Association of National Advertisers
Advertising Law and Public Policy Conference

Remarks of Chairman Jon Leibowitz
As Prepared for Delivery
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Thank you very much to Dan Jaffe and the ANA for inviting me to be here today. I want to congratulate the ANA on your 100th anniversary this year and your sustained leadership in the marketing industry. We'll be having our 100th anniversary in 2014, by the way, so I feel like in some sense we've grown up together.

and why this isn't the "end of the world" for business. In fact, we hope that most of you in the room will ultimately support this authority.

Currently, the FTC is required to do rulemaking under positively medieval procedures known as the Magnuson-Moss Act – also called "Mag-Moss." The requirements to promulgate a rule under these procedures are so onerous that the agency has not proposed a new Mag-Moss rule in 32 years.

Thirty-two.

For instance, under Mag-Moss, if any member of the public requests it, the agency has to hold a hearing where interested persons have the right to examine, rebut, and cross-examine witnesses.

I think many of you are probably familiar with our Funeral Rule, which the agency promulgated under Mag-Moss procedures. The rule requires funeral homes to provide consumers with itemized price lists for services and caskets so that they are able to comparison shop and pick and choose only the services they want. The rule provides much needed protections to consumers at a time when they are especially vulnerable to exploitation. This is a critical rule that brought order to an industry once rife with abuse. Consumers should not be forced to pay a small fortune for an elaborate bundle of funeral services, including a lavish casket, when they might be just as satisfied with more modest products and services instead.

The agency began the Mag-Moss rulemaking for the Funeral Rule in 1975. For this rule, the agency held 52 days of hearings. This wasn't a two-month period with a few days of hearings scattered here and there, but hearings that took place on 52 separate days. It took the Commission seven years and one month to actually promulgate the Funeral Rule under Mag-Moss procedures – and that doesn't even count the additional two years between 1973 and 1975 when the agency was working on the Rule before Mag-Moss took effect.

And a lot of the time we spent trying to promulgate other rules was for nothing. We spent over ten years on a rule regarding health spas – no rule enacted. We spent ten years and three months on a rule regarding hearing aids – no rule enacted. And we spent eleven years and eleven months working on a mobile home rule – but no rule was enacted.

It makes no sense to require the FTC to go to such lengths to promulgate rules. It is an incredible drain on agency resources, and it allows harmful business practices to continue unchecked during the time the rulemaking is underway. Sometimes you have an event like the current economic crisis, which generates new types of frauds, things like foreclosure rescue scams, debt relief, and phony economic stimulus grants. The agency has to be able to respond nimbly to new business practices and market conditions that are harming consumers.

Don't take my word for it; ask my colleague, Tom Rosch.

Now he's a Commissioner, but back then in the 1970s he was the Director of the FTC Bureau of Consumer Protection and present at the creation of Mag-Moss. He says that the

statute "has turned out to be enormously burdensome and expensive, involving lengthy hearings and cross-examination (in essence a trial), but nobody knew that then."[1]

Indeed, APA rulemaking is not "expedited" rulemaking – but rather is just the

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[1] *See* Prepared Statement of Commissioner J. Thomas Rosch on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance (Mar. 17, 2010).