June 30, 2021

TECH FREEDOM

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

cc: Commissioners Noah Philips, Rebecca Slaughter, Rohit Chopra and Christine Wilson

Re: Comments for July 1 Open Commission Meeting in re Streamlining Magnuson-Moss Rulemaking

Dear Madam Chairwoman:

Thank you for the opportunity to comment on the Commission's plan, at its July 1 open meeting, "to streamline the procedures for Section 18 rules prohibiting unfair or deceptive acts or practices."[1] A reassessment of the Commission's Mag-Moss rulemaking procedures is long overdue. But a vote on *whether* to implement specific reforms would be premature. Changes to the rules concerning rulemaking procedures should follow the same procedure as standard rulemakings: the Commission should propose, and seek comment on, specific changes before voting to make any changes.

When Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (commonly referred to as "Mag-Moss"),[2] it created procedural safeguards to avoid the rampant abuse of the FTC's consumer protection rulemakings that had, earlier that year, led a heavily Democratic Congress to briefly shutter the agency.[3] We attach hereto the history of the Commission's near-death experience written by Howard Beales, former director of the Bureau of Competition.[4] Any changes made to the "Mag-Moss" rulemaking process must be made with that experience squarely in mind.

---

[1] Federal Trade Commission, FTC Announces Agenda for July 1 Open Commission Meeting, https://bit.ly/2SBcxPT (June 24, 2021).

[2] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2193-95 (1975) (codified at 15 U.S.C. §§ 2301-12 (2012)).

[3] *See* H.R. Rep. No. 93-1107 (1974).

[4] J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 JOURNAL OF PUB. POL'Y & MARKETING 192 (2003).

The statute provides narrow discretion to the Commission to change its procedures. Among the most important differences between Mag-Moss rulemaking and standard APA rulemaking is the hearing process. For example, "an interested person is entitled to present his position orally or by documentary submission (or both)" as well as to conduct such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues…." 15 U.S.C. § 57a(c)(2)(B). The Commission may streamline the cross-examination process "to avoid unnecessary costs or delay," *id*. § 57a(c)(3), and to consolidate cross-examination among those with "the same or similar interests in the proceeding" even when they cannot agree to joint representation, *id*. § 57a(c)(4)(A). If one such party objects, the Commission enjoys discretion to decide whether "there are substantial and relevant issues which are not adequately presented by the group representative." *Id*. § 57a(c)(4)(B). But the Commission's discretion to streamlining hearings is not unlimited — and the stakes are high if the Commission excludes important evidence: a court "shall hold unlawful and set aside the rule" if the Commission has, through any of this streamlining, "precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole." 15 U.S.C. § 57a(e)(3)(B). As a command to the court, rather than language to be interpreted by the agency, the Commission could not claim *Chevron* deference in interpreting this provision. In short, the Commission must take great care that its efforts to streamline the Mag-Moss rulemaking process not cause that process to exceed the boundaries set by statute — lest it thereby end up engaging in defective rulemakings, and then having to start from square one.

Before the Commission begins a raft of Mag-Moss rule-makings, it should seek public comment on the threshold question of what constitutes "prevalence" and whether or not a practice is "widespread" — something that "has never been strictly defined by the FTC or the courts," *Pennsylvania Funeral Directors Ass'n v. F.T.C.*, 41 F.3d 81, 86 (3d Cir. 1994). As the Third Circuit noted, "[t]he FTC has stated, though, that a statement as to prevalence will 'vary depending on the circumstances of each rulemaking and the characteristics of the industry involved.'" Id. (quoting Ophthalmic Practice Rules, 54 Fed. Reg. at 10287, 16 C.F.R. § 456 (citing 49 Fed. Reg. 7740, 7742 n. 4)). Given the Commission's disuse of Mag-Moss, we could find no subsequent development of the term. That decision's survey of the FTC's past pronouncements decades ago as to the meaning of prevalence offers a starting point for that analysis — not a conclusion.

The statute requires the FTC to include, in the "statement of basis and purpose" in any notice of proposed rulemaking, "a statement as to the prevalence of the acts or practices treated by

the rule."[5] The statute also requires the Commission to issue an Advance NPRM "contain[ing] a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission," and to "invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives."[6] Understandably, the Commission is not required to establish the prevalence of a specific practice in the ANPRM, because identifying harmful practices and building a record as to their prevalence is a central purpose of ANPRM. But these requirements set a minimum floor, not a ceiling.

Chairman Khan and Commissioner Chopra have proposed "two … considerations that could weigh in favor of FTC rulemaking."[7] First, they suggest, "is the existence of an extensive enforcement record … against a particular anticompetitive practice" where "that enforcement record may not be enough to eliminate the practice altogether, especially when the conduct is highly profitable or can evolve in ways that do not precisely mirror prior application."[8] Second, rulemaking may be appropriate when "private litigation is unlikely to discipline anticompetitive conduct." Both are ways of thinking about prevalence: practices that will remain "widespread" without rulemaking. The Commission could greatly facilitate useful public comment by committing to include at least a preliminary analysis in both dimensions of the prevalence of the problem at issue in each ANPRM — rather than issuing ANPRMs that are so broadly worded that they amount to little more than Notices of Inquiry. Indeed, the statute specifically contemplates that the Commission "may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry."[9]

---

[5] 15 U.S.C. § 57(a)(d)(1).

[6] 15 U.S.C. § 57(a)(b)(2)(A).

[7] Rohit Chopra & Lina M. Khan, Symposium: Reassessing the Chicago School of Antitrust Law, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357, 371 (2020), https://bit.ly/2UhooCV.

[8] *Id.*

[9] 15 U.S.C. § 57(a)(b)(2)(B).