CHAPTER 1

The Federal Trade Commission Act: Historical Context, Legislative History, and Amendments

Chapter Contents

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§ 1.01 Historical Context

Although not strictly defined as one of the "antitrust laws,"[1] the Federal Trade Commission Act is a descendant of the seminal Sherman Act

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[1] See Clayton Act § 1; 15 U.S.C. § 12.

of 1890. The Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade;[2] it also prohibits monopolization and attempts to monopolize.[3]

Enactment of the Sherman Act was somewhat casual and enforcement was less than vigorous at its inception. In early cases, the Supreme Court appeared to interpret the statute as prohibiting almost any restraint in a business contract, regardless of whether there existed a legitimate competitive justification for it.[4] This presented obvious enforcement difficulties, since almost every business deal became susceptible to antitrust attack.

A crack in the literalist interpretation appeared in 1898 with a court of appeals enunciation of the doctrine permitting contractual restraints reasonably ancillary to a main legitimate business purpose.[5] Then, in 1911, the Supreme Court itself changed course in *Standard Oil Co. v. United States*[6], holding that only undue restraints of trade are prohibited by the Act. Thus was born the "rule of reason" that has ever since glossed the language of the Act.

While the new interpretation may have given needed flexibility to the statute, the decision was viewed with alarm by many. The Court was accused of undercutting the Sherman Act's objective to eradicate monopolies. In addition, critics perceived that judges, in applying the rule of reason, would hold too broad a power, since they would be free to decide the reasonableness of any particular business combination according to their individual economic philosophies.

The reaction to the *Standard Oil* decision coincided with a growing uneasiness about the continuing emergence of large business combinations in the United States, notwithstanding the prohibitions of the

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See also, Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-376, 78 S.Ct. 352, 2 L.Ed2d 340 (1958).

But see: Defense Production Act § 708(b); 50 U.S.C. App. § 2158(b) (defining the FTC Act as one of the "antitrust laws"); Export Trading Company Act of 1982 §§ 103(a)(7), 311(6); 15 U.S.C. §§ 4002(a)(7), 4021(6) (defining as an "antitrust law" that part of Section 5 of the FTC Act that applies to "unfair methods of competition").

[2] Sherman Act § 1; 15 U.S.C. § 1.

[3] Sherman Act § 2; 15 U.S.C. § 2.

[4] See: United States v. Joint Traffic Ass'n, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897).

[5] See United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *modified on other grounds* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899).

[6] Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

Sherman Act. This concern was exacerbated by a public perception that, notwithstanding successful antitrust prosecutions of the oil and tobacco trusts, the resulting court decrees had been ineffective in breaking their market power.

The unrest created by the convergence of these factors came to be felt in Congress.[7] Legislative activity to address the trust question began in earnest with a Senate resolution in 1911.

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[7] A perceptive analysis of the forces underlying the reform legislation of the early twentieth century appears in Hofstadter, *The Age of Reform* (1955). See also, Votaw, "Antitrust in 1914: The Climate of Opinion," 24 A.B.A. Antitrust Section 14 (1964).

§ 1.02 Legislative History

[1]—Legislative Prelude

In the summer of 1911, after the Supreme Court had handed down its *Standard Oil* opinion placing a "rule of reason" overlay on the Sherman Act, the Senate passed a resolution that marked the legislative beginnings of what eventually became the Federal Trade Commission Act.[1] That resolution authorized the Senate Committee on Interstate Commerce to conduct an inquiry into "what changes are necessary or desirable" in the laws relating to the creation or control of corporations or to persons operating in interstate commerce.

Thereafter, the Senate Commerce Committee conducted extensive hearings on all aspects of the competitive environment in the country. In 1913, the Committee issued its report.[2] The Committee concluded that the Sherman Act should stand as "the fundamental law" on the subject. This was in response to criticism from some quarters that the antitrust laws had become outdated. Antitrust critics argued that combination rather than competition was becoming the way to economic prosperity; competition was no longer adequate to regulate the marketplace and some form of government regulation had to be found as a substitute for it. The Committee rejected this view, believing that a free market philosophy was the established policy of the country and that conditions had not changed so materially as to justify abandonment of it. The report expressed the Committee's view that "the progress of the world depends in a large measure upon that fair, reasonable rivalry among men which has hitherto characterized the advances of civilization."[3]

The Committee report surveyed the Supreme Court's antitrust decisions since 1890 and identified two areas for further attention. First, Court decisions had required a direct effect in interstate commerce be-

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[1] S. Res. 98, 62d Cong., 1st Sess., 47 Cong. Rec. 2695 (1911).

A complete legislative history of the Federal Trade Commission Act is contained in 5 Kintner, *The Legislative History of the Federal Trade Commission Act and Related Statutes* (1982). See also: A.B.A. Antitrust Section, Monograph 5, *The FTC as an Antitrust Enforcement Agency: The Role of Section 5 of the FTC Act in Antitrust Law* Volume I 3-25 (1981); Baker and Baum, "Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition," 7 Vill. L. Rev. 517 (1962).

[2] See S. Rep. No. 1326, 62d Cong., 3d Sess. (1913).

[3] *Id.*, S. Rep. No. 1326 at 3.

fore the Sherman Act would apply. The Committee believed that uncertainty about whether an effect was direct or indirect could be forestalling enforcement. It called for legislation that would prohibit "certain forms of association, combination, or monopoly" which admittedly restrain trade but perhaps indirectly.[4]

Addressing the Supreme Court's *Standard Oil* holding that only "undue" restraints of trade are forbidden by the Sherman Act, the report took the position that this placed too much discretionary power in the hands of judges. It called for new legislation that would "specifically prescribe certain conditions upon which persons and corporations shall be permitted to engage in commerce."[5]

To administer and enforce these proposed new laws, the Committee called for a new commission. Such a commission would constitute a repository for more complete and accurate knowledge than then existed of the organization, management, and practices of corporations. In addition, it could handle those issues that require "administrative promptness rather than . . . judicial deliberation and delay."[6] A commission was also viewed as the appropriate body to supervise divestitures ordered by the courts.

Thus, the stage was set for President Wilson to urge the legislative package that evolved into the Federal Trade Commission Act and the Clayton Act.

[2]—President Wilson's Proposal

For the presidential campaign of 1912, the conventions of all three political parties responded to public concern about undue concentration of economic power by adopting platform planks dealing with antitrust. After his election, President Wilson addressed Congress on the subject of antitrust legislation.[7]

Responding to the national pressure to do something about the apparent concentration of economic power in increasingly fewer hands, the President proposed a six-point program that included the subjects of interlocking directors and the financing of railroads. He urged passage of legislation that would give "further and more explicit legislative definition of the policy and meaning of existing antitrust law." He

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[4] *Id.*, S. Rep. No. 1326 at 5.
[5] *Id.*, S. Rep. No. 1326 at 11.
[6] *Id.*, S. Rep. No. 1326 at 13.
[7] H.R. Doc. No. 625, 63d Cong., 2d Sess. 3 (1914).

recommended creation of an "interstate trade commission" that would provide to businessmen advice, guidance and information as to the propriety of conduct under the antitrust laws. He viewed the commission as "an indispensable instrument of information and publicity." It would act also as a valuable instrument in helping the courts to frame effective relief once antitrust wrongs had been established in litigated cases. His program advocated holding the individuals who committed antitrust violations responsible for them, instead of penalizing only their businesses and, indirectly, the innocent shareholders. Citizens would be granted a cause of action for injuries resulting from unlawful combinations and would be allowed to base such suits upon the facts and judgments proved and entered in suits brought by the government.

Shortly after President Wilson's address in January 1914, legislation to accomplish his goals was introduced in both houses. The House of Representatives was first to take up the proposals, which were pushed by the administration as a legislative priority.

[3]—House Consideration

Shortly after President Wilson's address, identical legislation was introduced in both houses by the Democratic majority to implement the administration's recommendations. Representative Clayton introduced the measure in the House of Representatives, but the provisions that were to become the Clayton Act were separated from the bill to create a trade commission, the former being referred to Representative Clayton's Judiciary Committee and the latter to the House Committee on Interstate and Foreign Commerce.

The House Commerce Committee reviewed the 1911-1912 hearings of the Senate Commerce Committee, held hearings of its own and reported a new bill.[8] It was a synthesis of several trade commission bills that had been introduced and would have created a three member commission.[9] The model for the new commission was the Interstate Commerce Commission.

The House bill envisioned an administrative agency, independent of the executive branch, that would take over the information gathering functions of the Bureau of Corporations, an entity that already existed in the Department of Commerce. The commission's investigatory

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[8] H.R. 15613, 63d Cong.,2d Sess., 51 Cong. Rec. 2150 (1914).
[9] H.R. Rep. No.533, Pt. 1, 63d Cong., 2d Sess. 2 (1914).

scope was to be more encompassing than that of the bureau, and it would have been empowered to require annual and special reports from corporations engaged in interstate commerce.

The bill also provided that if the commission believed that information it collected was beneficial for the proper functioning of the economy, it could make such information public. Indeed, the House bill viewed publicity as the commission's primary tool in promoting fair trade practices.[10] In addition, to the extent called for, it was contemplated that the information gathered by the commission could be used by Congress in enacting additional legislation.

The new commission also was to receive another function not delegated to the Bureau of Corporations. The perceived inability of the orders entered in the *Standard Oil* and *American Tobacco*[11] cases to bring effective relief led many to believe that the judiciary was not equipped by training to formulate remedial orders that could eradicate antitrust evils. Thus, the commission was to assist the courts in framing appropriate decrees, once an antitrust violation had been established.

The House bill was reported out of committee three months after the President's address. To the extent that there was dissent in the House, it focused on the failure of the committee bill to provide the commission with any power beyond that of information gathering and reporting. The response to this criticism from the bill's sponsors was that further powers should come gradually as experience with the new body developed and needs evolved. On June 5, 1914, after four days of House debate, H.R. 15613, a bill to create an "Interstate Trade Commission," was passed by the House, 151-19.

[4]—Senate Debate

Debate in the Senate was lengthy and vigorous. The trade commission bill reported by the Senate Commerce Committee contained the last-minute addition of a section making "unfair competition" unlawful and giving the new commission authority to prohibit "unfair methods of competition." The agency that emerged from the House with no greater weapon than publicity would be given enforcement teeth.

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[10] 51 Cong. Rec. 8849 (1914) (remarks by Rep. Covington, the bill's sponsor).

[11] Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911).

The Senate version contemplated a five-member commission whose mandate would be to supplement the attorney general's enforcement of the antitrust laws. The sponsors of the bill were adamant that the purpose of the commission should not be to regulate monopoly, but to eradicate it. The commission's advantage would be in its ability to attack those practices that had not ripened into violations of the Sherman Act, but which represented "the beginning of the attempt to monopolize, the beginning of the insidious efforts toward the restraint of trade and commerce."[12] Since the commission would be free from the procedural strictures under which courts operate, it would be a forum in which the power of monopolies could be checked expeditiously.

The Senate bill, like the House bill, provided for a commission that would have inquisitorial power with regard to corporations that do business in interstate commerce. This led a Senate opponent of the bill to brand the commission "a general smelling society" that would probe into the activities of corporations.[13] Provisions for obtaining both annual and special reports from corporations were included.

The commission was also seen as an aid to the judiciary in helping to frame appropriate antitrust decrees after antitrust allegations had been adjudicated. In addition, it was expected that the commission would monitor those subject to antitrust decrees to make sure that they were complying with decree provisions.

The new Section 5 added by the Senate Commerce Committee declared "unfair competition" to be unlawful. A considerable part of the debate in the Senate was taken up with discussion of the meaning of that term. Proponents argued that it encompassed all activity that would shock the conscience of the average businessman in similar circumstances. On the other hand, opponents argued that the term was ambiguous and, instead of giving guidance to businessmen as to what they might properly do, the bill would subject them to the whim of five commissioners or, even worse, a majority of only three at any point in time.

The difficulty in going beyond the general term "unfair competition" was the impossibility of coming up with a specific definition that would encompass all of the possible activities that the mind of the ingenious businessman might come up with. The legislative history records numerous attempts to expand on the definition or to explain its

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[12] 51 Cong. Rec. 11455 (1914) (remarks of Sen. Cummins).
[13] 51 Cong. Rec. 12805 (1914) (remarks of Sen. Sutherland).

meaning. There was no consensus. In the end, the illegality of "unfair competition" was adopted without amendment, leaving to the new commission the task of giving substance to the term.

At the same time that Congress was considering the bill to create a trade commission, the bill that was to become the Clayton Act was being debated also. Both had emerged from President Wilson's proposals in January 1914. Thus, pressure for certainty in the trade commission bill was relieved by the inclusion in the Clayton bill of prohibitions against certain trade practices that many legislators found particularly reprehensible.[14]

Because of the inclusion in the Senate bill of a new substantive law of "unfair competition" to be enforced by the commission, judicial review of commission actions took on a significance in the Senate that it did not have in the House. In view of the broad delegation of authority to the commission to define unfair competition, some form of judicial review would have to be granted, if for no other reason than to save the constitutionality of the legislation. The focus of the debate was on whether the review should be broad, permitting a trial *de novo* in the district court, or whether review should be narrow, limited to determining if the commission was acting within the authority granted to it and whether substantial evidence existed in the commission record to support its findings. Broad review was attacked as a way of prolonging commission proceedings and accomplishing little more than could be accomplished by giving the courts jurisdiction at the outset. Narrow review by the district courts, similar to the procedure employed in reviewing orders of the Interstate Commerce Commission, was adopted by the Senate.

An attempt was made to provide a right of review for a person who complained to the commission and triggered the proceeding. It was rebuffed, however, on the ground that the act was not intended to provide a forum for the settlement of private grievances.

Those most in favor of the measure also tried to insert a private right of action similar to the provision which was being included in the Clayton Act that was working its way through Congress just steps behind the trade commission bill. The proposal was rejected. It was argued that by attaching monetary penalties to violations of the act, com-

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[14] However, after the FTC Act was passed, some of the specificity was removed from the Clayton bill on the ground that it was already covered by the prohibition of "unfair methods of competition" in the FTC Act. See Votaw, "Antitrust in 1914: The Climate of Opinion," 24 A.B.A. Antitrust Section 14, 26 (1964).

panies would be forced to fight each commission proceeding to the hilt. This would undercut the principal purpose of "a statute that is intended to be correctional to gradually establish an administrative law upon this subject so that the vast body of business corporations can know as the result of these decisions what they can do and what they can not do."[15] Further, senators were uncomfortable with the idea of imposing penalties for violation of an ambiguously worded statute and for activities that had not developed into Sherman Act violations.

After six weeks of intensive debate, the trade commission bill was adopted in the Senate by a vote of 53-13, with 26 not voting. Thus, in the middle of the summer of 1914, House and Senate conferees met to resolve the differences between the measures voted out by each house.

[5]—Bill Reported by Conference

The House and Senate conferees had the task of reconciling a House bill, whose strongest weapon was publicity, with a Senate bill that created a new quasi-judicial agency with enforcement powers over "unfair competition." The conference report melded the two.[16] It adopted the House's investigative and reporting provisions and the Senate's addition of a new substantive law offense, judicial powers for the newly formed commission, and a right of appeal to the judicial branch.

The Senate provisions were not adopted word-for-word however. The conferees changed the substantive offense of "unfair competition" to "unfair methods of competition." In the minds of many, the change was a distinction without a difference. However, it did separate the new offense from the common law offense of "unfair competition." This confirmed the intent that emerges from the congressional debates that the phrase "unfair methods of competition" encompasses a broader range of conduct than the "palming off" activity primarily addressed under the common law offense.[17]

The conferees also changed the method of appeal from a commission decision to the judicial branch. Instead of a district court enforce-

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[15] 51 Cong. Rec. 13143 (1914) (remarks of Sen. Newlands).

[16] H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914).

[17] "And while most of the earlier cases related to the infringement of trade-marks, the term ["unfair competition" or "unfair methods of competition"] may be said now to embrace those unjust, dishonest, and inequitable practices by which one seeks to destroy or injure the business of a competitor."

51 Cong. Rec. 14929 (1914) (remarks of Rep. Covington).

ment action or challenge, appeal of a Section 5 prohibition of an unfair method of competition was to be to the appellate courts, with ultimate review by the Supreme court on *certiorari*. Review, however, was to be limited to matters of law, the commission's findings as to matters of fact to be conclusive if supported by the testimony in the record. Provision was made for the introduction of new evidence on appeal, but only at the discretion of the appellate court upon a showing of good cause. If new evidence was to be ordered, the matter would be remanded to the commission, which was to receive the new evidence and report thereon to the reviewing court. Although a new system of review by the circuit courts was devised, the intention was that review should be no broader than required to allow the statute to pass constitutional muster.[18]

Because of the responsibilities added by the "unfair methods of competition" section, the House acceded to the Senate version of the bill which created a five-member commission instead of one with three members. The conferees also made explicit that commission proceedings were to be instituted only when "in the interest of the public." Finally, to avoid confusion with the Interstate Commerce Commission, the name of the new agency was changed to the "Federal Trade Commission" from the House's selection of "Interstate Trade Commission."

The conference report was approved by both houses and became law upon the signature of President Wilson on September 26, 1914.[19]

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[18] See 51 Cong. Rec. 14931 (1914) (remarks of Rep. Covington).

[19] Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (15 U.S.C. §§ 41-58). See http://www.ftc.gov/ftc/history/ftchistory.htm (last visited March 2, 2005), for history of the Commission after its founding.

§ 1.03 Principal Amendments to the Federal Trade Commission Act

Since its passage in 1914, the Federal Trade Commission Act has been amended numerous times.[1] Most of those amendments have been technical in nature. However, several amendatory acts changed the FTC Act in significant respects and are frequently referred to by their own names.

[1]—Wheeler-Lea Act of 1938

In 1931, the Supreme Court held that the Federal Trade Commission Act's prohibition of "unfair methods of competition" did not include practices that, while deemed to be unfair in the marketplace, could not be demonstrated to have had an adverse impact on competition.[2] In 1938, Congress passed the Wheeler-Lea Act which eliminated this restriction by expanding the reach of the FTC Act's prohibitions to cover

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[1] The Federal Trade Commission Act has been amended by the following statutes:

(1) Act of June 10, 1921, ch. 18, § 304, 42 Stat. 24.
(2) Act of Feb. 13, 1925, ch. 229, § 2, 43 Stat. 939.
(3) Act of June 16, 1933, ch. 101, 48 Stat. 291.
(4) Wheeler-Lea Act of 1938, Mar. 21, 1938, ch. 49, 52 Stat. 111.
(5) Act of June 23, 1938, ch. 601, 52 Stat. 1028.
(6) Act of June 25, 1948, ch. 646, § 32(a), 62 Stat. 991.
(7) Act of May 24, 1949, ch. 139, § 127, 63 Stat. 107.
(8) Act of Mar. 16, 1950, ch. 61, 64 Stat. 21.
(9) Act of July 14, 1952, ch. 745, 66 Stat. 631.
(10) Act of Aug. 23, 1958, Pub.L. 85-726, 72 Stat. 809.
(11) Act of Aug. 28, 1958, Pub.L. 85-791, 72 Stat. 942.
(12) Act of Sept. 2, 1958, Pub.L. 85-909, 72 Stat. 1750.
(13) Act of June 11, 1960, Pub.L. 86-507, 74 Stat. 200.
(14) Act of Oct. 15, 1970, Pub.L. 91-452, 84 Stat. 929.
(15) Act of Nov. 16, 1973, Pub.L. 93-153, 87 Stat. 591.
(16) Magnuson-Moss Warranty—FTC Improvement Act of 1975, Jan. 4, 1975, Pub.L. 93-637, 88 Stat. 2193.
(17) Act of Dec. 12, 1975, Pub.L. 94-145, 89 Stat. 801.
(18) Act of May 28, 1976, Pub.L. 94-295, 90 Stat. 575.
(19) Act of May 29, 1976, Pub.L. 94-299, 90 Stat. 588.
(20) Act of July 23, 1979, Pub.L. 96-37, 93 Stat. 95.
(21) Act of Mar. 31, 1980, Pub.L. 96-221, § 610(b), 96 Stat. 174.
(22) Federal Trade Commission Improvements Act of 1980, May 28, 1980, Pub.L. 96-252, 94 Stat. 374.
(23) Act of Oct. 8, 1982, Pub.L. 97-290, § 403, 96 Stat. 1246.

[2] FTC v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931).

"unfair or deceptive acts or practices" as well as "unfair methods of competition."[3] Provisions were added that specifically address false advertising of food, drugs, devices or cosmetics. The FTC Act was amended also by adding a section that imposes a monetary penalty for violations of Commission final orders. Prior to that, penalties could only be imposed by a court for violation of that court's order compelling adherence to a previously entered Commission cease and desist order.[4]

[2]—McGuire Act

The Sherman Act was amended in 1937 by the Miller-Tydings Act to permit enforcement of resale price maintenance pursuant to the "fair trade" laws of the various states. In 1952, the FTC Act was amended by the McGuire Act to add a provision exempting fair trade activities from FTC prosecution.[5] Both acts were repealed in 1975.[6] Thus, fair trading was eliminated when it became subject again to the prohibitions of the Sherman Act and the Federal Trade Commission Act.

[3]—Alaska Pipeline Legislation

Concerned about problems encountered by the FTC in an investigation of the petroleum industry,[7] Congress added to the bill authorizing the Alaska pipeline a section streamlining FTC investigatory procedures.[8] It increased to $10,000 the maximum fine for each violation of an FTC order. It also set forth procedures by which Commission attorneys would be authorized to appear for the Commission in court proceedings instead of having to refer matters requiring court appearances

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[3] Wheeler-Lea Act of 1938, Mar. 21, 1938, ch. 49, 52 Stat. 111.

The FTC's jurisdiction over "unfair or deceptive acts or practices" is discussed in Chapters 5 and 6 *infra*.

[4] The "two-bites-at-the-apple" approach, under which a respondent under FTC order could avoid monetary penalties for its violation until it was found to have violated a court order, continued with respect to orders entered pursuant to the authority given to the Commission to enforce the Clayton Act. This was not corrected until enactment of the Finality Act in 1959. See Act of July 23, 1959, P.L. No. 86-107, 73 Stat. 243, amending Clayton Act § 11, 15 U.S.C. § 21.

[5] McGuire Act, Act of July 14, 1952, ch. 745, 66 Stat. 631.

[6] Act of Dec. 12, 1975, Pub.L. 94-145, 89 Stat. 801.

[7] See 119 Cong. Rec. S 12967-S 12970 (daily ed. July 10, 1973).

[8] Act of Nov. 16, 1973, Pub.L. 93-153, § 408, 87 Stat. 591.

to the Department of Justice.[9] The Act also allowed the Commission to compel production of documents and information from banks and common carriers, themselves exempt from the Act, to the extent necessary to investigate violations of the Act by others who are subject to the Act.[10] The Commission was authorized also to go into district court to obtain temporary or preliminary injunctions if it believes that a violation of a law for which it has enforcement responsibility has occurred or is about to occur and its cessation is called for by a pending Commission proceeding.[11] In "proper cases" the Commission was authorized to seek a permanent injunction. Lastly, the Commission was authorized under certain conditions to initiate court proceedings to impose penalties for non-compliance with FTC orders, instead of having to convince the Department of Justice to do so.[12]

[4]—Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975

Title I of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975[13] legislated certain characteristics of consumer warranties and authorized the FTC to embark on further rulemaking to flesh out the legislative will.[14] Title II made several significant changes in and additions to the Federal Trade Commission Act. It expanded the reach of that Act to conduct that is not only "in commerce", but which also "affects" commerce.[15]

A major new section was added to the FTC Act governing Commission rulemaking proceedings with respect to unfair or deceptive acts or practices.[16] It did not purport to change rulemaking procedures regarding unfair methods of competition, an area in which the Commission has not been active.

The Magnuson-Moss Act also added to the penalty provisions of the FTC Act.[17] A penalty of a maximum of $10,000 per violation was im-

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[9] For current FTC/Department of Justice allocation of authority to appear in court for the commission, see FTC Act § 16, 15 U.S.C. § 56.

[10] See §§ 3.05 [1] and [6] *infra*.

[11] See § 14.02 *infra* regarding injunctions.

[12] See § 14.03 *infra* regarding civil penalty suits.

[13] Magnuson-Moss Warranty—FTC Improvement Act of 1975, Jan. 4, 1975, Pub.L. 93-637, 88 Stat. 2193.

[14] See § 10.08 *infra* regarding the warranty legislation and implementing regulations.

[15] See § 3.01 *infra*.

[16] See Chapter 13 *infra* regarding FTC rulemaking.

[17] See § 14.03 *infra*.

posed for knowing violations of Commission rules relating to unfair or deceptive acts or practices. Penalties were authorized as well for violations of practices forbidden by Commission cease and desist orders, regardless of whether the violator had been a respondent in the proceeding in which the order was entered, as long as there was actual knowledge of the prohibition.

Lastly, the Act added a section providing the Commission with authority to seek in court consumer redress for injuries flowing from activity which the Commission can show was "dishonest or fraudulent."[18]

[5]—Federal Trade Commission Improvements Acts of 1980

After a decade that witnessed expansions of FTC power, the pendulum began to swing back as the exercise by the Commission of those powers impacted numerous and vociferous congressional constituencies. The Federal Trade Commission Improvements Act of 1980[19] contained provisions restricting Commission activity with regard to children's advertising rulemaking,[20] standards and certification rulemaking,[21] funeral industry rulemaking,[22] investigations of the insurance industry[23] and agricultural cooperatives,[24] and trademark cancellations under the Lanham Act.[25]

The Act made numerous technical changes in the Commission's rulemaking procedures, the most notable being the requirement that it give advance notice of rulemakings to Congress and to the public and that newly promulgated rules be subject to a two-house congressional veto.[26]

The 1980 amendments gave the Commission new powers of compulsory process via civil investigative demands in investigations involving unfair or deceptive acts or practices.[27] The new powers were coupled with new responsibilities, particularly with regard to the confidentiality of material submitted to the Commission pursuant to or in lieu of compulsory process.[28]

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[18] See § 14.04 *infra*.

[19] Federal Trade Commission Improvements Act of 1980, May 28, 1980, Pub. L. No. 96-252, 94 Stat. 374.

[20] See § 3.05[8] *infra*.

[21] See § 3.05[9] *infra*.

[22] See § 3.05[11][a] *infra*.

[23] See § 3.05[10] *infra*.

[24] See § 3.05[11][b] *infra*.

[25] See § 3.05[11][c] *infra*.

[26] The congressional veto of Commission rules was declared unconstitutional in Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.* United States Senate v. FTC, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1403 (1983).

[27] See § 11.03[3] *infra*.

[28] See § 11.04 *infra*.

[6]—Foreign Trade Antitrust Improvements Act of 1982

In an effort to promote United States export trade, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 that, among other things, amended the Sherman Act and the Federal Trade Commission Act to provide that those statutes do not apply to export trade of the United States unless the activity has a "direct, substantial, and reasonably foreseeable effect" on domestic or import trade or on the export trade of a United States resident.[29]

[7]—Federal Trade Commission Act Amendments of 1994

In reauthorizing the Federal Trade Commission for the first time in fourteen years, Congress amended the Federal Trade Commission Act in 1994 to make permanent some previous limitations on the use of appropriations to investigate agricultural cooperatives and to fund participation in rulemaking proceedings.[30] In addition, the legislation modified the effect on non-parties of consumer protection orders, required a finding of prevalence as a prerequisite to a consumer protection rulemaking, changed the effective date of orders, applied the Civil Investigative Demand procedure to competition investigations and expanded it to cover tangible things, codified the definition of "unfair practices," and expanded service of process requirements and liberalized venue for FTC court actions.

[8]—Dodd-Frank Wall Street Reform and Consumer Protection Act

In 2010, responding to the financial crisis of 2008, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") was enacted.[31] Title X of that Act, entitled "The Consumer Financial Protection Act of 2010," created within the Federal Reserve System a Bureau of Consumer Financial Protection ("CFPB") to which regulatory, enforcement and supervisory authority over many consumer oriented financial protection laws then housed in various federal agencies, including the Federal Trade Commission, was to be transferred. A year later, pursuant to this law, the following FTC rules relating to consumer finan-

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[29] Foreign Trade Antitrust Improvements Act of 1982, Act of Oct. 8, 1982, Pub. L. No. 97-290, §§ 402, 403, 96 Stat. 1246. See § 3.01[2] *infra*.

[30] Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (1994).

[31] Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

cial protection were transferred to the CFPB:[32] Privacy of Consumer Financial Information,[33] Disclosure Requirements for Depository Institutions Lacking Federal Depository Insurance,[34] Mortgage Acts and Practices (Advertising and Relief Services),[35] Fair Credit Reporting Act (with some exceptions),[36] and Fair Debt Collection Practices Act (Procedures for State Application for Exemption).[37] Federal Trade Commission Rules over which the Commission continues to have regulatory authority, but as to which the CFPB will have some enforcement authority, include the Telemarketing Sales Rule,[38] Negative Option Plans,[39] Cooling-Off Period for Sales Made at Homes,[40] Preservation of Consumers' Claims and Defenses,[41] Credit Practices,[42] Mail or Telephone Order Merchandise,[43] Franchise Rule and Business Opportunities Rule.[44] Notwithstanding these regulatory transfers, the Federal Trade Commission continues to have enforcement authority where it previously existed.[45]

A carve-out from CFPB regulatory authority exists for auto dealers, unless they provide real estate financing or other non-auto-related credit to consumers or provide retail credit or leases that they do not merely originate and assign to third parties.[46] The carve-out regulatory and enforcement authority remains in the Federal Trade Commission.

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[32] Identification of Enforceable Rules and Orders—Final List, 76 Fed. Reg. 43569 (2011). The CFPB may also have supervisory authority over "a larger participant of a market for . . . consumer financial products or services" (other than mortgage services), which participant will be determined by a rulemaking proceeding after consultation with the Federal Trade Commission. Dodd-Frank Act, § 1024.

[33] See § 10.15 *infra*.

[34] See § 10.10 *infra*.

[35] See § 10.21 *infra*.

[36] See § 9.06 *infra*.

[37] See § 9.08[5] *infra*.

[38] See § 10.12 *infra*.

[39] See § 7.02[18] *infra*.

[40] See § 7.02[19] *infra*.

[41] See § 7.02[21] *infra*.

[42] See § 7.02[27] *infra*.

[43] See § 7.02[22] *infra*.

[44] See § 7.02[23] *infra*.

[45] Dodd-Frank Act § 1061(b)(5).

[46] *Id*. at § 1029.