

CHAPTER FIVE

INDEPENDENT CONSUMER AGENCY

One of the major proposals for institutional public participation is embodied in legislation that would create an independent consumer protection agency. While it pertains to consumer interests rather than the whole range of interests involved in broadened public participation, the consumer agency is widely regarded as an exceptionally important and unique concept, and one that has occasioned a long history of intense support and opposition.

The notion of institutional representation of consumer interests goes back at least to the New Deal period. The particular concept involved in the current proposal for an independent consumer agency also has a lengthy history and traces its genesis back at least 15 years. In 1961, even before the resurgence of national interest in consumer protection that was to occur in the late 1960's, Senator Estes Kefauver introduced a bill (S. 1688) to establish a Department of Consumers to represent the economic interests of consumers. A similar bill to create a Cabinet-level Department of Consumers (H.R. 7179) was introduced in 1965 by Representative Benjamin Rosenthal, and hearings on the proposal were held by the House Subcommittee on Executive and Legislative reorganization. During this formative stage, hearings on consumer protection were also held by the House Subcommittee on Intergovernmental Relations, and the House Government Operations Committee.

Senate consideration of institutional representation for consumer interests dates to March 1969 when the Subcommittee on Executive Reorganization began hearings on S. 860, a bill to create a Department of Consumer Affairs, introduced by Senator Gaylord Nelson. As proposed by this legislation, the Department would have been an advocate of consumer interests in Government policymaking and in Federal regulatory proceedings; it would have been a clearinghouse for consumer information and complaints; and, the Department would have been an umbrella agency under which certain existing regulatory functions would have been transferred.

Although there was widespread recognition of the need for better administration of regulatory laws and better representation of consumer interests, most witnesses at the 1969 hearings opposed the creation of a Department of Consumer Affairs with the sweeping scope envisioned in S. 860.

Recognizing that reorganization does not necessarily bring about reorientation, Dr. James Goddard, former Commissioner of the Food and Drug Administration noted that, "If the proposed Department of Consumer Affairs were established, it would absorb a number of

less-than-effective programs carried out by less-than-committed employees."¹

Support for a separate Cabinet-level Department waned and a variety of other proposals emerged during the 91st Congress. Throughout the hearings and development of proposals for consumer representation, debate centered not so much on the need for institutional advocacy of consumer interests, as on the proper organizational setting and scope of such advocacy. It became clear that the proposed consolidation of various unrelated regulatory functions into a department or superagency would be unwieldy and that idea soon faded. At the same time, consumer advocates vigorously opposed the concept of having the proposed consumer agency within the Executive Office of the President where it would be dependent entirely on the administration's commitment to consumer protection.

The proposal for a consumer agency then shifted from a Department of Consumers to a more narrowly focused advocacy office. In 1970, drawing from the hearings and proposals which had come before, the Senate Committee on Government Operations recommended that the advocacy function on behalf of the interests of consumers should be placed in an independent agency. Accordingly, the Committee reported S. 4459 to create such an agency. An amended version of the bill was reported out by the Committee on Commerce. The bill passed the Senate on December 1, 1970, but the companion bill reported by the House Government Operations Committee failed to clear the House Rules Committee and the bill died in the House.

Similar legislation was introduced and reported in the 92d Congress (S. 3970 and H.R. 10835) and in the 93d Congress (S. 707 and H.R. 13163). In both Congresses, the bills passed the House by wide margins but failed in the Senate because of filibusters by the bill's opponents,

In 1975, the Senate passed S. 200, the Consumer Protection Act of 1975, and the House passed a companion bill, H.R. 7575.²

As set out in these bills, the proposed new consumer agency would:

1. Represent consumer interests before Federal agencies and Federal courts.
2. Conduct and support research, studies, and testing.
3. Submit annual recommendations to the Congress and the President on measures to improve the protection of consumer interests by the Federal Government.
4. Collect and disseminate information of interest to consumers.
5. Receive and transmit complaints from consumers.
6. Conduct investigations, including economic surveys on consumer problems.

For purposes of this section, however, the most salient function to be examined is the role of the proposed agency as an institutional advocate for consumer interests. For the reasons presented below, we continue to believe that an independent consumer agency is a necessary ingredient for the effective representation of consumer interests before Federal regulatory agencies.

¹ U.S. Senate, hearings on S. 860 and S. 2045 before a subcommittee of the Senate Committee on Government Operations, 91st Cong., 1st sess., at p. 557 (1960). Hereafter referred to as 1969 hearings.

² Due to a threatened Presidential veto, no further action was taken.

THE NEED FOR CONSUMER REPRESENTATION

The problem of bringing to bear widespread public interests in regulatory proceedings has been discussed earlier in this report.

As the political scientist Anthony Downs pointed out, since people consume in many areas, but produce in only one, they will concentrate their political efforts in the area of their production rather than in their many areas as consumers. Therefore, producer groups will, within any given policy area, exert more influence than consumers.³ While questions of consumer interest before regulatory agencies may be enormously important to consumers in the aggregate, they are far more important to the individual business or small group of businesses than they are to any particular consumer. Consequently, the individual consumer usually has no rational incentive to invest the time and resources to get involved in a regulatory agency proceeding.⁴ The businessman has.

Nonetheless, it should be noted that critics of the consumer agency concept dispute the notion that consumer interests are somehow disadvantaged. Rebutting the idea "that the individual consumer is unrepresented, or voiceless, or helpless, both in the marketplace and before the Government," a spokesman for the National Association of Manufacturers went on to say:

Whether or not all of us are pleased with the new political force known as the "consumer movement," it is functioning both visibly and vigorously. Today's consumers are not unrepresented. We have seen instead the rise of well-organized citizen groups with militant national leadership.⁵

We need not, however, rely only on theory or general assertions about the degree of consumer representation. As is shown by the information presented in chapter 2, there is a definite imbalance weighed against consumer interests.

As already noted in chapter 1, the assertion of a need for institutional advocacy of consumer interests is an acknowledgment that the agencies cannot adequately represent those interests in the absence of such advocacy. The need for effective advocacy in what are, in effect, adversary proceedings was also stressed by consumer advocates and former regulators. Even if we grant, however, that the agencies should be the ultimate advocates of the public interest, the issue of consumer interests would still be present. As former Chairman of the Federal Power Commission, Lee White stated, "Those staff positions that I am familiar with are intended to present the 'public interest' case, not that of the consumer. I would much rather have an agency whose measure of success is how effective it has advocated its position before regulatory agencies."⁶

THE PROPRIETY OF A GOVERNMENTAL ADVOCACY AGENCY

The propriety of utilizing a separate Government agency to advocate consumer interests has been often challenged by critics of that

³ Downs, "An Economic Theory of Democracy" (New York: Harper & Row, 1961), pp. 238-256.

⁴ See Mancur Olson, "The Logic of Collective Action" (Cambridge: Harvard University Press).

⁵ U.S. Senate, hearings on S. 200 before the Senate Committee on Government Operations, 94th Cong., 1st sess., at pp. 222-223 (1975). Hereafter referred to as 1975 hearings.

⁶ U.S. Senate, hearings on S. 707 and S. 1160 before the Senate Committee on Government Operations and the Senate Committee on Commerce, 93d Cong., 1st sess. (1973), p. 396. Hereafter referred to as 1973 hearings.

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proposal. The arguments most frequently raised are: that it is inappropriate to institutionalize a consumer advocate function; that the agency will not present balanced viewpoints; that the agency may create "dual prosecutions"; that the agency will drown out private consumer groups; that the agency will be unable to represent diverse consumer viewpoints; and, that the agency will create more bureaucracy and delay. Careful consideration of these arguments leads, we believe, to the conclusion that an independent consumer agency meets a legitimate need and can significantly enhance the role of public participation before the regulatory agencies.

John A. Stuart of the National Association of Manufacturers argues that the proposed consumer agency is not a proper mechanism because it would be a Federal agency acting as a critic and adversary.⁷ He distinguishes the agency from consumer groups who attract their own members and raise their own funds.

This objection seems to overlook the fact that many other Government agencies represent particular interests as important components of the public interest. Having an independent consumer agency is no more inappropriate than having a Department of Labor to advocate the interests of labor, or than having a Civil Aeronautics Board to promote the economic health of the airlines.

Nonetheless, critics object to the very feature that attracts supporters of the concept—the agency's potential for vigorous and unqualified advocacy of consumer interests. At issue is the question of bias:

I don't go along with the idea that when a Government agency agrees with industry it has caved in to pressure but when it agrees with professional consumerists it has acted in the public interest. I don't think the CPA would be independent at all. It would come to each proceeding with a built-in bias and through its special potential for attracting publicity would impose the pressure of that bias on every step of that proceedings.⁸

While the consumer agency could not dictate agency policy, the pressure it could exert, although feared by opponents of the concept, would actually have beneficial consequences. Even when it did not intervene formally, the presence of such an institutional advocate would provide an important incentive to the staffs of regulatory agencies to be especially diligent in assessing the consumer interest in regulatory policy. Just as the absence of consumer input has caused agencies to reflect too closely the needs of regulatory industries, the presence of an institutional consumer advocate would serve to sensitize agency officials to the interests of consumers.

Another commonly stated objection is that the consumer agency could create a "dual prosecutor" problem in abundant cases. Critics argue that if a regulatory agency is already proceeding to enforce its regulation against an offending business, why should participation by the consumer agency be necessary? There are two answers to this: First, the vast inequity of administrative agency proceedings do not involve such enforcement actions. They involve ratemaking, or licensing, or certifications, or standard setting. There is no "dual prosecution" problem in such cases. Second, even in the smaller category of enforcement actions, agencies frequently establish broad policy and

⁷ 1975 hearings, 228.

⁸ Statement of J. Edward Day, Electronic Industries Association, 1973 hearings, 195.

set future guidelines which have substantial impact on consumer interests. For the consumer agency to be barred from full policymaking processes would infringe markedly on its ability to advocate consumer viewpoints as policy is being made. We believe there is a clear need to preserve the agency's right to participate actively on such enforcement matters.

As noted above, another objection to the proposed agency relates to the present role of nongovernmental consumer advocates. Being confronted with a proposal for a new institutional advocate, some business representatives are now pointing out the virtue of representation by voluntary groups. Clearly, one of the strengths of our system of government is the role played by voluntary groups in the formulation of public policy. Supporters of the consumer agency concept argue that the agency is not intended to displace other consumer advocates. They point out that the number of agency actions affecting consumers is so great that a consumer advocacy agency could not possibly participate in all of them. Indeed, the report on S. 200 during the 94th Congress states:

One long-range purpose of this legislation is, in fact, to encourage consumers to represent their own interests before Government agencies, so that the ACA's role may be kept to a minimum.⁹

Given the comparatively limited financial resources of consumer groups, it is inevitable that there will be gaps in consumer representation not only in terms of particular regulatory proceedings but in whole policy areas.

Should the independent consumer agency be created, only time will tell what particular niche it will fill. At this stage, however, it can be predicted confidently that there will be no lack of regulatory proceedings that could occupy its attention. Potentially, such an agency can develop a base of expertise in both technical and legal matters that is simply beyond the resources of voluntary groups. Indeed, the proposed agency's other functions in regard to consumer complaint handling and information gathering would make it uniquely a central repository of expertise on consumer protection problems. Private consumer groups could draw from that expertise to benefit their own participation in regulatory proceedings, and there would still probably be areas where the consumer advocacy agency itself would be regarded as the most appropriate participant due to its particular area of expertise.

Another frequently voiced criticism of the consumer agency concept is that the public interest is composed of more than just the consumer interest. As argued in a statement submitted by the American Petroleum Institute:

Our system of government is designed to serve the public interest—not consumers' interests, manufacturers' interests, marketers' interests or any other special interests. Only a balanced judgment based on a consideration of all segments of the national economy serves the public interest. Any effort to emphasize consumer interest, as such, to the exclusion of all other parts of our economy can only result in distortion; it will not serve the public.¹⁰

Similarly, the National Association of Manufacturers worried that:

A new criterion may be established for both statutes and administrative policy, under which an undefined "interest of consumers" will be equal to, or prevail over, the whole public interest to which all government is accountable.¹¹

⁹ S. 200 Report, 12.

¹⁰ 1975 hearings, 255.

¹¹ 1975 hearings, 225.

To a considerable extent, this is an argument against a perilously perched straw man. Even the staunchest of consumer advocates do not claim that the consumer interest is the totality of the public interest. Indeed, the consumer advocacy agency is necessary precisely because the public interest requires "a balanced judgment based on a consideration of all segments of the national economy." Otherwise, agency deliberations would be, as they have been, imbalanced by the absence of input from consumers.

Furthermore, supporters of the agency claim that the intent is not to present the totality of the public interest but only the interest of consumers. It is the job of the regulatory agencies themselves to weigh the competing interests and promulgate policy in accord with the broader public interest. To criticize the proposed agency for not representing the complete public interest is to confuse the processes of advocacy and of judgment. The consumer agency is conceived as an advocate; the regulatory agencies retain the role of judging competing claims.

Critics of the proposal also point out that the direction of the public interest is difficult to determine on major policy questions where there are several major and legitimate interests competing for consideration—including differing consumer interests. For example, on the issues involved in energy policy, there are conflicting interests, and trade-offs to be made, between the desire for cheaper oil, for long-term supplies of energy, for environmental considerations (with the attendant costs), and so on. Any one of those interests may be considered as a "consumer interest."

The advocacy of one point of view by an independent consumer agency would not operate to exclude the presentation of other points of view by interested public participants. Any legislation providing for establishment of a consumer agency should make this absolutely clear.

Probably the thorniest problem confronting the proposed agency is the question of the diversity of the consumer interest and the problem of how an advocate can resolve that diversity. The United States Chamber of Commerce argues that:

The "consumer interest" is not a monolithic interest which is easily identified. While some consumers may want safe, high quality products, other consumers may wish to sacrifice these qualities for a lower price tag. "Consumer interest" is an amorphous concept, made up of many competing elements, and the ACA, time and again, will be called upon to make paternalistic judgments as to what is best for 210 million American consumers.¹²

It has also been argued that not only are there different consumer interests at any given time, but there are also different and competing time dimensions to the consumer interest. That is, critics have expressed the fear that an advocacy agency would pressure regulatory agencies to opt for the short run consumer goal of keeping products and services at minimum prices and maximum quality rather than at market prices that would assure the continued ability of firms to provide an adequate supply of such goods and services.

The fact is that most of the issues that come up before the regulatory agencies do not present conflicting consumer interests. For example, the former chief of the Bureau of Consumer Protection at the Federal Trade Commission observed that:

¹² 1975 hearings, 187.

On most consumer issues that I saw at the Federal Trade Commission, there was no underlying conflict. All consumers were pretty much on the same side in desiring and needing a certain form of protection. For example, I don't believe there is any consumer interest that favors false advertising or deceptive advertising and, hence, an aggressive program at the FTC to deal effectively with false advertising can only serve all consumers' interest.¹³

Similarly, with regard to another area of consumer unanimity, Peter Schuck of Consumers Union stated:

While it is certainly true that the utility functions of consumers are richly diverse, it is also true that there is a consumer interest which the CPA can faithfully and unequivocally represent—the interest in a free market economy characterized by vigorous competition, economic efficiency, and optimal consumer information.¹⁴

Admittedly, there are instances where diverse consumer interests will compete with one another. In such cases a rational process aggregation could be accomplished by the consumer agency. Where there are different interests that do not conflict, the agency would be able to represent all such interests simultaneously. If there is a conflict between consumer interests, the advocacy agency may be able to propose a solution that reconciles the differing consumer interests. It may also be the case that one consumer interest will be represented by another party, thereby permitting the consumer agency to concentrate on an important consumer interest that that is being ignored. Of course, situations may arise in which none of these solutions is applicable. In such circumstances, the advocacy agency may conclude that the best way to advance consumer interests is to assure that the decisionmaker is aware of all the important, conflicting consumer interests without advocating that any one of the interests be favored at the expense of others.

Indeed, a former regulator, Lee White of the Federal Power Commission, argued that the diversity of consumer interests was a major factor in favor of the consumer advocacy agency:

Were I a member of a regulatory agency, I personally would have more confidence in an agency supported with Federal funds and conducted by presidentially appointed and Senate-confirmed Commissioners than in any other single group or representative. I would expect such an agency to seek out differing conflicting positions that different consuming groups may have and to be able to present them clearly and without prejudice because of the base from which it would be operating, namely, public representatives paid with public funds.¹⁵

Finally, it is often said that creation of a new consumer agency would mean more bureaucracy.

The short answer is that since the agency would have no decision-making power—no regulatory authority—it cannot entail more bureaucracy. Perhaps it may put an additional 200 individuals on the Federal payroll. But they would have no authority to order anyone to do anything, or to compel the taking of any action, or to restrict any benefits. The consumer agency is no more a bureaucracy than the public defender's office or the legal aid bureau. It is simply an advocate for the consumer viewpoint, supported by public funds.

In addition to the objection to creating yet another Federal agency, some observers have expressed the fear that the advocacy agency

¹³ 1973 hearings, 201.

¹⁴ 1973 hearings, 514.

¹⁵ 1973 hearings, 394.

might compound another chronic bureaucratic problem—delay. This argument about delay is applicable to any mechanism for increasing public participation and is treated more extensively elsewhere in this report. As evidenced in volume IV of this study, we have found that most regulatory delay is attributable to poor management practices by the agency and to cumbersome internal administrative procedures.

With its resources and official standing, a consumer advocacy agency might actually be a force against delay as it attacks both agency practices or the use of any dilatory tactics detrimental to consumer interests. To the extent that more time is necessary to hear previously unvoiced consumer interests, some further deliberation should be acceptable. After all, lawsuits would proceed more rapidly if only one side were able to present its case, yet our system of justice does not accept the loss of equity in the interest of speed. Similar considerations of equity are also present in regulatory proceedings and should not be readily sacrificed to other procedural considerations.

SUMMARY AND RECOMMENDATION

In its various forms, a proposal for a single agency to represent consumer interests has been pending before Congress since 1965. The current proposal is to create an independent nonregulatory agency with authority to advocate consumer interests before administrative agencies and the courts.

While opponents of the proposed consumer advocacy agency have raised objections, most of them arise from a minimization of the problem of consumer representation and a misconception of the proposed solution. Contrary assessments notwithstanding, there currently is a serious underrepresentation of consumer interests in regulatory proceedings. In our view, the proposed consumer agency would be one of the major remedies for that underrepresentation.

The agency would not hold a monopoly on the public interest, nor would it be a "czar" dictating policy to the regulatory agencies. Rather, it would be a valuable advocate of consumer interests that would supplement the efforts of the private consumer groups and enhance the ability of the regulatory agencies to regulate in the public interest.

We recommend the creation of an independent, nonregulatory, consumer agency that would (1) have full intervention and participation rights to advocate consumer interests before the Federal agencies, and the Federal courts; (2) undertake studies and disseminate information of importance to consumers; (3) serve as a consumer complaint clearinghouse; (4) possess authority to obtain information needed to carry out its function; and (5) have adequate funding to assume these responsibilities.