

Legislation and Compliance Update



Important Information for GIS Customers

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April 13, 2010

Federal Legislation Could Expand FTC's Authority

The House of Representatives has recently passed the Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173) the full text of which can be found at <http://www.govtrack.us/congress/bill.xpd?bill=h111-4173>. This bill would grant the FTC the equivalent of extraordinary legislative powers, including:

- Unbridled authority to create rules about "unfair or deceptive acts or practices" across all but a few sectors of the American economy;
- Power to seek immediate civil penalties for "unfair or deceptive acts or practices without first giving companies the opportunity to change their practices;"
- Authority to go after companies for allegedly "aiding and abetting" others in an FTC Act violation, even without actual knowledge of the violation; and
- Power to seek such penalties without coordinating with the Justice Department.
- There would be additional assessments (taxes) on businesses (including small business) to fund the new agency.

It is for these reasons that we ask you to write to your senators and representatives to stress the importance of upholding the longstanding safeguards that prevent the FTC from overreaching. The National Association of Professional Background Screeners (NAPBS), of which GIS is a charter member, has provided sample verbiage that may be used to effectively voice your concerns about HR 4173 directly to your Representative and Senators in Congress.

In order to determine who you should send this letter to, please visit <http://www.usa.gov/Contact/Elected.shtml>.

To Whom It May Concern:

As a supporter of the National Association of Professional Background Screeners (NAPBS), a national association that represents over 700 member companies engaged in employment and tenant background screening across the United States, I would like to speak to you about the Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173). Member companies range from Fortune 100 companies to small local businesses, conducting millions of pre-employment and tenant background checks each year as part of the hiring and leasing process.

H.R. 4173 passed by the House includes provisions that would grant the Federal Trade Commission (FTC) the equivalent of extraordinary legislative powers. Expecting that the Senate Commerce Committee will consider these same provisions as part of its work on FTC reauthorization, I write to highlight the potentially significant and negative impact such changes would have on my business.

APA Rulemaking Authority

Under these provisions, the FTC would be able to promulgate trade regulations using the Administrative Procedure Act (APA) rulemaking procedure instead of the enhanced Magnuson-Moss procedure. Congress first required use of the Magnuson-Moss procedure in response to overzealous regulation by the FTC in the 1970s, finding "that in many instances the FTC had taken actions beyond the intent of Congress." In one such instance, the FTC 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."

FTC Chairman Jon Leibowitz has argued that the simplified APA rulemaking procedure is "generally available to other federal agencies." However, where agencies such as the Securities and Exchange Commission and the Commodity Futures Trading Commission use APA for rulemaking in narrowly focused areas where they possess extensive subject matter expertise, the FTC is a generalist agency, regulating across the U.S. economy except for specific sectors handled by other agencies. With such broad jurisdiction, it is appropriate to require robust industry and consumer participation when the FTC seeks to issue a rule that would affect an entire trade or sector.

Enforcement Authority for "Substantial Assistance" Violations

These provisions would give the FTC significant new enforcement powers that Congress

has previously considered and decided against, including new authority to go after companies for "aiding or abetting" a violation of the FTC Act. This would subject the entire advertising and marketing chain to liability based on the veracity of a single company's product claims. For example, a publisher could be held liable for claims made in an advertisement printed in its newspaper or magazine. Such an expansion of FTC authority is neither reasonable nor necessary.

Civil Penalty Authority

The FTC would receive authority to seek penalties not only for actual violations of the FTC Act, but also to deter potential violations. Currently, the FTC delivers an administrative order for a company to change a certain practice or behavior, seeking civil penalties only if that order is violated. This gives companies an incentive to reach an agreement with the FTC and improve their business practices instead of litigating against the Commission. In contrast, the prospect of civil penalties would likely lead companies to mount a more adversarial and vigorous defense against FTC scrutiny. With ample enforcement tools already at its disposal, giving the FTC civil penalty authority would have negative unintended consequences.

Independent Litigating Authority

The FTC would also receive independent litigating authority: the Commission would no longer need to notify the Department of Justice (DOJ) of any proposed action. Currently, the DOJ can decide to act on the FTC's behalf rather than the Commission taking action on its own. DOJ consultation is necessary 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. We urge the Senate to remove these provisions from any vehicle used for FTC Reauthorization and retain the longstanding safeguards against FTC overreaching.

The financial troubles of the past year have not been laid at the FTC's doorstep, and provisions to expand FTC authority are out of place in proposals for financial regulatory reform. At a minimum, a proposal to delegate such unbridled regulatory authority - reversing the considered decisions of two earlier Congresses - should receive full hearings, where business leaders can present their concerns about the potential effects of these provisions on American commerce, and debate before they are subject to a vote.

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