Prepared Statement of the Federal Trade Commission
on

The Sports Agent Responsibility and Trust Act, H.R. 4701

Before the
Subcommittee on Commerce, Trade and Consumer Protection
of the Committee on Energy and Commerce
United States House of Representatives

Washington, D.C.

June 5, 2002

I. INTRODUCTION

Mr. Chairman and members of the Subcommittee, I am Howard Beales, Director of the Bureau of Consumer Protection at the Federal Trade Commission (FTC). I am pleased to be here today to discuss H.R. 4701, a bill known as the "Sports Agent Responsibility and Trust Act" that designates as deceptive or unfair certain conduct by sports agents relating to the signing of contracts with student athletes.[(1)] This testimony begins with a general overview of the FTC and its enforcement authority. Second, it discusses the criteria the Commission considers in deciding whether to challenge deceptive or unfair practices under existing authority. Third, it notes the Commission's concerns about certain provisions of H.R. 4701. Fourth, it suggests possible revisions to enable the legislation to better achieve its stated goal.

II. THE COMMISSION'S CONSUMER PROTECTION MISSION

The FTC is charged with protecting consumers and promoting a competitive marketplace. The cornerstone of the Commission's mandate is Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." The FTC's consumer protection mission focuses on stopping actions that threaten consumers' opportunities to exercise informed choice. The FTC Act authorizes the Commission to halt deceptive or unfair practices through administrative cease and desist actions and equitable actions filed by FTC attorneys in federal district court. In appropriate cases, the Commission also may seek civil penalties, restitution to injured consumers, or disgorgement to the U.S. Treasury of defendants' ill-gotten gains.

III. THE PUBLIC INTEREST

The FTC has been directed by Congress to act in the public interest.[(2)] When determining whether to initiate a law enforcement action, the Commission considers a number of factors, including: the type of violation alleged; the nature and amount of consumer injury at issue and the number of consumers affected; the likelihood of preventing future unlawful conduct; and the likelihood of securing appropriate relief, including redress. The Commission also considers to what extent states have regulated the area and the existence and effectiveness of appropriate voluntary industry standards and self-regulation.

The Commission continually monitors trends and developing issues in the marketplace to determine the most effective use of its resources. The Commission, therefore, focuses its resources on cases involving a large number of complaints or other evidence that the deceptive or

unfair act or practice is widespread or an emerging trend, rather than individual disputes. For example, because of numerous complaints regarding deceptive practices used by modeling scams to persuade young consumers or their parents to pay exorbitant up-front fees for unnecessary services, the Commission has brought a number of cases against these types of scams.[3] Similarly, because of large numbers of complaints regarding scholarship service scams proclaiming "FREE MONEY FOR COLLEGE," the Commission has filed nine cases against 11 companies and 30 individuals to combat this fraud.[4]

IV. THRESHOLD CONCERNS ABOUT CERTAIN PROVISIONS OF H.R. 4701

Certain provisions of H.R. 4701 appear to endorse and strengthen private restraints contained primarily in the NCAA's rules on student athletes' eligibility to participate in collegiate sports.[5] The proposed legislation furthers the NCAA's rules prohibiting student athletes who wish to maintain their collegiate eligibility from entering into sports agency contracts. Specifically, the bill requires that any sports agency/representation contract include a disclosure clearly stating that the student athlete may lose eligibility if he or she signs the contract. The legislation also enacts a substantive ban on any gifts by sports agents to student athletes prior to the signing of a contract.

Our general experience is that, although many industry self-regulatory programs provide significant and desirable protection for consumers, it is important to consider whether particular private restraints may function to protect the industry rather than consumers. The Commission's extensive enforcement and oversight history with other self-regulatory industry organizations counsels us to advise caution before Congress enacts federal legislation to support or endorse specific non-public regulation. Academic articles on the effects of NCAA eligibility rules reveal diversity of opinion on their fairness and application.[6] The public debate surrounding NCAA eligibility rules underscores the need for the careful examination of the effects of underlying private restraints before enacting legislation that supports them.[7]

We also are concerned that some of the requirements of the proposed legislation are static. In particular, the required disclosure in sports agent contracts will apparently remain the same, absent additional Congressional action, even if, at some time in the future, the NCAA's eligibility rules change, as the Olympic eligibility rules have changed. In such a case, not only may the disclosure itself become misleading, but the disclosure requirement could hamper worthwhile changes in the rules.

Furthermore, although there is clearly no room in any consumer or commercial transaction for the false or misleading statements the proposed legislation would prohibit, some conduct addressed in the legislation is acceptable in many other markets. In particular, the use of incentives as inducements to signing a contract are common features of marketing in many industries. Even understanding the vulnerability of many college student athletes to tempting sales presentations with financial inducements, it may be possible to craft a less restrictive legislative provision to address this concern. We would urge the Subcommittee to examine these issues before enacting legislation.

V. SUGGESTIONS TO MODIFY THE PROPOSED LEGISLATION

We have some suggestions to modify the proposed legislation. First, Section 3 of H.R. 4701 prohibits sports agents from giving false or misleading information - such deceptive statements that already are prohibited by Section 5 of the FTC Act and numerous state "Little FTC" Acts. If Congress sees a need for additional avenues to challenge such practices, we believe that the most appropriate avenue would be a private right of action rather than additional public enforcement provisions. A private right of action would enable individuals to vindicate

their rights in specific cases that might not be appropriate for Commission action taken in the

public interest. We note, however, that although Section 6 of H.R. 4701 provides for a private right of action to universities injured as a result of an agent's conduct, there is no similar private right of action provided to injured individual student athletes. Adding such a cause of action would further the proposed legislation's purpose to protect student athletes.

In addition, given the apparent close relationship between the proposed legislation and the existing NCAA rules, we suggest requiring a more complete disclosure of those circumstances that may lead to loss of eligibility under the rules. Such a fuller disclosure would better provide student athletes with opportunities to exercise informed choices. For example, it is our understanding that the NCAA rules prohibit a high school or college student athlete from agreeing, either orally or in writing, to be represented by an agent (regardless of when the contract becomes effective). Accordingly, to better protect student athletes from unwittingly losing eligibility, the definition of "agency contract," which currently refers only to written contracts, should be amended to clarify that the agreement may be oral or written.

In addition, Section 3(b) of the proposed legislation requires the agent to provide a written disclosure that the student athlete must sign before the student athlete signs an agency contract. Because NCAA rules prohibit a verbal commitment as well as a written commitment, we recommend modifying the language to require the disclosure before there are any substantive discussions regarding possible representation that might give rise to commitment.

As another example, it is our understanding that NCAA rules prohibit student athletes, as well as family members and friends who may be able to influence a student athlete, from receiving any benefits or gifts from an agent. Accordingly, we recommend modifying Section 3(a)(1)(B) to include providing anything of value to student athletes, family members, or friends who may influence a decision.

Further, it is our understanding that state law may restrict some student athletes' ability to enter into a contract on their own due to their age, and that a parent or guardian must sign the contract on their behalf. To ensure the proposed legislation protects all student athletes, regardless of age, we recommend inserting "or parent or guardian" after "student athlete" in proposed Section 3(a)(2).

Finally, we recommend that the Congress consider three modifications to the required disclosure set forth in Section 3(b). First, as a general matter, it has been our experience that disclosures in "plain English," so consumers can easily understand them, are the most effective. Second, to avoid inadvertently misleading student athletes, the disclosure should both track the NCAA's current rules regarding oral or written commitments and provide for adjustments should the rules change. Third, although section 6 of the proposed legislation imposes on student athletes the obligation to notify their educational institutions within 72 hours after they have entered into an agency contract, the proposed legislation takes no steps to ensure student athletes are aware of this obligation. The required disclosure, therefore, should alert student athletes of their notification obligations under the proposed legislation.

VI. CONCLUSION

In sum, the FTC protects consumers from deceptive or unfair acts and practices, but it generally focuses on acts and practices that affect a significant number of consumers or signify an emerging trend. We ask this Subcommittee to examine carefully the need for and the appropriateness of the underlying private restraint before enacting it into law. In the event this Subcommittee continues with the proposed legislation, we have provided suggestions, based on our experience with consumer disclosures, on how the legislation can be revised to better achieve its stated goal.

Mr. Chairman, the FTC greatly appreciates this opportunity to testify. I would be happy to answer

any questions that you and other Members may have.

[**Endnotes**]

1. This written statement presents the views of the Federal Trade Commission. My oral statement and responses to questions are my own and are not necessarily those of the Commission or any individual Commissioner.

2. Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), provides that

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue ... a complaint stating its charges.

3. *See, e.g.*, *United States v. National Talent Associates*, Civ. Action No. 96-2617 (D.N.J.); *FTC v. Screen Test U.S.A.*, Civ. Action No. 99-2371 (WGB) (D.N.J.); *FTC v. Model 1, Inc.*, Civ. Action No. 99-737-A (E.D.Va.) (the local Better Business Bureau had received more complaints about this company than any other in its history).

4. *FTC v. Career Assistance Planning, Inc.,* Civil Action No. 1:96-CV-2187-MHS (N.D. Ga.); *FTC v. College Assistance Services, Inc.,* Case No. 96-6996-CIV-Highsmith (S.D. Fla.); *FTC v. Deco Consulting Services, Inc.,* Case No. 96-7196-CIV-Nesbitt (S.D. Fla.); *FTC v. National Grant Foundation, Inc.,* Case No. 97-7339-CIV-Lenard (S.D. Fla.); *FTC v. National Scholarship Foundation, Inc.,* Case No. 97-8836-CIV-Ferguson (S.D. Fla.); *FTC v. Christopher Nwaigwe,* Case No. 96-CV-2690 (D. Md); *FTC v. Student Assistance Services, Inc.,* Case No. 96-6995-CIV-Roettger (S.D. Fla.); *FTC v. Student Aid Incorporated,* Case No. 96-CIV-6548 (S.D.N.Y.); and *FTC v. College Resource Management, Inc.,* Civil Action No. 3-01-CV-0828-G (N.D. Tex.).

5. It is our understanding that the Uniform Athlete Agents Act of 2000, which has been adopted by a number of states, similarly endorses NCAA rules on agent contracts.

6. *See, e.g.*, Arthur A. Fleisher III, Brian L. Goff, and Robert D. Tollison, The National Collegiate Athletic Association, A Study in Cartel Behavior (1992); Gary Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 Tul. L. Rev. 2631 (1996); Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 Ala. L. Rev. 487 (1995); Lee Goldman, *Sports and Antitrust: Should College Students be Paid to Play?,* 65 Notre Dame L. Rev. 206 (1990).

7. *Cf. United States v. Walters*, 997 F.2d 1219, 1224-25 (7th Cir. 1993) (Court rejected use of the mail fraud statute "to shore up the rules of an influential private association" against a sports agent who secretly signed college football players to agency contracts before their college eligibility expired).