December 3, 2009

U.S. House of Representatives
Washington, D.C. 20515

Dear Member of Congress:

The undersigned associations write to express our significant concerns about the provisions of H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009, that would amend the Federal Trade Commission Act ("FTC Act") by removing existing procedural safeguards on the rulemaking and enforcement capabilities of the Federal Trade Commission ("FTC" or "Commission"). The potential significant and negative impact of these provisions on the business community at large require a more deliberative legislative process outside the context of financial services regulatory reform. As such, we urge the House of Representatives to remove the provisions from H.R. 4173.

The provisions in question would eliminate procedural safeguards that were imposed upon FTC rulemaking decades ago, after Congress determined the Commission had repeatedly overstepped its regulatory authority. The legislation couples this unrestrained rulemaking authority with enforcement powers to seek civil penalties for unfair or deceptive acts or practices; to seek such penalties without coordinating with the Justice Department; and to pursue companies that allegedly provide "substantial assistance" in an FTC Act violation, even without actual knowledge of the violation. Taken together, these provisions grant such sweeping powers that the FTC could essentially act as an unelected legislature governing industries and sectors across the economy.

There has been remarkably little debate on the consequences of reversing the considered decisions of two earlier Congresses. In particular, there has been no opportunity for affected industries to appear at a hearing to present their concerns about the potential effect of these provisions on American commerce and our economic future. A proposal for Congress to delegate such sweeping new regulatory authority deserves more thorough deliberation.

I. Elimination of Existing Procedural Safeguards

When the FTC operates under congressional guidance in the form of a specific authorizing statute, the Commission may use the notice-and-comment rulemaking procedures followed in most federal agency proceedings. However, the FTC's consumer protection mandate under the FTC Act is exceptionally broad. The Commission's authority extends to all "unfair or deceptive acts or practices in or affecting commerce", including business-to-business interactions as well as conduct toward consumers.[1] The statute provides scant guidance to channel the FTC's exercise of its discretion in executing this mission.

The FTC is also set apart from other federal agencies by the breadth of its jurisdiction. The FTC has authority to regulate across the U.S. economy, except for a few sectors that are specifically exempted and within the jurisdiction of other agencies. While it is true that certain other agencies, such as the Securities and Exchange Commission and the Commodity Futures Trading Commission, may issue rules using expedited procedures under the Administrative

[1] 15 U.S.C. § 45(a).

Procedure Act ("APA"), these agencies are narrowly focused in both jurisdiction and mission. In contrast, the FTC is, by definition, a generalist agency. It is therefore appropriate to require robust industry and consumer participation when the FTC seeks to issue a rule that would affect a broad range of trades or sectors, in order to inform the agency and avoid the types of abuses that occurred previously.

In 1975 and again in 1980, Congress stepped in to stop the FTC's abuse of its rulemaking authority. Congress imposed enhanced safeguards, including more public input opportunities, when the FTC seeks to outlaw specific acts or practices as "unfair" or "deceptive." As the House Energy and Commerce Committee's predecessor explained in 1975, "[b]ecause of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words 'unfair or deceptive acts or practices' … greater procedural safeguards are necessary."[2]

The procedures that Congress required, and that remain the law today, are quite reasonable. In addition to the notice-and-comment steps required by the APA, the FTC must afford advance rulemaking notice to Congress and the public, must provide an informal hearing so that the public may comment orally or in writing on the agency proposal, and must provide a Statement of Basis and Purpose for any final rule. Robust judicial review ensures that these procedures are followed. In addition, existing law requires transparency when Commissioners meet with outside parties about regulatory proceedings, and prohibits staff from giving Commissioners facts outside the regulatory record. These procedures improve the quality of agency decision-making and increase public accountability and support.

Timothy Muris, who served as Chairman of the FTC from 2001 until 2004, testified before Congress on July 14, 2009, to oppose the removal of these longstanding safeguards. As Chairman Muris explained:

> "The administration's proposal would do more than just change the procedures used in rulemaking. It also would eliminate the requirement that unfair or deceptive practices must be prevalent, and eliminate the requirement for the Commission's Statement of Basis and Purpose to address the economic effect of the rule. It also changes the standard for judicial review, eliminating the court's ability to strike down rules that are not supported by substantial evidence in the rulemaking record taken as a whole. The current restrictions on Commissioners' meetings with outside parties and the prohibition on *ex parte* communications with Commissioners also are eliminated. These sensible and important protections should be retained."

Jim Miller, another former FTC chairman, has commented that passage of the legislation as currently drafted would be "like putting the FTC on steroids."[3] In the past, the existing safeguards have proven an essential check on FTC regulation that exceeds congressional intent. Congress, then acting under Democratic leadership, established the current set of procedural protections after finding "that in many instances the FTC had taken actions beyond the intent of

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[2] H.R. Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7727.

[3] Brody Mullins and John D. McKinnon, "FTC's Powers Would Grow Under Financial Overhaul," *Wall Street Journal Online*, October 29, 2009, available at http://online.wsj.com/article/SB125677809189114853.html (last visited October 30, 2009).

Congress."[4] For example, the FTC notoriously considered a total ban on children's advertising in a proceeding that the *Washington Post* criticized as "a preposterous intervention that would turn the FTC into a great national nanny."[5] In its current form, H.R. 4173 would give the FTC free rein – and a congressional blessing – to repeat these abuses. There would be little to restrain the FTC from pursuing sweeping new regulations in areas where Congress has not yet legislated, or from drastically reshaping regulations in areas where Congress has already legislated.

We share the concerns expressed by these former FTC chairmen, and we agree with current FTC Commissioner William Kovacic, who previously served as the agency's Chairman and General Counsel, that it is "prudent to retain procedures beyond those encompassed in the APA" when the FTC acts without specific authorization from Congress.[6] Given the extremely broad scope of the FTC's jurisdiction and mandate, and the agency's history of regulatory overreaching, the existing procedural protections remain necessary and appropriate in those cases when the FTC seeks to outlaw certain business acts or practices.

II. Excessive Enforcement Authorities

Likewise, removing existing checks on the FTC's enforcement powers would not serve the public interest. While we support the FTC's mission to prevent and punish unfair and deceptive acts or practices, we believe that the current limits on the FTC's discretion are appropriate given the significant consequences of any enforcement action for a targeted company and its shareholders and employees.

Civil Penalty Authority: The FTC has ample enforcement tools at its disposal, and adding civil penalty authority would produce negative unintended consequences. Currently, the FTC primarily proceeds by imposing an administrative order to change a company's behavior or seeking a court order that may force a company to return ill-gotten gains. The FTC may then seek civil penalties if an administrative order is violated. This system gives companies an incentive to reach an agreement with the FTC to improve their business practices, rather than litigating against the FTC. The FTC routinely issues detailed administrative orders to correct companies' policies and behavior, and other companies look to these orders to understand the FTC's expectations and shape their own practices. We therefore agree with Commissioner Kovacic that "routine availability of civil penalties, even if subject to a scienter requirement, would … risk constraining the development of doctrine" through enforcement actions, and should not be adopted.[7]

Independent Litigating Authority: The House Energy and Commerce Committee recently approved, by a narrow margin, an amendment to a prior version of the legislation to provide the FTC with independent litigating authority to seek civil penalties. If added to H.R. 4173, this provision would eliminate the current requirement that the FTC notify the Department of Justice ("DOJ") when the FTC intends to seek civil penalties, after which the DOJ has 45 days to decide whether to pursue the case on behalf of the FTC. This consultation is necessary to

[4] S. Rep. No. 96-500 at 2.
[5] Editorial, *The Washington Post* (Mar. 1, 1978).
[6] Prepared Statement of the Federal Trade Commission at 11 n. 25, "Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission," Hearing Before the House Comm. on Energy and Commerce, Subcomm. on Commerce, Trade and Consumer Protection, 111th Cong. (July 8, 2009).
[7] *Id.* at 12 n. 30.

allow DOJ to coordinate law enforcement activities across agencies, and to provide a critical check on the FTC's discretion when a company is exposed to damaging penalties. This approach also provides a more considered and orderly access to the federal courts.

"Substantial Assistance" Violation: H.R. 4173 would provide that any person that "knowingly or recklessly" provides "substantial assistance" to another in committing an unfair or deceptive act or practice can be punished as a primary perpetrator, even without actual knowledge of the violation. We believe that such an expansion of FTC jurisdiction is neither reasonable nor necessary, given that the FTC has the ability to pursue a perpetrator of any unfair or deceptive act or practice.

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For the reasons discussed above, the undersigned associations strongly oppose the provisions currently set out in H.R. 4173, which would remove existing checks on the FTC's discretion. As currently drafted, the legislation would provide the FTC with unprecedented and sweeping powers to execute its broad mandate. We urge the House of Representatives to remove these provisions from H.R. 4173, so that, at a minimum, these momentous provisions receive full hearings and debate before they are subject to a vote.

Sincerely,

American Advertising Federation
American Association of Advertising Agencies
American Escrow Association
American Financial Services Association
American Herbal Products Association
Association of National Advertisers
Consumer Data Industry Association
Consumer Electronics Association
Direct Marketing Association
Direct Selling Association
Electronic Retailing Association
Financial Services Institute, Inc.
Financial Services Roundtable
Interactive Advertising Bureau
International Franchise Association
Internet Commerce Coalition
National Association of Manufacturers
National Association of Professional Background Screeners
National Business Coalition on E-Commerce and Privacy
National Retail Federation
Natural Products Association
U.S. Chamber of Commerce