



# Breaking Down the FTC's Ambitious Rulemaking Agenda

How Did We Get Here? Where Are We Now? Where Are We Going?



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# The FTC's Heightened Attention to Rules

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# The Impact of *AMG* on the FTC's Increased Attention to Rulemaking

In a unanimous opinion on April 22, 2021, the United States Supreme Court held in *AMG Capital Management, LLC v. Federal Trade Commission* that Congress did not authorize the FTC to obtain equitable monetary relief pursuant to its authority under Section 13(b) of the Federal Trade Commission Act (FTCA) to obtain an injunction.

- Since the late 1970s, Section 13(b) has been the FTC's preferred enforcement tool, which it has used to seek large sums on money in the form of restitution and disgorgement.
- After losing its primary enforcement tool, the FTC is increasingly relying on its enforcement authority of Section 19 of the FTCA, which allows it to seek monetary relief for violations of FTC-promulgated rules and certain statutes, like the Restore Online Shoppers' Confidence Act (ROSCA).

# Monetary Relief Under Section 19 of the FTC Act

15 U.S. Code § 57b(a)(1):

- “If any person, partnership, or corporation **violates any rule** under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then **the Commission may commence a civil action** against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.”

15 U.S. Code § 57b(b):

- “The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, **but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.**”

# Pre-AMG Advocacy for Civil Penalties for Rule Violations

Even before *AMG* was decided, then-Commissioner Chopra and his attorney advisor, Samuel Levine, publicly advocated for an increased use of the FTC's rulemaking and notice of penalty offense authority to obtain civil monetary penalties from purported bad actors.

15 U.S. Code § 45(m)(1)(A):

- **“The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.”**



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# The FTC's Rulemaking Authority

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# FTC Rulemaking Under The APA

Most federal agencies promulgate rules under the Administrative Procedures Act (APA), which is commonly known as “notice-and-comment rulemaking.”

- The agency publishes a notice of a proposed rule.
- The public provides commentary.
- Then the agency finalizes the rule.

Unlike certain federal agencies, the FTC’s ability to use APA rulemaking is limited.

- The FTC can use APA rulemaking only where Congress has specifically authorized it to do so.
- Examples:
  - Telemarketing Sales Rule, 16 C.F.R. § 310
    - Authorized under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102
  - Children’s Online Privacy Protection Rule, 16 C.F.R. § 312
    - Authorized under the Children’s Online Privacy Protection Act, 15 U.S.C. § 6502
  - Privacy of Consumer Financial Information Rule, 16 C.F.R. § 313
    - Authorized under the Gramm-Leach-Bliley Act, 15 U.S. Code § 6804

# The FTC's Magnusson-Moss Rulemaking Authority

Section 18 of the FTC Act, 15 U.S.C. § 57a, also known as the Magnuson-Moss Warranty Federal Trade Commission Improvements Act (“Mag-Moss”), confers the FTC the authority to promulgate trade regulation rules generally.

To promulgate a rule under Mag-Moss, the FTC must:

1. Publish an Advanced Notice of Proposed Rulemaking (ANPR) soliciting public comment.
2. Issue a Notice of Proposed Rulemaking (NPRM).
3. “Have reason to believe” that the conduct at issue is “prevalent.”
  - Conduct is “prevalent” only when the FTC has previously issued ceased and desist orders or there is a “widespread pattern” of such conduct.
4. Conduct informal hearings allowing interested parties to present their views.
  - If there are disputed issues, the FTC must allow participants to rebut and cross-examine those making oral presentations.
5. Publish the final rule with a “statement of basis and purpose” accompanying the rule.

Mag-Moss also allows for any person to seek judicial review of the rule within 60 days of promulgation.

# Unfair Methods of Competition Rulemaking

Section 6(g) of the FTC Act also provides:

- “**From time to time** classify corporations and (except as provided in [Section 18 of the FTC Act] of this title) to **make rules and regulations for the purpose of carrying out the provisions of**” the FTC Act.

Former Commissioner Chopra and Chair Khan have argued that the FTC can proceed with rulemaking under Section 6(g) to promulgate rules regarding unfair methods of competition.

- Believe UMC rulemaking would:
  - Give market participants sufficient notice about what the law is,
  - Relieve antitrust enforcement of steep costs and prolonged trials, and
  - Enable a transparent and participatory process.

Opponents to UMC rulemaking have opined that reading UMC rulemaking into Section 6(v) would be allowing “a small statutory tail to wag a very large dog.”

# FTC's Integration of Its Unfair Competition and Unfair or Deceptive Acts or Practices Rulemaking Authority

- Though the FTC historically has hesitated to use its UMC rulemaking authority under Section 6(g) of the FTC Act, recently it has foreshadowed that it can use its Mag-Moss authority, including rulemaking and rule enforcement, to further its UMC priority.
- This includes:
  - Implementing policies to protect small businesses as “consumers.”
  - Holding big tech platforms accountable for using their market share to carry out “unfair, deceptive, and anticompetitive practices,” such as:
    - Categorizing workers as independent contractors
    - Imposing restrictive covenants



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# Historic Use of FTC Rulemaking

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# The FTC's Prolific Rulemaking in the 1970s

- Mag-Moss rulemaking was initially enacted in 1975.
- In the wake of Mag-Moss, the FTC promulgated a number of rules, at one point issuing a rule a month in a 15-month period.
- No area of commerce was safe from regulation:
  - The Labeling and Advertising of Home Insulation Rule
  - The Vocational Schools Rule
  - The Proposed Advertising for Over-the-Counter Antacids Rule



# Backlash to the FTC's "National Nanny" Rulemaking

- In addition to promulgating a flurry of rules in the late 1970s, the FTC sought to significantly limit all advertising to children, a campaign known as "KidVid."
- Congress intervened and found that the agency's rulemaking efforts were filled with "excessive ambiguity, confusion, and uncertainty."
- This led Congress to pass the Federal Trade Commission Improvements Act of 1980, imposing additional procedures, such as:
  1. Requiring submission of the ANPR and advance notice of the NPRM to the congressional committees tasked with oversight.
  2. Tasking the presiding officer of the rulemaking hearings with recommending a decision.
  3. Providing for meetings with outside interested parties.
  4. Prohibiting promulgation of a Mag-Moss rule with respect to children's advertising.



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# Recent Changes to Mag-Moss Rulemaking

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# The FTC's Procedural Amendments to Mag-Moss Rulemaking

- In the wake of *AMG*, the FTC first amended its rulemaking procedures to remove purported “extraneous and onerous procedures.”
- Changes centralized control of the process in the hands of the FTC chair—Lina Khan.
- Several Republican commissioners have cautioned that these swift and sweeping revisions will result in hasty rules.
- The concern with these changes is that promulgated rules will not be based on solid evidence or an independent process.



# Changes to Control over Mag-Moss Rulemaking

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Who oversees the process?

Before: Chief ALJ

After: FTC Chair

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Who sets the agenda?

Before: Chief ALJ as the Presiding Officer

After: Commission sets the agenda

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# Disputed Issues of Fact in Finalizing Mag-Moss Rule

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Who decides what the disputed issues of fact are in finalizing a rule?	Before: Presiding Officer (ALJ) finalizes
	After: Commission finalizes

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What's the Commission's staff role in determining the impact of a proposed rule?	Before: Commission required to publish report
	After: No report requirement because "the Commission believes [that] will provide for more efficient proceedings without undermining the Commission's ability to formulate effective rules."

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# Recent Proposed Rulemaking

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# Proposed Earnings Claims Rule

February 2022: The FTC unanimously approved the issuance of an Advanced Notice of Proposed Rulemaking that addresses earnings claims in several ways:

- Primarily, in light of *AMG*, the rule would allow the FTC to recover funds for consumers harmed by deceptive earnings claims under Section 19 of the FTC Act, in addition to civil penalties under Section 5.
- Though the FTC currently has rules regulating earnings claims in certain instances, such as the TSR, the scope of the proposed rule would be far broader.

The ANPR called for public comment on 28 separate topics, and the comment period closed in May 2022.

# Proposed Rulemaking Regarding the Telemarketing Sales Rule

In April 2022, the Commission unanimously approved issuing a Notice of Proposed Rulemaking and Advance Notice of Proposed Rulemaking seeking public comment on the Telemarketing Sales Rule (TSR).

June 2022

- Advance Notice of Proposed Rulemaking seeking comments on:
  - Tech Support Scams
  - Click-to-Cancel Requirements
  - Robocalls and Other Telemarketing to Small Businesses
- Notice of Proposed Rulemaking seeking comments on:
  - Recordkeeping Requirements
  - Business-to-Business (B2B) Schemes

# Automotive Fees and Advertising Rulemaking

On June 23, the FTC announced that it was issuing a notice of proposed rulemaking (NPRM) to address “junk fees” and “bait-and-switch advertising tactics” with respect to automobile sales.

Specifically, the proposed rule has four substantive provisions:

1. Prohibiting misrepresentations regarding vehicle costs, terms of purchasing, financing, or leasing, and the availability of vehicles at an advertised price.
2. Requiring dealers to clearly and conspicuously disclose the offering price and any “add-on” products or services in any advertisement or communication with customers.
3. Prohibiting dealers from charging for add-ons that provide no benefit, are undisclosed, or are not selected, such as duplicative warranty coverage. The rule also requires disclosure of an itemized list of add-ons.
4. Requiring dealers to keep copies of all materially different marketing materials, purchase orders, and consumer complaints.

The comment period for the NPRM closed on September 12, and the FTC is sure to take action soon after.

# Commercial Surveillance and Privacy Rulemaking

In August 2022, the Commission voted 3-2 on party lines to issue an Advance Notice of Proposed Rulemaking to create a Rule seeking to limit “commercial surveillance” and protect consumer privacy.

- Specifically, the FTC seeks comment regarding how businesses (1) collect, aggregate, protect, use, analyze, and retain consumer data, and (2) transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive.
- The rulemaking seeks to create uniform privacy and data security requirements and confer on the FTC the authority to seek financial penalties against first-time violations.
- Comments are due October 21, 2022. The FTC also held a public forum on commercial surveillance on September 8.
- There is bipartisan congressional pushback on the FTC’s announcement.

# Impersonation of Government and Businesses Rule

- On September 15, the FTC issued a NPRM to address the impersonation of government, businesses, or their officials.
- The ANPR was published on December 23, 2021, and the FTC received 140 comments from consumers, ten from businesses, eleven from trade associations, and three from government or law enforcement agencies.
- The proposed rule would prohibit, without authorization:
  - Calling, messaging, or contacting consumers while posing as a government or business agent
  - Sending physical mail or creating a website using:
    - Government “seals,” “lookalikes,” or “other identifying insignias”
    - Business “logos,” “insignias,” or “marks”
  - Spoofing government or business addresses
  - Using government seals or business marks on a “building, letterhead, website, e-mail, vehicle, or other physical or digital place.”
- The proposed rule also prohibits providing “the means and instrumentalities” for violations, which the ANPR notes is different from “assisting-and-facilitating” liability.

# Other FTC Guidance Foreshadowing Informal Rulemaking

The FTC's updates to guidance documents and policy statements might be viewed as informal regulation:

- Updates to Endorsement and Testimonial Guides
- Updates to Dot-Com Disclosure Guidance
- Enforcement Policy Statement Regarding Negative Option Marketing
  - Details three requirements:
    - Disclosures of materials terms, nature of the charges, and frequency of charges
    - Evidence of consumer's express informed consent prior to charge
    - A "simple" cancellation mechanism
- Guidance on Consumer Reviews
  - Soliciting and Paying for Online Reviews: A Guide for Marketers
  - Featuring Online Customer Reviews: A Guide for Platforms



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# Recent Enforcement of Rule Violations

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# FTC Enforcement of the New Made in the USA Labeling Rule

The FTC's Made in the USA Labeling Rule took effect on August 13, 2021.

- Since then, the FTC has pursued five actions for alleged violations of the Rule.
- All five actions have one thing in common: they expand the scope of the Rule to include not just product packaging and labeling, but also claims made on websites.



# Expanding the Scope of the Made in the USA Labeling Rule via Enforcement Actions

## *In the Matter of Resident Home LLC*

- The FTC originally entered a no-money, no-fault order against Nectar Sleep (later purchased by Resident Home) for violations of the FTCA in 2018.
- In June 2022, the FTC filed a new administrative complaint against Resident Home, alleging its **website** contained false and misleading claims that their imported DreamCloud mattresses were “made with 100 percent USA-made premium quality materials,” when in fact they were not.
- Settlement approved on June 22, 2022.
  - Pay \$753,000 monetary relief
  - Notify affected customers that their mattresses were not made in the USA
  - Barred from claiming its products are Made in the USA, unless Rule’s requirements are satisfied
- Commission voted 3-2 to approve the complaint and settlement order, with Commissioners Phillips and Wilson voting no.
  - Majority cited company’s “repeat offender” status for making false Made in USA claims in justifying the amount of monetary relief pursuant to a damages theory under Section 19 of the FTC Act.
  - Dissent argued that the amount of monetary relief exceeded the bounds of the FTC’s Section 19 authority because it was punitive beyond addressing the actual amount of consumer injury that could be proved.

# The Textile Rule and the FTC's Notice of Penalty Offense Authority

*USA v. Kohl's Inc.*, No. 1:22-cv-964-JDB (D.D.C.)

- On May 4, 2022, the FTC obtained \$2.5 million in civil penalties from Kohl's for purportedly marketing and selling rayon-fiber sheets, towels, and pillows as being made from "bamboo."
- The Textile Rule prohibits the advertising or labelling of a textile fiber product that is "false, deceptive, or misleading as to the fiber content[.]"
  - The FTC alleged that the products advertised as bamboo instead contain rayon, the generic name for manufactured and processed cellulose fiber deriving from a variety of plants, including cotton linters, wood pulp, and bamboo.
- Furthermore, the FTC alleged that it sent Kohl's a warning letter in 2010 containing FTC settlements and administrative action against others who marketed rayon products as bamboo.
  - The FTC obtained penalties under Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. § 45(m)(1)(B), its Penalty Offense Authority.
  - Under Section 5(m)(1)(B), a party is liable for civil penalties if it engages in an unfair or deceptive act with actual knowledge that such act was unfair or deceptive.

# TSR Enforcement Actions

*USA v. VoIP Terminator*, No. 6:22-cv-798 (M.D. Fla.)

- Department of Justice brought the case on behalf of the FTC for the authority to seek civil penalties.
- Alleged that the VoIP provider assisted and facilitated TSR violations by knowing that its customers were not using defendants' services to scrub numbers from DNC lists and, despite receiving numerous complaints from government and industry regulators, did nothing to stem the tide of illegal calls on its network.
- Defendants stipulated to an order for, *inter alia*, \$3,256,190 in civil penalties.

*FTC v. Green Equitable Solutions*, No. 2:22-cv-6499 (C.D. Cal.)

- On September 19, the FTC along, with the California Dept. of Financial Protection and Innovation, obtained a TRO providing for an asset freeze and appointment of a receiver for purported deceptive claims in telemarketing calls related to mortgage relief assistance.
- On September 29, the Court issued a preliminary injunction extending the asset freeze and the receivership through the pendency of the action.



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# **A Call to Action: How to Advocate During the Rulemaking Process**

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# Opportunities for Comment During Rule Promulgation

## Advance Notice of Proposed Rulemaking

- The FTC publishes areas of focus and objectives, along with questions for public comment.

## Notice of Proposed Rulemaking

- Sets forth the rule, and allows 60 days for public comment.

## Informal Hearings

- Any interested person may seek a hearing to present their views, and if disputed on the issues, may submit rebuttal information or allow cross-examination.

# Judicial Review of Mag-Moss Rulemaking

15 U.S.C. § 57a(e):

- “Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule.”
- Court can hold a rule unlawful if it is:
  - Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - Contrary to constitutional right, power, privilege, or immunity;
  - In excess of statutory jurisdiction, authority, or limits, or short of statutory right;
  - Without observance of procedure required by law;
  - Not supported by substantial evidence in the rulemaking record taken as a whole; or
  - At the informal hearing, the petitioner was:
    - Not entitled to conduct cross-examination or make rebuttal submissions, or
    - Cross-examination or rebuttal submissions were limited, precluding the disclosure of disputed material facts.

# Courts' Reining in of Agency Authority

## The Major Questions Doctrine

- In *West Virginia v. EPA*, decided on June 30, 2022, the Supreme Court applied the “major questions doctrine,” in striking down the EPA’s authority to devise emissions caps under the Clean Air Act.
- The Court reasoned that if Congress wanted to delegate to an agency the authority to make “decisions of vast economic and political significance,” it must clearly say so.
- Though the Court did not revitalize the nondelegation doctrine, the major questions doctrine is a step toward limiting agencies’ policymaking discretion.



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