not had their day in court. GAMA knows of no reasonable amendatory language to Section 202 which would satisfy its objections thereto, and, therefore, would welcome its deletion from the bill.

It should be noted that Section 203 (incorrectly numbered 204) through and including Section 206 amend additional subsections of Section 5 of the FTC Act to conform with the changes provided for in Section 202. GAMA is also opposed to these sections of the bill.

5. Question. What limitations on the Commission's authority to issue remedial orders under the above would you propose?

Answer. GAMA believes that the existing procedures in respect of cease and desist orders are effective, would be adequate for the purposes of this proposed legislation, and should not be expanded.

6. Question. Would you object to the proposed new Section 5(a)(8) of the FTC Act (contained in Section 202 of the bill), authorizing the Commission to go into court and seek civil penalties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by Section 5(a)(1) of the act, if the phrase "including any rule or regulation promulgated by the Commission under Section 6(g) of this act" (appearing at lines 11–13 on page 17 of S. 986) were eliminated?

Answer. Yes. Please see our answer to Question 4.

7. Question. A. At present the FTC undertakes interpretive and rule-making proceedings. Is it your position that the resulting rules are advisory only and not legislative?

Answer. GAMA is of the opinion that the rules developed in such proceedings create a rebuttable presumption of illegality and to that extent are presumably advisory. We definitely do not consider such rules legislative.

7. Question. B. Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

Answer. Yes. GAMA would find acceptable only a statutory approval formalizing the rule-making procedures currently utilized by the Commission provided that such statutory approval made it clear that the resulting trade regulation rules created only a rebuttable presumption and not a rule of law.

8. Question. If the rule-making authority were eliminated and the section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease and desist orders?

Answer. GAMA has no strong feeling one way or the other; however, we believe that any such provision should safeguard the businessman from being the victim of delays or other adverse effects arising out of relations between the FTC and the Department of Justice. Accordingly, if rule-making authority and Section 202 were eliminated, GAMA would not object to a provision authorizing the Commission, after making a request of the Justice Department, to go directly into court to enforce its cease and desist orders if the Department refused to take any action upon the FTC's request within 30 days after the request was

9. Question. Do you object to the expansion of subpoena power and delegation of the authority to issue subpoenas which would be accomplished by the revision of the act proposed under section 209 of the bill?

Answer. Some of the amendatory provisions to Section 9 of the FTC Act sought by Section 209 of the bill appear to correct inherent ambiguities in the language of the Section. As to these amendments, GAMA does not believe it would have objections. Section 209 would also permit the Commission, through its own attorneys, to go directly into the Federal district courts to enforce its subpoenas instead of having to rely on the Attorney General. Since this aspect of the amendments to Section 9 of the FTC Act are matters solely of internal concern between the Attorney General and the Commission, we offer no comment.

10. Question. If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

Answer. The matter of the desirability of a separate consumer agency is currently under study within this Association by a group designated for that purpose. Their work has not been completed and no position on this question has as yet been adopted by GAMA. Accordingly, GAMA respectfully requests that, under these circumstances, we be excused from answering this question at this particular time.

NATIONAL ASSOCIATION OF FOOD CHAINS,
Washington, D.C., March 29, 1971.

Senator MARLOW W. COOK,
U.S. Senator, Senate Committee on Commerce,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR COOK: We appreciate the opportunity to respond to the questions you proposed in your letter of March 19, 1971 concerning the bills pending before the subcommittee on product warranties and expansion of authority and jurisdiction of the Federal Trade Commission.

As I indicated in my oral testimony on March 16, our prime concern is with the provisions of Title II of S. 986. Thus, I would again limit my comments on your first three questions to the reiteration that other industries are more directly involved in the warranties problem than are food distributors, and we commend to the Committee's attention the knowledgeable views which have been offered by spokesmen for those industries.

I would like to renew and emphasize the main point of my comments on S. 986 that the provisions of Title I are essentially embodied in S. 3074 which passed

the Senate last year and these provisions have been examined in substantially greater detail than those of Title II. Due to this fact there is more than considerable merit to the suggestion that the Committee sever the two Titles and evaluate the proposed increase in the Commission's enforcement powers independent of any other legislative proposal. The recommendations contained in Title II are simply too important and far reaching to be evaluated in conjunction with essentially extrinsic legislative proposals.

My response to your questions numbered four through ten are attached. In some instances, the subject matter is dealt with in additional detail in the written analysis you graciously permitted me to file as a supplement to my oral testimony, a copy of which I enclose for your information.

In connection with the administration's proposals on which you offer the opportunity to comment my response on S. 1221 is as outlined in the second paragraph above and our views on the specific provisions of S. 1219 were covered in my oral testimony.

Again, we appreciate the opportunity you have given us to present these views.

Sincerely,

CLARENCE G. ADAMY,
President.

NATIONAL ASSOCIATION OF FOOD CHAINS RESPONSE TO QUESTIONS PROPOUNDED BY SENATOR MARLOW W. COOK ON S. 986

4. Would the amendments in Title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new section 5(a)(7) of the FTC Act (contained in section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

In all probability, Section 5(b) of the Federal Trade Commission Act and the procedures prescribed thereunder would apply to the type of orders issued under proposed Section 5(a)(7) as well as to cease and desist orders presently issued under Section 5(a)(6). Accordingly, any amendment to the proposal which would require proposed Section 5(a)(7) orders to be entered on a public record after a hearing would most likely be clarifying in nature rather than accomplishing any substantive improvement in the present draft.

The enumeration of specific courses of redress which the Commission might adopt would at least alert businessmen to the type of remedies which might be sought. In this regard, at a minimum, attention might be accorded a limitation to the ordering of such immediate redress mechanisms as replacement or refund for goods purchased in reliance on false or misleading representations of the supplier.

We remain concerned, however, regarding the cumulative impact of proposed Section 5(a)(7), proposed Section 5(a)(8) (relating to civil penalties for knowing "first offense" violations of the Federal Trade Commission Act "including any rule or regulation" promulgated under proposed Section 6(g)), and proposed Section 5(g) authorizing the issuance of legislative-type rules. The net effect of these provisions may well reverse the Commission's traditional and accepted role as an adjudicative and innovative administrative agency and convert it into a miniature legislative body with powers to sit as judge on the "statutes" which it promulgates. This proposed combination of functions goes far beyond any yet vested in the administrative agencies, and certainly well-beyond that granted an agency with such broad, general jurisdiction as the Federal Trade Commission.

The grant of broad, undefined powers to the Commission to order redress could also impair the agency's present flexibility in devising new legal theories under Section 5 as new courses of possible misleading business conduct evolve. This flexibility to innovate is justified in part by the fact that the Commission's orders have purely prospective force. If the Commission is to be given power to enter retrospective relief, such as the award of damages, the courts, in the interest of fairness, may be less sympathetic than presently as to the new legal approaches of the agency.

Finally, if the redress powers were to include the authority to award relief in the nature of damages, serious question might be raised under the Seventh Amendment to the U.S. Constitution which guarantees the right of jury trial in civil claims involving more than $20. While it is true that certain categories of administrative orders providing for affirmative relief are not within the Seventh

Amendment, awards of damages in misrepresentation cases may so closely resemble the relief granted in cases arising under the common law as to require jury trial if requested.

5. What limitations on the Commission's authority to issue remedial orders under the above would you propose?

For the reasons set forth in our response to question 4, we have serious reservations as to any retrospective type of remedy being entered by the Commission. We believe that the Commission can operate most effectively and flexibly under its present system of adjudication for cease and desist orders and industry guidance.

6. Would you object to the proposed new section 5(a)(8) of the FTC Act (contained in section 202 of the bill), authorizing the Commission to go into court and seek civil penalties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by section 5(a)(1) of the Act, if the phrase "including any rule or regulation promulgated by the Commission under section 6(g) of this Act" (appearing at lines 11–13 on page 17 of S. 968) were eliminated?

Whether or not the Federal Trade Commission should be empowered to go to court and seek civil penalties through its own attorneys or should be required to make application to the Attorney General for the initiation of such proceedings is essentially a policy question and one on which we have no firm opinion. There is, however, some danger that authorizing the Commission to proceed for civil penalties in the case of first offense violations of Section 5 would transform the Commission into a prosecuting rather than an adjudicative administrative agency. To the extent that its resources are increasingly dedicated to civil penalties suits, its experimentation through the adjudicative process will suffer. In any event, it seems that actions for civil penalties in the case of first offense violations should be limited to those circumstances in which the defendant acted not only with knowledge of the consequences of his conduct but that the practice engaged in is one which has clearly been established as unfair or deceptive. It is inappropriate for the agency to plow new legal ground in an action for punitive relief.

7. At present the FTC undertakes interpretive and rule making proceedings. Is it your position that the resulting rules are advisory only and not legislative? Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

As noted in the written analysis filed as part of NAFC's presentation, the Commission presently has authority to issue interpretive rules. The Commission accomplishes its guidance function in this regard through advisory opinions, industry guides and statements of enforcement policy. Thus, there is no need to empower the Commission to issue legislative rules in the interest of expressing its position on generally applicable legal issues. For the reasons stated in our written analysis we object to legislation authorizing the Commission to promulgate rules having the force of law.

8. If the rule making authority were eliminated and the section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the Commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease and desist orders?

As is the case with question 6, whether the Department of Justice or the Federal Trade Commission should be empowered to directly enforce cease and desist orders in court is a question of intragovernmental policy. It should be pointed out, however, that the attorneys for the Department of Justice are more familiar with the procedures to be followed in court and the type of case which is most deserving of judicial resolution.

9. Do you object to the expansion of subpoena power and delegation of the authority to issue subpoenas which would be accomplished by the revision of the Act proposed under section 209 of the bill?

The provisions of Section 209 of the bill are unclear in their application, and their purpose is not illuminated by any testimony during the hearings on this legislation. We submit that the Commission already possesses broad investigative powers; any expansion of these powers should be based on a much more firmly established showing of need than yet has been demonstrated.

10. If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

The issues involved in Title II of S. 986 are substantially different from those which relate to the creation of a consumer protection agency. The Commission is itself in part a law enforcement agency. As we understand it the sole legitimate function of a consumer protection agency would be to act as an advocate for the consumer viewpoint before the existing federal administrative agencies. Of course, if the existing agencies are fully effective and satisfying their statutory responsibilities, any alleged need for an independent advocacy agency would be substantially diminished.

AMERICAN RETAIL FEDERATION,
Washington, D.C., March 29, 1971.

Mr. HENRI F. RUSH, Jr.,
Minority Staff Counsel, Senate Committee, New Senate Office Building, Washington D.C.

DEAR MR. RUSH: On March 19, Senator Marlow W. Cook transmitted a list of 10 questions concerning S. 986.

The responses to those questions are enclosed for inclusion in the hearing record or for whatever purposes you wish to make of them.

Very best regards.

Cordially,

EUGENE A. KEENEY.

AMERICAN RETAIL FEDERATION ANSWERS TO QUESTIONS BY SENATOR MARLOW W. COOK ON S. 986

1. Would title of the bill be improved if "warranty" were defined in terms of a written promise or undertaking and "warrantor" defined in terms of a person making such a promise or undertaking?

Yes. The definition of "express warranty" in section 101(2) was placed in Title I for the purpose of expanding the Uniform Commercial Code definition of warranty to include services as well as products. Express warranty is used in section 108 dealing with disclaimer of implied warranties. Services are used in section 110(d) dealing with remedies. Neither "express warranties" nor "services" are mentioned in any other place in Title I. In the title of S. 986, the bill is deemed "to provide minimum disclosure standards for written consumer product warranties against defect or malfunction; to define minimum Federal content standards for such warranties." By defining "warranty" in terms of a written promise much inconsistency will be eliminated.

2. Is there a better way than the above to ensure that oral representations of retailers and wholesalers will not become binding upon a manufacturer as oral additions to the manufacturer's written warranty?

No. The problem is that the Uniform Commercial Code is enforced in 49 states. Unless it is desirable to pre-empt all UCC laws as to warranties the scope of any federal warranty law must take the Code into consideration.

3. It has been suggested that only a very few large nationwide manufacturers and merchandisers would be able to meet the requirements for offering a so-called "full warranty" under this bill because of the apparent requirement of on-the-spot service and repair facilities. Would this requirement pose problems for the company or members of the association which you represent?

As the Federal minimum requirements are now worded, retailers giving warranties would probably be able to comply. The Federal Trade Commission is, however, given authority—in section 109—to detail those duties that the makers of a "full" warranty must perform in order to fulfill that warranty. Depending on what the Commission does the cost of providing a warranty might significantly increase, or worse, the availability of warranties in the marketplace might decrease or disappear.

4. Would the amendments in Title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new section 5(a)(7) of the FTC Act (contained in section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

The amendments in Title II dealing with the proposed new Section 5(a)(7) would be less objectionable if the new orders were specified and such orders were required to be made on a public record following a public hearing.

Specificity always helps a potential defendant better judge the legality of a proposed course of action and, in this regard, a listing of the types of relief which the Commission could order would be most helpful.

We would still object to the section, however, especially when it is viewed against the backdrop of similar legislation (S. 3201) in the 91st Congress. That bill, which was favorably reported by the Senate Commerce Committee, would have limited the Commission's power to issue orders to its present cease and desist authority.

If the Commission desired a different type of remedy—recission of contract, refund of moneys, or so-called "corrective advertising," for example—the FTC would have been required to seek that relief in a civil suit in a federal district court.

Vesting broad rule-making, and remedial authority in a single agency is dangerous, particularly in view of the FTC's traditional role as an administrative—rather than a prosecutorial or quasi-legislative—body.

5. What limitations on the Commission's authority to issue remedial orders under the above would you propose?

Because the Federal Trade Commission is an innovative agency with the ability to define new areas of "unfair and deceptive acts or practices" on a case-by-case basis, we have grave reservations about giving the Commission authority to issue remedial orders which go beyond prospective relief. Any retrospective remedy poses infinite dangers for the businessman who has only the broad, and often vague, language of Section 5(a)(1) to guide his actions.

6. Would you object to the proposed new section 5(a)(8) of the FTC Act (contained in section 202 of the bill), authorizing the Commission to go into court and seek civil penalties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by section 5(a)(1) of the Act, if the phase "including any rule or regulation promulgated by the Commission under section 6(g) of this Act" (appearing at lines 11–13 on page 17 of S. 986) were eliminated?

The proposed new Section 5(a)(8), authorizing the Commission to go into court to seek civil penalties against person engaged in unfair and deceptive acts or practices raises questions beyond that of whether the FTC, or the Justice Department should act as prosecutor.

The language of the proposal in S. 986 is mandatory, stating that the Commission "shall" go to court in any case where "actual knowledge" or "knowledge fairly implied" is involved. This, we fear, could turn the agency into a prosecutorial agency, a change in direction which, we believe, would have adverse effects on its ability to protect consumer by acting in its traditional role as an advisory body.

7. At present the FTC undertakes interpretative and rule making proceedings. Is it your position that the resulting rules are advisory only and not legislative? Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

The question of whether the Federal Trade Commission presently has the authority to issue legislative rules has never been determined directly in a court test. The Federation believes that the legislative history of the FTC Act, as well as what court decisions there have been in the interim, clearly demonstrate that the Commission does not now possess such legislative rule-making ability.

Further, to vest the Commission with the type of legislative rulemaking contemplated in S. 986, would, we believe pose serious procedural problems for the businessmen who would be affected by such rules. The procedures established in S. 986 are wholly inadequate to the promulgation of legislative rules, and would not provide adequate protection to the rights of persons who might be affected by such rules.

In addition, we question seriously whether the Congress should delegate such vast legislative rule-making authority to a regulatory agency, particularly in view of the strict guidelines which the legislative branch has set forth when making other such legislative rule-making grants in the past.

8. If the rule making authority were eliminated and the section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the Commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease-and-desist orders?

Even if the rule-making authority were eliminated, and the section 202 authority were limited as indicated, the Federation would still object to an authorization for the FTC to go to court directly—either before or after making a request to the Justice Department—to enforce its own cease and desist orders.

The Department of Justice has historically been the government's legal arm. Through U.S. Attorneys across the country, its relationships with and knowledge of federal courts have been excellent.

The sometimes-observed lag between certification of a case to Justice from another agency has been due in large measure, not to recalcitrance at the Department but to faulty preparation at the agency level.

Hopefully, these problems will be minimized now that Justice has centralized all consumer prosecutorial functions within a new Consumer Affairs Section in the Antitrust Division. This Section, it is reported, is taking an active and aggressive role in assisting in the preparation of cases at the agency level, so that, when a case is certified to Justice for follow-up, Justice can move expeditiously.

For this reason, the Federation favors retention of the present system of Justice Department enforcement of FTC cease and desist orders.

9. Do you object to the expansion of subpoena power and delegation of the authority to issue subpoenas which would be accomplished by the revision of the Act proposed under section 209 of the bill?

For the reasons outlined above, the Federation would prefer that present FTC authority regarding subpoena power be retained, and that delegation of authority to issue subpoenas not be granted.

10. If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

No. S. 1177 in conjunction with new Commission powers will cause duplicative and inefficiency. One of the ironies in enacting numerous consumer laws is that duplication harms the consumer more than it benefits him.

NATIONAL SMALL BUSINESS ASSOCIATION,
Washington, D.C., March 26, 1971.

Mr. HENRI F. RUSH, Jr.
Minority Staff Counsel, Senate Committee on Commerce,
New Senate Office Building, Washington, D.C.

DEAR MR. RUSH: Here is our response to Senator Cook's questions enclosed with his letter of March 19th.

Sincerely,

THOMAS A. ROTHWELL,
Special Consultant to NSB.

Enclosure:

ANSWERS TO QUESTIONS PRESENTED BY SENATOR MARLOW W. COOK RE S. 986, WARRANTY-GUARANTY BILL

Question 1: Would Title I of the bill be improved if "warranty" were defined in terms of a written promise or undertaking and "warrantor" defined in terms of a person making such a promise or undertaking?

Answer: The question is what warranties should be included within the scope of S. 986. Ordinarily the term "express warranty" is used to differentiate between a warranty that is conveyed in some manner to the purchaser, and an "implied warranty" that arises by operation of law.

The difficulty with the definitions contained in Title I, Section 101 of S. 986 is that the warranty may be oral as well as written, and, pursuant to and in view of the definition of the term "supplier," and may be made by anyone who is even peripherally involved in the transaction. Add to this the difficulty contained in subsection (2)(c) wherein the use of the word warranty or guaranty or even specific intent is not necessary to create an express warranty, it is clear that this is an extremely broad, and perhaps unnecessary, scope for S. 986.

To limit the definition of the subject matter of the bill to that which is written would afford a supplier badly-needed protection against haphazard statements by others. In addition, if the concept of warrantor were limited to a firm or individual that was willing to extend a promise in writing, this would reduce the risk of a supplier being bound to an involuntary bargain.

Question 2: Is there a better way than the above to insure that oral representations of retailers and wholesalers will not become binding upon a manufacturer as oral additions to the manufacturer's written warranty?

Answer: In Section 108(a) of S. 986 the warrantor is forbidden to disclaim implied warranties if an express warranty is made. If this section were to be followed by a proviso permitting a supplier making available a written warranty to claim the protection of the Parol Evidence Rule (by a recital that the written form of warranty was entire, and that changes, additions or modifications were not authorized and of no effect whether such changes, additions or modifications were made orally or were evidenced by writing), this would also help avoid the creation of unexpected warranty obligations.

Question 3: It has been suggested that only a very few large nationwide manufacturers and merchandisers would be able to meet the requirements for offering a so-called "full warranty" under this bill because of the apparent requirement of on-the-spot service and repair facilities. Would this requirement pose problems for the company or members of the association which you represent?

Answer: The introduction of the concepts "full" and "partial" warranties in section 103 through 105 introduces unnecessary confusion and most certainly places the smaller economic unit at a decided disadvantage.

The terms "parts only" and "parts and labor" have been in common usage for many years and are widely understood. The substitution of "full" and "partial" concepts of S. 986 disadvantages the smaller producers as compared with his present situation for the reason that such a producer would have to change his present "parts only" warranty to a "partial warranty". The words are strongly suggestive of inferior status and thus readily lend themselves to unfavorable comparisons.

There seems to be no reason why a producer who is willing to extend a "parts only" warranty in good faith should be compelled by law to demean and downgrade his warranty practice by the use of the word "partial". The plan of S. 986 would clearly redound to the advantage of a handful of nationally organized concerns that would readily understand the aditional competitive avantage flowing from their protected use of the words "full warranty".

Question 4 and question 5: Would the amendments in Title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new section 5(a)(7) of the FTC Act (contained in section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

What limitations on the Commission's authority to issue remedial orders under the above would you propose?

Answer: The proposed new section 5(a)(7) of the FTC Act gives the FTC power to fashion unusual remedies to redress the injuries to consumers. This is an extraordinary power.

Equity jurisprudence took centuries to develop and today the power of the courts to fashion new remedies is curbed by tradition and the doctrine of judicial restraint and are limited to conventional remedies. For example, equity as practiced in court does not require an individual or firm to humiliate itself by a compelled public confession of wrong-doing, and the wearing of symbolic sack cloth and ashes for a designated period. Yet the FTC, under its existing powers, is now attempting to do precisely this in recent cases inolving false advertising.

The justification offered for the attempted imposition of the novel remedy of public confession and humiliation is that of "setting an example" and "acting as a deterrent". In the field of criminal law we have long since abandoned these justifications for public torture and the public execution of condemned criminals.

Under the language proposed in subsection (7) to be added pursuant to S. 986 to section 5(a) of the FTC Act, the FTC would be granted an additional sanction of the unknowable dimensions that far transcends those possessed by any court. It is a sanction that woulld obviously be capable of great and far reaching abuse. For example, the mere existence of such a sanction would provide the FTC with near irresistible power to coerce respondents into negotiating settlements, as the perils of unsuccessful litigation would be impossible to predict.

The enactment of new subsection (7) to section 5(a) of the FTC Act may make unnecessary any further consideration of the Class Action proposals. The FTC would be empowered to constitute itself as the official representative of any consumer class it cared to describe or designate. There may be many consumers who do not and will not subscribe to the approach of empowering a government

agency to look after and vindicate their interests, especially if such decisions are in the sole discretion of the agency.

Vesting the Class Action for consumers in the FTC does violence to the very foundations of our legal system in providing private redress for private wrongs. Heretofore the decisions whether to sue or not to sue have been considered to be the unique province of the injured plaintiff.

Question 6: Would you object to the proposed new section 5(a)(8) of the FTC Act (contained in section 202 of the bill), authorizing the Commission to go into court and seek civil penalties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by section 5(a)(1) of the Act, if the phrase "including any rule or regulation promulgated by the Commission under section 6(g) of this Act" (appearing at lines 11–13 on page 17 of S. 986) were eliminated?

Answer: The new section (8) to be added to section 5(a) of the FTC Act, as proposed in S. 986 poses many problems. To grant the Commission authority to so enforce regulations of its own creation seems anomalous. The Commission has long insisted that its own rules and regulations have the force of law, and the proposed subsection (8) surely vindicates this view. However, there may be questions of unlawful delegation of power, separation of powers, and due process involved in the attempts by the FTC to obtain civil penalties that are in effect fiines of $10,000.00 for each violation of FTC-made rules.

There is yet another and more practical problem that must be considered at the threshold. The substance of the offense is actual knowledge or knowledge fairly implied. Knowledge of what? In almost every case there will be knowledge that the act challenged is being performed by the party challenged, but that party may be wholly unconvinced that such acts are a violation of the FTC Act. The familiar statement that everyone is presumed to know the law is totally devoid of merit in the area of antitrust and trade regulation. There is frequently widespread dispute as to what antitrust law is or should be among scholars. Even after the Supreme Court speaks, debates among the experts as to the cogency of the legal and economic reasoning of the Court and the propriety of the rulings constitutes an ever-increasing increment to legal literature.

Under the proposed subsection (8), a business firm might well decide to discontinue the challenged practice, even though it could be ultimately decided to be a lawful practice. The stakes would simply be too high and the cost to the unsuccessful litigant potentially too great to make resistance a prudent course. Thus, the FTC would have it wav.

Question 7: At present the FTC undertakes interpretive and rule making proceedings. Is it your position that the resulting rules are advisory only and not legislative? Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

Answer: The interpretive and rule-making authority of any agency should never have the force of law. Thus far the FTC has been unable to gain acquiescence from the courts that its rules and regulations do have the force of law. Prior experience with the existence and exercise of this power in the hands of royalty has led to an obsolescence and discard of such power. Unless curbed by the judiciary, such rule-making authority would in truth create a super agency, with nearly unlimited new powers over the private sector. Were this a time of national crisis, a case might be made out for the creation and investing of such powers on a temporary basis. Even then the matter would not be free of doubt.

Question 8: If the rule-making authority were eliminated and the section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the Commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease and desist orders?

Answer: There is no disadvantage attendant upon permitting the FTC to have access to the Federal District Courts without reference to the position of the Department of Justice as to any particular case. Indeed such a provision may be most helpful in that it would tend to emphasize the limited powers of the FTC, and constitute it as just another government litigant before the United States District Courts. From time to time in the past the FTC has taken the position that its powers and prerogatives were superior to those of the Courts of Appeals. A provision permitting the FTC to engage in District Court proceedings first-hand is unobjectionable.

Question 9: Do you object to the expansion of subpoena power and delegation of the authority to issue subpoenas which would be accomplished by the revision of the Act proposed under section 209 of the bill?

Answer: There seems to be no reason to expand the subpoena power as proposed in section 209 of S. 986. The FTC should have the burden of establishing that its present investigatory powers are unduly limited, and that such limitations are hampering its enforcement of law. The delegation contained in the words "acting through any of its attorneys designated by it for such purpose" will have the inevitable effect of downgrading the importance of the exercise of the subpoena power and making the exercise thereof much more common place. It is suggested that there should be a convincing case of need made before the increase in power sought be granted by Congress.

Question 10: If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

Answer: Should the increase in FTC powers be enacted, it would be imprudent to set up yet another consumer protection agency with concurrent and rival powers. The FTC would have within its ambit the potential of becoming the total consumer agency.

To set up by further legislation an addititonal agency would lead to interagency rivalry that could be most oppressive to business enterprise. Two consumer agencies would serve to increase the regulatory supervision of business affairs and decrease competitive viability and innovation of all businesses, with no compensating advantage to consumers.

RESPONSE OF WINSTON H. PICKETT TO QUESTIONS BY SENATOR MARLOW W. COOK

Question 1: Would Title I of the bill be improved if "warranty" were defined in terms of a written promise or undertaking and "warrantor" defined in terms of a person making such a promise or undertaking?

Answer: Yes, and for the reasons contained on pages 2 and 3 of our prepared statement. In this connection, we would recommend that the definition of "warranty" used in S. 1221 be used. Additionally, if this change is not made, we urge the definition of "warranty in writing against defect or malfunction" suggested in our statement be used and that the first sentence of Section 110(e) be changed to make clear that the obligations assumed under the warranty there referred to be limited to those in writing against defect or malfunction. Finally, the definition of "deceptive warranty" in Section 110(c) should clearly refer to express warranties.

Question 2: Is there a better way than the above to ensure that oral representations of retailers and wholesalers will not become binding upon a manufacturer as oral additions to the manufacturer's written warranty?

Answer: We prefer the definitional approach outlined in response to Question 1.

Question 3: It has been suggested that only a very few large nationwide manufacturers and merchandisers would be able to meet the requirements for offering a so-called "full warranty" under this bill because of the apparent requirement of on-the-spot service and repair facilities. Would this requirement pose problems for the company or members of the association which you represent?

Answer: We believe that the "full warranty" requirement could pose grave problems for our smaller business members for the reasons stated on page 3 and 4 of our testimony.

Question 4: Would the amendments in Title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new Section 5(a)(7) of the FTC Act (contained in Section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

Answer: The amendments suggested in Title II would remain equally objectionable even if the Federal Trade Commission remedial orders authorized by proposed Section 5(a)(7) were specified and required to be made on a public record. Our objections concern the nature of these orders as much as the procedures under which they are adopted. Remedial orders should be issued by a court of law where the traditional protections of the judicial forum are present. Further, such orders should be issued by an objective party, like a judge, and not by the accusatory body.

Question 5: What limitations on the Commission's authority to issue remedial orders under the above would you propose?

Answer: We believe that the Commission's existing cease and desist powers are entirely adequate as a remedial tool. If the Commission's powers must be expanded, Title II ought to make clear that the remedial power attaches only to violations the nature of which have been defined in Commission rules which are prospective in effect, and that the Commission be required to petition a court of law for enforcement. Once before a judicial forum the defendant ought to retain his opportunity for voluntary settlement. Where such informal procedures fail, he ought to retain his right of jury trial and the Commission's rule ought to carry the weight of a rebuttable presumption as to illegality. Possible remedies ought to be confined to replacement, refund or repair (or recision of executory arrangements) and these remedies ought to extend only to those parties who can demonstrate the manner in which the fraud or deception caused damage. It is obvious that this subject needs a full discussion—perhaps in conjunction with legislation now before your committee which would enable other consumer remedies.

Question 6: Would you object to the proposed new Section 5(a)(8) of the FTC Act (contained in Section 202 of the bill), authorizing the Commission to go into court and seek civil penalties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by Section 5(a)(1) of the Act, if the phrase including any rule or regulation promulgated by the Commission under Section 6 (g) of this Act (appearing at lines 11–13 on page 17 of S. 986) were eliminated?

Answer: The amendment suggested would be a distinct improvement in Section 202. However, we still have reservations about making the Federal Trade Commission that kind of enforcement agency, but if the committee is seriously considering giving such authority to the Federal Trade Commission we believe an amendment should be added to make clear that the knowledge required is knowledge of falsity or deception of the act committed. As it now reads, a respondent could be charged with civil penalty if he intentionally committed an act or practice but did not know it violated the law.

Question 7: At present the FTC undertakes interpretive and rule making proceedings. Is it your position that the resulting rules are advisory only and not legislative? Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

Answer: It is our position that the FTC's interpretive rule making proceedings are advisory only. We object to any provision which gives the FTC authority to promulgate rules having the force of law. Even if such authority is provided its area of substantive operation should be carefully defined. Moreover, we find especially objectionable such rules when adopted in accordance with informal rule making procedures, the absence of any testing of facts by cross-examination and the consequent lack of an adequate record upon which decisions are based. Even if rules are to be issued with more than an advisory effect, they at best should have only prima facie effect. Furthermore, we are convinced that the "substantial evidence" test has proven to be an inadequate standard for judicial review and we recommend the use of the preponderance of the evidence standard for these crucially important rules.

Question 8: If the rule making authority were eliminated and the Section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the Commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease and desist orders?

Answer: If the rule making authority was eliminated and Section 202 authority was eliminated or amended as indicated above we would have no objection to permitting the FTC to go directly into court to enforce its cease and desist orders. We have no position on the exercise of the Department of Justice's responsibility in treating such requests.

Question 9: Do you object to the expansion of subpena power and the delegation of the authority to issue subpenas which would be accomplished by the revision of the Act proposed under Section 209 of this bill?

Answer: We do object to any expansion of the Federal Trade Commission's subpena power, but we do not object to delegation of the enforcement function to FTC attorneys.

Question 10: If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

Answer: While we support extension of the FTC's jurisdiction to matters affecting interstate commerce and authority to seek preliminary injunctions we emphatically oppose other broad, and we believe unjustified, expansions of the Commission's authority, as noted both in our statement to the committee and in our answers to the above questions. The philosophy behind consumer representation legislation, such as S. 1177, appears to be that consumers' interests should be adequately presented in various proceedings of other Federal agencies, a concept which appears different from that underlying the instant legislation. The investigatory and enforcement powers conferred in Title II are so indeterminate that the duplication of such powers in a consumer protection agency would be pointless.

NATIONAL ASSOCIATION OF MANUFACTURERS,
March 29, 1971.

Hon. MARLOW W. COOK,
U.S. Senate Old Office Building,
Washington, D.C.

DEAR SENATOR COOK: This is in response to your letter of March 19 addressed to the National Association of Manufacturers posing certain questions with regard to S. 986 and S. 1219, both of which would amend the Federal Trade Commission Act. The comments which follow are in accord with the testimony presented by Mr. Curtis Clark on behalf of this Association when he appeared before the Senate Subcommittee on Consumer Affairs, March 23, 1971.

Your letter was accompanied by a list of questions and we shall address these first. Questions 1, 2 and 3 concern warranties and, since our testimony did not embrace this subject, we begin with question 4.

Question 4: Would the amendments in Title II of the bill, S. 986, be less objectionable if the orders which the FTC would be authorized to enter under the proposed new section 5(a)(7) of the FTC Act (contained in section 202 of the bill) were specified and such orders were required to be made on a public record after an opportunity for hearing?

Answer: Yes; however, as we explained at length in our testimony our objection is to the granting of such broad scale equitable powers to the Commission regardless of the procedure which might be used in their exercise. We feel very strongly that such powers should remain in the courts where they are surrounded by adequate due process.

Question 5: What limitations on the Commission's authority to issue remedial orders under the above would you propose?

Answer. In accordance with the original concepts under which the Federal Trade Commission was established, we feel that "remedial" powers beyond cease and desist are not justified. Congress has entrusted the Commission with an extremely broad grant of authority, i.e., the determination of what constitutes an "unfair or deceptive act or practice." Having thus established, after a fair hearing, the existence of such an act or practice, the Commission may order its cessation. The diligent application of this power along with such orders for affirmative disclosure and corrective advertising as the Commission may be successful in substantiating should prove more than adequate and obviate the necessity for any additional remedial powers, particularly those with retroactive effect.

Question 6: Would you object to the proposed new section 5(a)(8) of the FTC Act (contained in section 202 of the bill), authorizing the Commission to go into court and seek civil penalties against persons knowingly engaged in unfair or deceptive acts or practices prohibited by section 5(a)(1) of the Act, if the phrase "including any rule or regulation promulgated by the Commission under section 6(g) of this Act" (appearing at lines 11–13 on page 17 of S. 986) were eliminated?

Answer: Yes, we would object on several grounds. First, the language of new section 5(a)(8) says the Commission "shall" initiate civil actions. As FTC Chairman Kirkpatrick testified, this language should be permissive instead of a flat direction, if it remains in the bill. Secondly, the Commission is instructed to initiate civil actions against corporations engaged "with actual knowledge or knowledge fairly implied" in unfair or deceptive acts or practices. There is considerable room for reasonable men to differ concerning when knowledge may be "fairly implied" and this phrase should be stricken from the bill. Third, paragraph 8 contains language which would allow the Commission to compromise,

mitigate or settle any penalty following a public hearing. As indicated in our testimony, we feel that this is an extremely clumsy procedure.

Addressing the question in general as to whether the Commission should have authority to seek civil penalties for a breach of section 5(a)(1), we would again refer to the rationale set forth above in the answer to question 5.

Question 7: At present the FTC undertakes interpretative and rule making proceedings. Is it your position that the resulting rules are advisory only and not legislative? Would you object to any provision which you believe gave the FTC authority to promulgate rules having the force of law?

Answer: Although this matter is now in adjudication in the courts, pending a final answer in that forum, it would be our position that FTC rules currently are advisory only. We do object strenuously to the granting of substantive rule making power to the Commission because, as we have explained at length in our testimony, to do so would be an abnegation by Congress of the power to legislate.

Question 8: If the rule making authority were eliminated and the section 202 authority limited, as indicated above, or eliminated, would you object to a provision authorizing the Commission (either before or after making a request of the Justice Department) to go directly into court to enforce its cease and desist orders?

Answer: No opinion.

Question 9: Do you object to the expansion of subpoena power and delegation of the authority to issue subpoenas which would be accomplished by the revision of the Act proposed under section 209 of the bill?

Answer: Yes, it is our opinion that the changes which would be brought about by the language of section 209 would result in a considerable expansion of the authority to issue subpoenas and correspondingly result in a major increase in their use by the Commission. We do not feel that the Commission should be able to subpoena witnesses and documentary evidence relating to "any matter under investigation." The courts have long looked with jaundiced eyes on "fishing expeditions." We share this view.

Question 10: If the jurisdiction and powers of the FTC were expanded and increased as proposed, do you see any need for establishing another consumer protection agency such as has been proposed under S. 1177 recently introduced by Senators Ribicoff and Javits?

Answer: Absolutely not. We feel that the creation of an independent consumer protection agency for the purpose of looking over the shoulder of governmental agencies already in existence represents bad law and bad government. No useful purpose can possibly be served nor any justifiable end obtained by superimposing an additional intermediate level of bureaucracy on those government agencies which already exist.

With regard to the Administration's "Federal Trade Commission Act Amendments of 1971" (S. 1219), we have these comments: We agree with section 2 which would substitute the words "affecting commerce" for "in commerce" in section 5 of the FTC Act and thereby expand the jurisdiction of the Commission. Similarly, we agree with the provisions of section 3 amending section 13 of the FTC Act empowering the Commission to seek preliminary injunctions. We would, however, prefer to see language making it necessary for the Commission to file a formal complaint at the same time it applies for a preliminary injunction on the theory that, if there is sufficient evidence to substantiate a preliminary injunction, the Commission should be in possession of sufficient evidence upon which to base a complaint.

We appreciate this additional opportunity for comment on what is an extremely important matter and will be pleased to have this letter incorporated into the record of proceedings.

Very truly yours,

RICHARD D. GODOWN,
Associate General Counsel.

NATIONAL ASSOCIATION OF MUSIC MERCHANTS, INC.,
March 18, 1971.

Hon. FRANK E. MOSS,
Chairman, Subcommittee on Consumers, Senate Commerce Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The National Association of Music Merchants has a direct interest in the warranty legislation, S. 986, under consideration by our Committee. NAMM is a national retail trade association representing over 1,200

retail stores that sell not only pianos and band instruments, but electronic organs, stereophonic sound equipment and other electronic amplifying equipment.

NAMM supports voluntary warranty and guaranty legislation that establishes standard definitions for the terms used in warranties, but opposes legislation that would force manufacturers to give mandatory warranties. We support the concept of legislation like S. 986 that seeks clear and understandable disclosure of the protection provided to a customer by a warranty.

As responsible businessmen, our members do not fear legislation requiring disclosure of the terms and conditions of any warranty that is voluntarily given by a manufacturer or seller. However, we are opposed to any legislation that would require manufacturers to warranty the products they produce. Our customers should not be denied the opportunity to decide for themselves if they want to purchase a product with a warranty or to purchase a similar product without a warranty at a lower price. Warranties are a basic element of competition in the music instrument industry and Congress should not interfere with the right of the seller to adjust the conditions of his warranty to permit him to compete most effectively in the marketplace.

Although NAMM supports disclosure, we do have a particular problem that we would like to call to the attention of the Committee.

As retailers of music instruments, our customers look on us as direct agents of the manufacturer-warrantor. It is the local music merchant that the customer turns to for service or repairs if the electronic organ is not working properly or if the key sticks on the new piano. Our stores have technicians trained to handle service and repair problems—store technicians who go to the customer's home to put the instrument into first class condition. Although the manufacturer's warranty promises the customer that the instrument will perform properly during the warranty period, the manufacturer does not have its own staff available to answer these service requests. Instead, he depends upon the retailer to provide the service to keep the customer happy and help develop the degree of consumer satisfaction that will encourage repeat business for the retailer.

The manufacturer-warrantor not only does not provide the service his warranty promises, in far too many cases the manufacturer does not reimburse the retail music merchant for performing the service promised by the warranty.

We recognize that S. 986 incorporates a provision (Section 107) that partially meets the problem of manufacturer reimbursement to retailers for in-warranty service work by providing that the warrantor "equitably compensate" his designated retail representative for performing duties under the warranty. Although this provision establishes the warrantor's responsibility for paying the retailer for performing in-warranty services, it does not require the manufacturer-warrantor to pay the dealer the same amount for warranty repair work that the dealer charges a customer for the same work when there is no warranty or when the warranty has expired.

Therefore, if Congress is going to enact warranty legislation, we recommend that Section 107 of S. 986 be amended to require the warrantor to "fully compensate" the retailer or other designated representative who performs service or repair duties under the manufacturers warranty.

In addition, we recommend that Title II be removed from the warranty bill, S. 986. If the proposal to give addation authority to the Federal Trade Commission to clamp down on unfair consumer practices has significant merit, then the proposal should be the subject of independent legislation and should not be imposed as a rider on a bill designed to permit consumers to better understand warranty promises. If Title II does not have merit enough to secure Congressional attention and support as separate legislation, it should not be enacted at all.

In behalf of music merchants throughout the nation, we urge the Committee to adopt our recommendations, and we ask you to include our letter in the record of the hearings of your Committee.

Sincerely,

ROBERT J. MCDOWELL,
President.

Statement on Behalf of the American Frozen Food Institute

CONSUMER PROTECTION WARRANTIES AND FEDERAL TRADE COMMISSION IMPROVEMENTS ACT

The undersigned Thomas B. House, President of the American Frozen Food Institute (formerly the National Association of Frozen Food Packers), whose members pack some ninety percent of the national production of frozen vegetables, fruits, and juices and a large volume of other frozen foods, presents the following statement in behalf of the Institute and the industry it represents in connection with S. 986:

This bill is divided into two titles. Title I deals with warranties for consumer products costing more than $5, and Title II would amend the Federal Trade Commission Act to broaden its application and to provide the Commission with extraordinary new legislative and enforcement powers. We have no position on Title I; we oppose Title II in its present form.

Title II would amend Section 5 of the Federal Trade Commission Act to (a) extend it to unfair acts that "affect," rather than directly involve, interstate or foreign commerce; (b) empower the FTC to take "any other action" (i.e., other than the familiar cease and desist order, but conceivably including action such as public confession of wrongdoing, rescission and restitution) necessary to redress injury caused by an unfair act; (c) authorize the FTC to initiate civil actions in the U.S. District Courts for civil penalties of not in excess of $10,000 for violation of any trade rule issued under the proposed amendment to Section 6(g) of the Act; and (d) allow the FTC, as well as the Department of Justice, to recover in civil actions fines of not more than $10,000 (now $5,000) for violation of cease and desist orders.

Additionally, Title II would (a) amend Section 6(g) of the Act to authorize the FTC to promulgate trade rules defining unfair or deceptive actions or practices and to provide that the violation of such rules will constitute a violation of Section 5 of the Act; (b) amend Section 9 of the Act to authorize the FTC, as well as the Department of Justice, to seek writs of mandamus in U.S. District Courts to obtain compliance with the provisions of the Act or any trade rule the FTC may promulgate; (c) amend Section 10 of the Act to allow the FTC, as well as the Department of Justice, to recover in civil suits the fine of $100 per day for failure to file any annual or special report required by the Act; and (d) amend Section 12 of the Act to extend it to false advertisements that "affect" interstate or foreign commerce.

Finally, Title II would add a new subsection to Section 13 of the Act empowering the FTC to obtain temporary injunctions against violations of Section 5 of the Act, including the violation of trade rules issued under the proposed amendment to section 6(g) of the Act. At present, this power only extends to the dissemination of false advertisements proscribed by Section 12 of the Act.

The most objectionable features of Title II are that it would authorize the FTC to issue almost any kind of order it saw fit, empower the FTC to promulgate in summary fashion trade rules having the force and effect of law, and give the FTC a whole new array of enforcement powers. Taken together, the effect of this would be to change radically the present statutory concept of the FTC as an administrative agency. The Commission would not only have a mandate to legislate broadly, but also have authority to act as prosecutor, trial court, jury, and judge.

We suggest that in its expanding activist role the FTC itself should welcome more precise Congressional ground rules than are provided in Title II, particularly as to the nature of the activities to be proscribed and of equal importance, the type of remedial orders which the FTC can impose. We believe the present deserved high regard in which the Commission is held by the people, business (most people are engaged in business) and the Congress is based on its facility for moral suasion and its understanding of the need for certainty in day-to-day affairs. We are apprehensive that the almost unlimited authority granted by Title II will create internal and external problems for the Commission which will ultimately diminish its effectiveness with the public and business generally.

Many specific questions could be raised concerning Title II. Perhaps just one will suffice. Under Title II a new Commission rule might be issued proscribing conduct "X" theretofore not considered unlawful. Also, the remedy sought by the FTC might be new and novel. Perhaps the remedy would require enforced idle

plant capacity. As we understand Title II the Commission might or might not have held a public hearing on the proscribed conduct, and it would not be required to make any detailed findings of fact. Is this procedure and any rule or novel remedy proper? In what community will this enforced idle plant capacity result in substantial unemployment with its repercussions on the community? In what state will this community be located? In what district will this community be located?

We respectfully suggest that Title II warrants the fullest inquiry by the Senate as to the necessity for, and the wisdom of, the changes that would be wrought by its passage. Most assuredly, Title II should not be treated as an inconsequential addendum to the Consumer Warranty Bill in Title I. Title II deserves careful scrutiny and should not be permitted to be hurried to the floor of the Senate under the guise of "improvements" to the Federal Trade Commission Act.

Thank you for affording us this opportunity to present our views. Should this Subcommittee desire we would be pleased to prepare several substantive amendments to Title II.

Sincerely,

THOMAS B. HOUSE,
President.

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