HOUSE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

HEARING ON

H.R. 2309, THE CONSUMER CREDIT AND DEBT PROTECTION ACT

Tuesday, May 12, 2009

TESTIMONY OF

THE AMERICAN FINANCIAL SERVICES ASSOCIATION

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The American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

AFSA appreciates the opportunity to provide testimony to the Members of the Subcommittee on H.R. 2309, *The Consumer Credit and Debt Protection Act*. While AFSA applauds the subcommittee's attempt to address problems facing the debt settlement and automobile sales industries, AFSA believes that much of the legislation as currently drafted will likely result in additional harm to consumers.

First, giving the Federal Trade Commission (FTC) expedited rulemaking authority and authority to obtain civil penalties in connection with unfair and deceptive acts or practices (UDAP) could result in rushed and unfair decisions that have a broad negative impact on industry and consumers. Second, the provision restricting post-sale changes in financing terms is too broad and would limit consumers options. Third, allowing the consumer to cancel the transaction within a specified period after contract is signed would greatly increase the complexity of car-buying with little, if any, added benefit for the consumer. Fourth, limiting the ability of automobile dealers to accept or solicit compensation could have the unintended consequence of eliminating the finance and insurance office in the dealership, thus destroying the indirect financing model, which would limit the number of financing options available to the consumer. Fifth, allowing state attorneys general (AGs) is unnecessary and would create confusion.

I. FTC: Expedited Rulemaking Authority [Section 2(a)] and Authority to Obtain Civil Penalties in Connection with Unfair and Deceptive Acts or Practices Relating to Consumer Credit or Debt [Section 3]

The expedited rulemaking authority could lead to a serious “rush to judgment,” allowing the FTC to create major industry-wide regulatory changes without adequate time for business input and thoughtful consideration.

The Magnuson Moss rulemaking requirements, which have been in effect for more than 30 years, provide procedural safeguards that are appropriate when a federal agency is given a broad mandate to proscribe by regulation “unfair or deceptive acts or practices” in interstate commerce. When applied to the Commission’s consumer protection mission, “unfair or deceptive acts or practices” can be, and has been, interpreted very broadly. Without adequate opportunity for concerned public input, the agency could promulgate rules that are based on subjective notions of unfairness or on an incomplete understanding of an industry or of the full consequences of a rule.

In at least two instances, a Court of Appeals overturned the FTC’s final rule as unsupported by the record. In many other cases, the Magnuson Moss rulemaking process led the FTC to decline to publish a final rule or to promulgate a more reasonable rule than originally proposed. The deliberative process inherent in Magnuson Moss rulemaking has served the public interest well.

Additionally, if the FTC is allowed to obtain civil penalties in connection with UDAP, a defendant could face civil penalties of several thousand per violation, based on an act or practice that is adjudicated to be unfair or deceptive for the first time in the lawsuit against the defendant.

No company should face the prospect of civil penalties for an act or practice until there has been a prior determination that the act or practice is unfair or deceptive and the company has had actual knowledge of that determination. That is why FTC civil penalty actions in U.S. District Court under Section 5 of the FTC Act are reserved for violations of rules or cease and desist orders. This process provides appropriate notice, not only to the target of the FTC enforcement action, but to the industry as a whole, and lets market participants reform their practices before facing crippling fines and penalties.

The requirement of knowledge that an act or practice is “unfair or deceptive” is based on the fact that these terms are very broad, susceptible to differing interpretations and applied to many different industries. “Unfairness” is a particularly evolving standard, in both the FTC’s interpretation and its use in enforcement actions.

II. Restricting Post-Sale Changes in Financing Terms

This provision is unnecessarily broad. It would clearly cover assignee serving activities, such as extensions, rewrites, payment schedule modifications. Such collection activity takes place in distressed obligations to allow the consumer to continue in the contract. Without such flexibility, repossessions would increase and consumer options would be greatly limited.

Additionally, the Truth In Lending Act (TILA) sets out a process to correct disclosures that are technically inaccurate but that do not harm the consumer. It is also the practice of many creditors to send similar notices to correct minor inaccuracies in the documentation that were not intended by the parties under “contract reformation” law. Failure to carve out the ability to make these changes is inconsistent with existing law (both TILA and general contract law) and would impose a significant hardship on consumers who would be required to come back to the dealer to correct their contracts for relatively minor items.

Finally, post-sale changes in financing terms are extensively regulated by the states. Further regulation is unnecessary.

III. Allowing the Consumer to Cancel the Transaction Within a Specified Period

AFSA does not believe that this provision is necessary. Car purchases are not impulsive buys. On the contrary, they are usually very well researched. It may be that Congress is trying to prevent the same pressure or undue influences as has been alleged in home solicitation sales from occurring in the automobile industry. However, there have been no signs of that pressure or undue influence in the automotive industry. Moreover, the right of rescission under a TILA mortgage transaction does not apply to purchase money mortgage loans, so it should not apply to purchase money automobile sales.

It is important to distinguish that door-to-door sales are much different that sales made at a dealership and so the regulations governing the two types of sales should be different. There are already heavily regulated. In fact, the FTC has public comment on its Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (Cooling-Off Rule). There are states laws for duress under contract law and state unfair and deceptive practices laws. In fact, several states have looked at all of these issues and are happy with the solutions they have already come up put in place.

As opposed to helping consumers, the legislation could, in fact, end up mandating a “three day waiting period” provision where consumer picks up vehicle after expiration of rescission period to avoid titling issues. This will likely anger consumers, particularly if they had to trade in their car and then cannot drive home with a new one and so are left without a car.

This provision would also hurt the dealerships and finance companies the government is working so hard to save. If vehicle was sold as “new,” but returned under a right of rescission it would then have to be classified as “used,” which would lower its value. This would place an undue financial burden on dealers who would take back into inventory vehicles at significantly lower values. Additionally, if it becomes truly a three day right to rescind after delivery of the vehicle, and market practices result in those contracts being purchased prior to termination of rescission period, more risk is put on to the assignee finance company, who must now assume risk of dealer solvency when repurchase rights are exercised.

If Congress does feel that this provision will benefit consumers, it should allow consumers to waive their right to rescission.

IV. Limitations on Dealer Compensation

There is no indication that the existing method for computing dealer compensation has involved any type of systemic abuse or unfairness to consumers. Franchised automobile and truck dealers offer very competitive financing rates to consumers based on their relationships with numerous finance sources.

This provision appears to be based on the conclusion that the borrower will receive all the financial benefit from the decrease in dealer compensation. However, this provision could have the unintended consequence of eliminating the finance and insurance office in the dealership, thus destroying the indirect financing model, which is a major source of financing for consumers.

Not only may many consumers be left without the ability to get a loan, but those that do will have to do much more work to find someone to finance the purchase. In fact, this would have a greater negative impact on that segment of society that does not have access to traditional banking channels.

V. Enforcement by State Attorneys General

If Congress were to give the AGs the authority to enforce the federal rules and statutes, the result would be the creation of new federal requirements and prohibitions based on state enforcement actions. State AGs lawsuits enforcing the federal law could result in duplicative and inconsistent lawsuits based on the same conduct. Such lawsuits would undermine the federal standards under the FTC rules and federal statutes. Moreover, state unfair or deceptive acts or practices statutes often provide that they are to be interpreted consistently with the federal law. As a result, an action by a state AG could create new law in other states, as well as new federal law.

It is unnecessary to give state AGs this new power. As a matter of practice, the state attorneys general regularly join with the FTC in enforcement actions and settlements. When they do so, however, each attorney general proceeds under its own state law, which is how it should be.

Again, AFSA appreciates the opportunity to submit testimony to the subcommittee on this legislation.