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Protecting Access to Credit and Consumer Choice

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Peter J. Levitas
Deputy Director
Federal Trade Commission
Office of the Secretary
Room H-113 (Annex Y)
600 Pennsylvania Avenue NW
Washington, D.C. 20580

RE: Parts 2 and 4 Rules of Practice Rulemaking (16 CFR Parts 2 and 4) (Project No. P112103) – Notice of Proposed Rule Amendments Regarding Rules on Attorney Discipline

Dear Mr. Levitas:

On behalf of our member organizations, the American Financial Services Association ("AFSA") welcomes the opportunity to provide comments on the *Notice of Proposed Rule Amendments Regarding Rules of Attorney Discipline* (the "Notice") published by the Federal Trade Commission (the "Commission"). Specifically the Commission is requesting comment on its proposed rule amendments, one of which revises the rules on its ability to discipline attorneys for behavior it deems to be misconduct, specifically 16 CFR Part 4. AFSA is a national trade association for the consumer credit industry which represents a broad cross-section of financial services companies that provide credit products and services to consumers. Its 350 members include consumer and commercial finance companies, auto finance companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

AFSA members recognize the need for all tribunals, including Commission hearing officers, to control their hearing chambers and, within the limits of due process, to achieve maximum enhanced efficiencies in the investigatory process, but it is our opinion that the current proposal to amend the rules on attorney discipline goes too far.

I. Overreaching concern – as noted in more detail below, the proposal is slanted and biased against legitimate efforts of attorneys to defend and protect their clients from potential governmental overreaching. The process should be one which affords both balance and adequate due process.

AFSA members encourage the Commission to retain the current rule language as it is sufficient in addressing attorney discipline.[1] It not only requires an attorney practicing before it

[1] 16 CFR Part 4.1(e) Standards of conduct; disbarment.
(1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

to abide by accepted and well established Rules of Professional Conduct, but it also provides a mechanism, as well as a wealth of precedent on which to rely, for the Commission to act in those cases where it deems that misconduct has occurred, all the while ensuring the protections of due process, including the right to counsel, for the accused "offender." The proposed rules do not enhance the process substantially, but give the Commission an advantage over an attorney representing the subject of an investigation. At the very least, if the Board has determined that attorney conduct is a problem[2] and that attorney disciplinary matters are not adequately addressed under existing rules, the Commission should ensure that any proposed revisions to its rules stay in line with established due process procedures. By incorporating this new disciplinary rule along with the proposed enhanced and expedited investigatory powers proposed in 16 CFR part 2 (which limit the scope of how privileges are asserted and include how responses are to be made[3]), the Commission is creating a situation where the agency could run roughshod over

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(2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

[2] Although the preamble to the proposed revisions address the need for appropriate control over attorneys practicing before the Commission, that preamble does not indicate that attorney conduct is, in fact, a problem. It cites some published cases (which were apparently resolved before a federal judge) as being the reason for the need of the proposed rules without indicating that there is indeed a problem that needs correcting. The Notice is unclear and is confusing as to what it intends to accomplish. It indicates that the intention is to "make certain technical revisions, through the rules including, for example, eliminating the convention for specifying numbers in both written and numerical form, and substituting gender neutral language." But the issues addressing the attorney discipline are substantive in nature and not merely procedural. Additionally, the Notice provides that the rules relate *solely* (emphasis added) to agency practice and therefore are exempt from the requirements of the Administrative Procedures Act (APA) pursuant to 5 U.S.C. 553(b)(3)(A) which provides:

> **553 (b)** General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
> **(1)....**
> **(2)....**
> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.
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> Except when notice or hearing is required by statute, this subsection does not apply--
> ***(A)*** *to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice*

However, this logic fails in that the proposed rules relate directly to external behavior of third parties, namely attorneys practicing before the FTC. Therefore, it does not meet the exception that it claims for itself.

[3] For example, the proposed 16 CFR Part 2.11(a) gives the Commission, who would not be a neutral third party in those matters before it, the authority to determine what is or is or is not "privileged." These are essentially limited to attorney client privilege and attorney work product. There is no authorization provided for other potential grounds for privilege or assertions of protected information, such as proprietary information. In fact, the rule suggest that in the interest of expediency, all information should be turned over and anything that is entitled to privilege but mistakenly disclosed would be addressed after the fact. An attorney who knowingly acts in such manner would be remiss and subject to discipline and/or a malpractice claim. The proposed 16 CFR Part §2.11(b) provides "Any petition to limit or quash an order requiring access shall be filed with the Secretary of the Commission within twenty (20) days after service of the order, or, if the date for compliance is less than twenty (20) days after service of the order, then before the return date. Such petition shall set forth all assertions of privilege or other factual and legal

whomever, when it determines that an investigation is warranted, effectively circumventing the ability to defend oneself with aid of legal counsel. It does this all the while holding out that these standards of conduct will not apply to its own staff attorneys and that allegations of misconduct by its own attorneys will be handled "pursuant to procedures for employee discipline or pursuant to investigations by the Office of the Inspector General."[4] Internal employee discipline matters typically do not result in public reprimands or disbarment, and they are not reported to state agencies that regulate the conduct of attorneys at law. As proposed, the standards for and the potential for unwarranted disciplinary action against attorneys practicing before the Commission would be significantly higher than those for attorneys employed by the Commission. The application of rules and the right of appeal for both outside attorneys and Commission-employed attorneys should be coterminous.

II. The Amended Rules as Proposed Do Not Strike the Right Balance

The proposed amended rule greatly expands the powers of the Commission while simultaneously limiting the role of counsel in matters before it. Section 4.1(e) provides that the Commission may publicly reprimand, suspend or disbar an attorney from practicing before it if it finds that the attorney "[h]as engaged in obstructionist, contemptuous, or unprofessional conduct during the course of any Commission proceeding or investigation." None of these terms are defined, although definitions abound under state law. While the overall goals of streamlining may be laudable, governmental agencies have been known to over reach and intrude upon individuals and companies in the past. The very essence of having counsel is to provide a shield against such activities, particularly when faced with the unlimited resources of the federal government. Moreover, the section provides that an attorney may be responsible for another attorney's violation by virtue of being a partner in the same law firm as the so-called offending attorney, regardless of the size of the law firm or any direct relationship to allegedly offending lawyer.

While the notice indicates that it is relying upon the Sedona Conference's "Cooperation Proclamation" in an effort to obtain "just speedy and inexpensive adjudication," it does not seem to look at the cost benefit of initializing these proposed rules. The benefits to be obtained

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objections to the order requiring access, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash orders requiring access shall be ruled upon by the Commission itself, but the above-designated Directors, Deputy Directors, Assistant Directors, Associate Directors, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon motions for extensions of time within which to file petitions to limit or quash orders requiring access. The proposed rule 2.10(a)(1) provides that any petition to limit or quash any compulsory process shall be filed with the Secretary within 20 days after service of the Commission compulsory process or, if the return date is less than 20 days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the Commission compulsory process, including all appropriate arguments, affidavits, and other supporting documentation, such petition shall not exceed 3,750 words, including all headings, footnotes, and quotations, but excluding the cover, table of contents, table of authorities, glossaries, copies of the compulsory process order or excerpts thereof, appendices containing only sections of statutes or regulations, the statement required by paragraph (a)(2), and affidavits and other supporting documentation. Petitions to limit or quash that fail to comply with these provisions shall be rejected by the Secretary pursuant to §4.2(g) of this chapter."

[4] Footnote 1 to Proposed Rule §4.1

(expedited, even if unwarranted, adjudication) at the expense of the respondent and its counsel, do not outweigh the costs (loss of effective representation).

Under the proposed rules, allegations of attorney misconduct can be proffered by anyone, orally or written, and can be submitted to essentially anyone in the Commission, including the person in front of whom the matter is pending (the "Bureau Officer"). The "Bureau Officer " is given discretion to "notify the subject of the complaint of the underlying allegations and potential sanctions available to the Commission under this subsection, and provide him or her an opportunity to respond to the allegations and provide additional relevant information and material."[5] The Bureau Officer then has discretion to determine whether or not further action is warranted.[6] [7] Afterward, the Commission may issue a resolution based upon the Bureau Officer's recommendation and "may institute administrative disciplinary proceedings proposing public reprimand, suspension, or disbarment of the attorney from practice before the Commission."[8] Presumably there would be no incentive for the Commission to disregard the recommendation of the Bureau Officer. All of this can happen based upon allegations by a single person who may well be the least disinterested individual in the process. Additionally, there is no requirement that an administrative law judge will hear that matter. This is a significant divergence from the current practice. Currently Rule 4.1(e) (2) provides that, if for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause (presumably before an administrative law judge) why he should not be suspended or disbarred from practice before the Commission.

There is no mechanism within the proposed rule for the subject of the complaint for judicial review once the Commission has ruled;[9] the Commission may refer allegations to a state bar, etc., even if it decides to take no action[10] and, most alarmingly, the Commission may issue a public reprimand, sua sponte, based solely on the Bureau Officer's recommendation[11] with no notice to or opportunity for the subject of the complaint to be heard.

This ability, within the proposed rule, for the Commission to take unilateral action against attorneys practicing before it is contrary to even the most fundamental principles of due process and fails absolutely to consider the very real and severe ramifications of reciprocity. Typically, in matters regarding another jurisdiction's ability to consider disciplinary actions, such as suspensions or disbarments, a disciplinary board will accept as conclusive evidence of guilt, the findings of another's jurisdiction, which will result in the summary discipline of the attorney in the receiving jurisdiction. Normally, it is generally accepted that due process has been adequately afforded to the attorney in the previous action. Here, such reciprocity would be based upon less than adequate due process. This is further complicated for lenders who find themselves operating under both the purview of the Consumer Financial Protection Bureau

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[5] Proposed Rule §4.1(e)(3)
[6] Proposed Rule §4.1(e)(4).
[7] One must assume that this discretion to warrant further action may not be exercised if the Bureau Officer uses his own discretion to not notify the subject of the complaint of the underlying allegations.
[8] Proposed Rule §4.1(e)(5)
[9] Proposed Rule §4.1(e)(5)(vi)
[10] Proposed Rule §4.1 (e)(7)
[11] Proposed Rule §4.1(e)(6)

("CFPB") and the FTC. Under the dual system that a lender now finds itself having to operate under, it is not inconceivable that, in addition to state bar reciprocity, reciprocity would also be freely given by the CFPB to the FTC's determination.

Also problematic is the effect the adoption of these rules would have on the practices and procedures of state regulatory agencies. Often, there is an intersection of federal and state laws affecting unfair and deceptive practices, and many, if not most, lenders are licensed by state regulatory agencies. These agencies regularly model their own rules on those practices found at the federal level and point to the federal model as the justification for those rules. Unfortunately, at the state level, the degree to which procedures are in place to afford due process protections varies greatly, and if this rule were adopted, which essentially lowers the standard of what is "due process," there is concern that significant abuse could result by a state taking the position that what is good for the federal government is good enough for them. It would also provide the state agencies with reason, and perhaps even incentive, to circumvent the rules regarding professional conduct at the state level.

The proposed rule would create a chilling effect on those who would defend their clients before the Commission and would ultimately reduce the zealousness that attorneys are required to exhibit when defending their clients. This should not be the result or goal of a "technical" rule.

III. Conclusion

AFSA believes that the Commission should retain the current rules for addressing attorney misconduct. If it chooses to proceed, then it should, at a minimum, revise the proposed rules to offer a more balanced approached to the issue, as the proposed rules go to the essence of due process, not only for the alleged offending attorney, but for his or her client as well.

AFSA again thanks the Commission for the opportunity to comment on the Notice and welcomes the opportunity to discuss further any of the issues raised in this letter. If you have any questions, or if we can provide any additional information, please feel free to contact me at 202-296-5544, ext. 616 or bhimpler@afsamail.org.

Respectfully submitted,

/ Bill Himpler
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