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Comments of

TechFreedom

Berin Szóka[i]

In the Matter of

Negative Option Rule Informal Hearing (16 CFR part 425)

FTC-2024-0001

Project No. P064202

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Re: Negative Option Rule Proposed Rule, 16 C.F.R. § 425 (FTC-2024-0001)

I'm Berin Szóka, President of TechFreedom, a think tank dedicated to technology law and policy. I've spent much of the last decade studying the Federal Trade Commission, its history, processes, and structure. For better or worse, the FTC is the de facto Federal *Technology* Commission. Every precedent the agency sets influences how it might regulate technology across the board.

I'm here today to raise three concerns about the proposed rule: the process used, the need for the rule, and its scope.

I. Process

In regulation, process always matters. But nowhere does it matter more than at the FTC.

The Magnuson-Moss Act of 1975 authorized the FTC to write consumer protection rules. Because of the extraordinarily "amorphous"[1] nature of the FTC's authority to define what qualifies as "unfair" and "deceptive," Congress imposed special procedural requirements beyond standard notice-and-comment rulemaking under the Administrative Procedure Act. Yet even these safeguards proved inadequate to prevent the FTC from going on a rulemaking bender in the late 1970s. At its peak, the FTC initiated one rulemaking each month.[2] When the FTC attempted to ban the advertising of sugared cereals to children, *The Washington Post* famously dubbed the FTC the "National Nanny."[3]

In 1980, furious lawmakers briefly shuttered the agency and slashed its funding. The Commission faced the real possibility of abolition. A bipartisan pair of Senators aptly summarized the danger of FTC overreach: "the apparent power of the Commission with respect to commercial law is virtually as broad as the Congress itself. In fact, the Federal Trade Commission may be the second most powerful legislature in the country . . ."[4] Lest the FTC supplant Congress as a second, unelected national legislature, a huge bipartisan majority of Congress and President Jimmy Carter imposed additional safeguards on Mag-Moss rulemaking.

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[1] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 774 (7th Cir. 2019).

[2] J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(B) of the FTC Act*, 79 ANTITRUST L. J. 1, 1 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764456.

[3] Editorial, Wash. Post (Mar. 1, 1978), reprinted in Michael Pertschuk, REVOLT AGAINST REGULATION, 69–70 (1982).

[4] S. Rep. No. 96-184, at 18 (1980), http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=417102.

As revised, the Mag-Moss process aims to ensure that the FTC fully vets the tradeoffs inherent in any trade regulation rulemaking. Notably, the FTC must publish an advance notice of proposed rulemaking, give Congress advance notice, and publish a notice of proposed rulemaking "stating with particularity the text of the rule, including any alternatives" considered.[5] Unlike notice-and-comment rulemakings, Mag-Moss allows commenters to request an informal hearing and requires that the presiding officer "make a recommended decision . . . as to all relevant and material evidence."[6]

Today's hearing makes a mockery of the process Congress designed. Both IAB and NCTA identified multiple material questions of fact, but the FTC refused to allow an evidentiary hearing today as Congress required. That decision means that you, as presiding officer, cannot decide questions of fact.

Since 1980, the FTC has rarely used its Mag-Moss powers, but when it did so, it took the hearing process very seriously. On the Eye Glass Rule, 31 speakers testified over 32 days. On the Vocational and Home Study School Rule, more than 400 speakers spoke over 44 days. On the Funeral Rule, it was 315 speakers over 52 days. These were sectoral rules with limited effect. Here, regarding a rule that would impose significant costs across the entire economy, over 1100 comments were submitted. Yet the FTC has only invited five other commenters to speak today. This sham hearing will be over and done in just about an hour.

Your honor, you are being asked to sit not as an administrative law judge but as a glorified timekeeper. It is not surprising that the Chair did not ask the Commission's own Chief ALJ to preside over this farce. Presumably, she expects you to do what Judge D. Michael Chappell has been unwilling to do in the few administrative cases that have reached him: rubberstamp the FTC's attempt to sidestep the safeguards imposed by Congress.

At a minimum, you should remind the FTC what is at stake here. This rule will inevitably be challenged. Mag-Moss requires that, if a court determines that the Commission had "precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole," the court "shall hold unlawful and set aside the rule."[7] True, the statute gives the FTC some discretion to streamline the informal hearing process, but only "to avoid unnecessary costs or delay."[8] Limiting presentations to just ten minutes, barring all cross-examination, and prohibiting

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[5] 15 U.S.C. § 57a(b).

[6] 15 U.S.C. § 57a(c).

[7] 15 U.S.C. § 57a(e)(3)(B).

[8] 15 U.S.C. § 57a(c)(3).

any additional parties from participating cannot possibly be justified under this narrow standard.

It's not too late for the Commission to remedy this inadequate process by holding a further, longer hearing with the opportunity for other parties to comment. Your honor, you would be well within your rights to urge the Commission to do so.

II. The Need for Rulemaking

Second, the FTC has not shown that the proposed amendments are needed. The FTC can issue a trade regulation rule "only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."[9] An act or practice is deceptive (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material.[10] An act is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[11] A host of laws, including FTC rules (ROSCA, TSR, EFTA) already prohibit deceptive and unfair deceptive billing practices, and allow the FTC to obtain civil penalties for violations.[12]

But the FTC wants to go beyond those laws. The FTC wants to prohibit conduct that Congress specifically authorized in ROSCA—namely, by requiring companies to give consumers a "simple cancellation method" to cancel a recurring payment. The FTC wants to go above what Congress explicitly required, to require the same method of cancellation upon sign-up. The net effect of all this is to allow the FTC to impose civil penalties for conduct that remains legal under the statutes Congress enacted.

III. Civil Penalties Should Apply Only to Negative Option Marketing, Not to Every Aspect of a Service That Uses Negative Option Marketing.

Indeed, the proposed rule would impose civil penalties even more broadly; in effect, it would rewrite the statute. TechFreedom raised this concern in comments joined by two other think tanks and seven former senior FTC officials. Ostensibly, the proposed amendments are about

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[9] 15 U.S.C. § 57a (emphasis added).

[10] Letter from James C. Miller III, Chairman, FTC, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Commerce (Oct. 14, 1983), appended to In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984) (decision & order), https://www.ftc.gov/public-statements/1983/10/ftc-policy-statementdeception.

[11] 15 U.S.C. § 5(n).

[12] Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401-8405; Telemarketing Sales Rule, 16 C.F.R. § 310 (2010); Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r. *See also* Unordered Merchandise Statute, 39 U.S.C. § 3009 (protecting consumers from deceptive and unfair negative option practices across a wide range of industries).

protecting consumers from negative option marketing. But as former Commissioner Christine Wilson warned in her dissent, "[t]he scope of the proposed Rule is not confined to negative option marketing. It also covers any misrepresentation made about the underlying good or service sold with a negative option feature."[13] Thus, "even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple,"[14] the FTC could—for the first time—seek civil penalties for run-of-the-mill deception claims, such as claims involving product efficacy, national origin, and about how information about the consumer or the transaction is shared, used, or secured.

This is yet another abuse of the rulemaking process. It aims to circumvent a deliberate decision by Congress *not* to empower the FTC to impose civil penalties for ordinary misrepresentations. Congress made that choice in crafting the original FTC Act. Lawmakers reaffirmed that choice as recently as 2010: the sprawling Dodd-Frank overhaul passed by the House included a provision that would have authorized the Commission to "obtain a civil penalty authorized under any provision of law enforced by the Commission," including Section 5's ban on deception.[15] After considerable opposition, this provision was dropped in conference—and for good reason; it would have fundamentally changed the balance struck by Congress in crafting the FTC Act.

Extending this rule to all aspects of a service that uses negative option marketing achieves much the same result. True, if a company chose to use negative option marketing, Section 5(m)(1)(A) would still require the FTC to show that the company had "actual knowledge or knowledge fairly implied" that its conduct was illegal, as in any action for civil penalties based on a rule violation.[16] Here, that would require showing that a company knew that its representation about a product was deceptive. But this is not the only part of the statutory framework that matters.

As the Seventh Circuit later explained in the *Credit Bureau* decision, Congress carefully "counterbalance[d]" the exceptionally "amorphous" standard of Section 5 with a "detailed framework": namely, the *combination* of Section 5(m)(1)(A)'s knowledge requirement with Section 18(a)(1)(B)'s procedural "requir[ement that] the Commission . . . . give defendants

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[13] Dissenting Statement of Commissioner Christine S. Wilson on Notice of Proposed Rulemaking, Negative Option Rule at 2 (Mar. 23, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissent-negative-option-rule.pdf.

[14] *Id.* at 2.

[15] H.R. 4173, 111th Cong. § 4950 (2009), https://www.congress.gov/bill/111th-congress/house-bill/4173/text/eh.

[16] 15 U.S.C. § 45(m)(1)(A).

fair notice . . . through . . . rules that 'define with specificity' prohibited acts"[17] before being ordered to pay money, whether in the form of restitution[18] or civil penalties.[19] The FTC's proposed rule flouts the specificity requirement: Section 5's general prohibition on deception is the anthesis of "specific,"[20] so it cannot be incorporated into a rule as the basis for civil penalties.

Determining which evidence is "relevant and material" presumes that the proposed rule is "specific"; otherwise, how could the presiding officer know possibly which evidence should be considered? It is thus impossible to say whether the Commission has fully explored the evidence that would be implicated by a rule that allows the Commission to impose civil penalties for any deceptive practice engaged in by services that use negative option marketing. There is simply no way to imagine all such scenarios or what the tradeoffs involved might be. Thus, such a proposal cannot be justified under Section 18(c)(1)(B); therefore, it lies beyond the bounds of what the Magnuson-Moss Act authorizes.

Accordingly, we urge you to recommend that the Commission drop this part of its proposed rule.

Thank you for the opportunity to testify today.

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[17] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 774 (7th Cir. 2019) (quoting 15 U.S.C. § 57a(a)(1)(B)) ("the Commission may prescribe. . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices. . .").

[18] *Id*.

[19] 15 U.S.C. § 45(l) (violation of a final order); 15 U.S.C. § 45(m)(1)(B). "Where the Commission has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive and has issued a final cease and desist order, the Commission may obtain civil penalties from non-respondents who thereafter violate the standards articulated by the Commission. To accomplish this, the Commission must show that the violator had 'actual knowledge that such act or practice is unfair or deceptive and is unlawful' under Section 5(a)(1) of the FTC Act." *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

[20] The FTC commonly bars companies from engaging in further unfair or deceptive acts and practices in orders issued after a violation of the Act, then imposes civil penalties when companies engage in such acts or practices. But unlike Section 18(B), Section 5(b) does not require "specificity" in such issuing orders, nor does Section 5(l) require specificity or even knowledge before the FTC may obtain civil penalties in enforcing such orders.