

# **Pushing the Limits?**

*A Primer on FTC Competition Rulemaking*

**U.S. Chamber of Commerce**

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<sup>1</sup> The authors' analysis and views found within this paper are their own based on their expert experience as former competition enforcers, not necessarily the views of Baker Botts L.L.P. or its clients.

Since its founding in 1914, the Federal Trade Commission (“FTC”) has held a unique and multifaceted role in the U.S. administrative state and the economy. It possesses powerful investigative and information-gathering powers, including through compulsory process; a multi-layered administrative adjudication process to prosecute “unfair methods of competition” (and later, “unfair and deceptive acts and practices” as well); and an important role in educating and informing the business community and the public.<sup>2</sup> What the FTC cannot be, however, is a legislature with broad authority to expand, contract, or alter the laws that Congress has tasked it with enforcing.

Recent proposals for aggressive unfair methods of competition (“UMC”) rulemaking, predicated on Section 6(g) of the FTC Act, would have the effect of claiming just this sort of quasi-legislative power for the Commission based on a thin statutory reed authorizing “rules and regulations for the purpose of carrying out the provisions of” that Act.<sup>3</sup> This usurpation of power would distract the agency from its core mission of case-by-case expert application of the FTC Act through administrative adjudication. It would also be inconsistent with the explicit grants of rulemaking authority that Congress has given the FTC throughout its history and run afoul of the Congressional and constitutional “guard rails” that cabin the Commission’s authority.

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- *The FTC has a troubling history of **rulemaking overreach**, one that the courts and Congress have both stepped in to limit*
  - *Congress has explicitly provided for informal **APA notice and comment rulemaking through specific statutes**, such as the Children’s Online Privacy Protection and Telemarketing and Consumer Fraud and Abuse Prevention Acts*
  - *Congress, however, has **not explicitly** granted informal rulemaking authority to the FTC relating to its broad Section 5 authority*
  - *Rather, Congress provided the FTC explicit rulemaking authority for unfair and deceptive acts and practices through specific **“Magnuson-Moss” procedures***
  - *Congress has made no such grant for unfair methods of competition rulemaking, instead empowering FTC to undertake **case-by-case administrative adjudication** of competition cases to shape the law*
  - *Although the FTC and DOJ cooperate on the issuance of **voluntary guidance** to the business community (such as the Merger Guidelines), unlike rules, such guidance is **not legally binding***
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<sup>2</sup> Federal Trade Commission, “About the FTC” (accessed June 28, 2021), <https://www.ftc.gov/about-ftc>; Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 1, 97 (2003) (“[T]hen, as now, the agency combined formal powers to investigate (those emphasized in the House debate, formal powers to prosecute (those emphasized in the Senate debate), and informal authority to educate and work with business to facilitate compliance with the law (those emphasized by [President] Wilson).”

<sup>3</sup> 15 U.S.C. § 46(g).

## I. FTC's Unique Role as an Administrative Adjudicator

### A. FTC's Original Purpose: Applying Administrative Expertise on a Case-by-Case Basis

The FTC's Part III adjudication authority is central to its mission of preserving fair competition in the U.S. economy. To challenge an alleged "unfair method of competition" under that process, the Commission first votes on the filing of a complaint regarding the conduct at issue. Assuming the matter is not settled immediately under a consent order, a walled-off group of FTC attorneys then take on a prosecutorial role as "complaint counsel," going through a litigation process very much resembling a federal lawsuit culminating in a bench trial. Complaint counsel and respondents go through the discovery process, make pretrial evidentiary motions or motions for summary decision, and ultimately argue at a trial-like hearing before an administrative law judge ("ALJ"), presenting fact and expert witness testimony, along with documentary and other evidence. Whatever the decision of the ALJ, either complaint counsel or the respondent have the opportunity to appeal to the full Commission, which reviews both the factual and legal determinations of the ALJ *de novo*.<sup>4</sup>

Although the procedural protections of administrative adjudication are similar (likely by design) to those in federal court, one notable distinction is the fact that the litigation process is overseen, and ultimate decisions made, by subject-matter experts attuned to the goals, legal frameworks, and other details of antitrust and consumer protection law, the two mission areas of the FTC. The Commissioners themselves are often veteran antitrust practitioners, each counseled by a team of specialized attorney-advisors. Given the sometimes highly technical nature of antitrust analysis, particularly when complex econometrics are involved, the benefit of this expertise should not be underestimated. As capable as generalist federal judges may be, by their own admission they sometimes "d[o] not try th[ese] case[s] very well."<sup>5</sup> Utilizing both trial court and appeals court jurists who are steeped in the nuances of antitrust has the benefit of eliminating a considerable learning curve, increasing the likelihood of "getting it right" in the first instance.

Consistent with these benefits, the FTC has enjoyed considerable success in recent years with its administrative adjudications, both in terms of winning on appeal and in shaping the development of antitrust law overall (not simply a separate category of UMC law) by creating citable precedent in key areas.<sup>6</sup> These successes include challenges to hospital mergers in *Evanston Northwestern Healthcare* and *Promedica Health System*, in which the FTC secured a

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<sup>4</sup> Although this process sometimes places an administrative defendant in the somewhat awkward position of arguing its innocence before the same panel that approved the complaint initiating the prosecution in the first place, the evidentiary standard is considerably higher for sustaining a liability finding (or reversing a finding of no liability), requiring a preponderance of evidence (more likely than not) standard as opposed to a mere "reason to believe" that a violation may have occurred to issue a complaint. Federal Trade Commission, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, § II.A., <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

<sup>5</sup> In re Nexium (Esomeprazole) Antitrust Litig., 309 F.R.D. 107, 110 (D. Mass. 2015).

<sup>6</sup> See Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMP. L. & ECON. 623-59 (Dec. 1, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/1005443/ohlhausen\\_-\\_administrative\\_litigation\\_at\\_the\\_ftc\\_effective\\_tool\\_for\\_developing\\_the\\_law\\_or\\_rubber.pdf](https://www.ftc.gov/system/files/documents/public_statements/1005443/ohlhausen_-_administrative_litigation_at_the_ftc_effective_tool_for_developing_the_law_or_rubber.pdf).

conduct remedy and divestiture, respectively.<sup>7</sup> FTC won an important administrative victory in *North Carolina Board of Dental Examiners*, upheld at the Supreme Court, establishing limits on the state action defense and anticompetitive actions by state licensing boards.<sup>8</sup> The FTC’s decision in *McWane*, upheld by the Eleventh Circuit, has become an oft-cited example in exclusive dealing cases.<sup>9</sup> And the FTC has won major victories in challenging already-consummated acquisitions in administrative adjudication, such as in *Chicago Bridge & Iron Co.* and *Polypore International*.<sup>10</sup>

## **B. FTC’s Shift from Administrative Process to Federal Court**

Despite this enviable administrative record, the FTC has – until very recently – turned increasingly to federal court for its enforcement actions. The FTC Act does allow for the FTC to seek preliminary injunctions in federal district court before proceeding in its internal administrative actions, a useful tool for putting pending mergers on hold and other instances when the status quo cannot be easily restored.<sup>11</sup> The same statute allows, “in proper cases” and with “proper proof,” courts to grant the FTC a “permanent injunction.”<sup>12</sup> Until the Supreme Court put a stop to this practice in May 2021, FTC used this provision to seek monetary relief, including disgorgement of allegedly ill-gotten gains, a remedy that would otherwise require going through administrative adjudication and meeting other strict requirements, including time limits (filing of a complaint within three years and filing of a request in federal court for monetary redress within a year after a cease and desist order) and a finding of objectively “dishonest or fraudulent” conduct.<sup>13</sup>

Likely due to the relative ease of this process and the allure of money in a much wider array of cases, FTC’s enforcement actions began to be weighted more and more heavily towards federal court and away from administrative adjudication. This shift was accelerated by the FTC’s 2012 decision to jettison its own policy statement on the use of disgorgement, which was followed, predictably, by a large increase in the number of “permanent injunctions” pursued in federal court.<sup>14</sup> As the Supreme Court noted while striking down in May 2021 the FTC’s expansive interpretation of what could be included in a “permanent injunction,” the FTC brought as many federal antitrust suits seeking disgorgement in the four years after this change as the two decades preceding it, with “dozens” of cases filed every year.<sup>15</sup> As described below in greater detail, the Court found that FTC’s pursuit of disgorgement under the category of “permanent injunction” simply stretched the statutory language beyond its breaking point, particularly given the

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<sup>7</sup> *ProMedica Health Sys. v. FTC*, 749 F.3d 559 (6th Cir. 2014), cert. denied, 135 S. Ct. 2049 (2015); *In re Evanston Nw. Healthcare Corp.*, 2008 FTC LEXIS 62 (2008).

<sup>8</sup> *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015).

<sup>9</sup> *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015), cert. denied, 2016 WL 1078944 (U.S. 2016);

<sup>10</sup> *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012), cert. denied, 133 S. Ct. 2853 (2012).

<sup>11</sup> 15 U.S.C. § 53(b).

<sup>12</sup> *Id.*

<sup>13</sup> 15 U.S.C. § 57b(a)(2).

<sup>14</sup> See Maureen K. Ohlhausen, *Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC’s Antitrust Mission* at 7 (Apr. 20, 2016),

[https://www.ftc.gov/system/files/documents/public\\_statements/945623/160420dollarsdoctrinespeech.pdf](https://www.ftc.gov/system/files/documents/public_statements/945623/160420dollarsdoctrinespeech.pdf).

<sup>15</sup> *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. \_\_\_, No. 19-508, slip op. at 5-6 (2021), <https://www.supremecourt.gov/docket/docketfiles/html/public/19-508.html>.

availability of similar remedies to FTC after obtaining a cease and desist order through its usual administrative procedures.<sup>16</sup>

With this judicial course correction, now would be an ideal time for the FTC to begin a return to its roots with increased use of its administrative adjudication process to seek relief against antitrust violators and develop antitrust law, which other enforcers may also utilize. However, as a result of its July 1, 2021 open meeting and the recently issued Executive Order 14036,<sup>17</sup> the FTC appears to be headed for another misadventure in response to calls to claim authority for broad, legislative-style “unfair methods of competition” rulemaking out of Section 6(g) of the FTC Act.<sup>18</sup>

## **II. FTC’s Rulemaking Authority Was Meant to Complement its Case-by-Case Adjudicatory Authority, Not Supplant It**

### **A. FTC Administrative and Rulemaking Processes: A Comparison**

#### **1. Informal Notice-and-Comment Rulemaking**

Informal rulemaking refers to the basic APA requirements in 5 U.S.C. § 553, which include adequate public notice of the proposed rule and a meaningful opportunity to comment on the proposed rule (hence “notice-and-comment” rulemaking). These requirements function as a “default” process for rulemaking when Congress does not specify a more stringent standard, and set a “minimum degree of public participation the agency must permit.”<sup>19</sup> As discussed below, however, Congress *has* specified a more stringent rulemaking standard for FTC’s consumer protection rulemaking under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975. Nevertheless, Congress has directed the FTC on several occasions to use informal notice-and-comment rulemaking through statutes that provide the agency detailed guidance on rulemaking topics and goals and that specifically exempt it from the additional burdens of Magnuson-Moss rulemaking. Some examples of such statutes include the Telephone

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<sup>16</sup> *Id.* at 9-10.

<sup>17</sup> Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>18</sup> *See, e.g.,* Rohit Chopra & Lina Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L.REV. 367 (2020) (arguing that “[r]ulemaking would advance clarity and certainty about what types of conduct constitute – or do not constitute – an ‘unfair method of competition’”). The Commission recently took a significant and misguided step towards this goal by rescinding – without replacing – its bipartisan Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, divorcing (at least in the Commission majority’s view) Section 5 from prevailing antitrust law principles and leaving the business community without any current guidance as to what the Commission considers “unfair.” *See* Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf).

<sup>19</sup> *See* CONG. RESEARCH SERV., A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017), <https://crsreports.congress.gov/product/pdf/download/R/R41546/R41546.pdf/>.

Disclosure and Dispute Resolution Act of 1992, the Children’s Online Privacy Protection Act of 1998, and the Telemarketing and Consumer Fraud and Abuse Prevention Act.<sup>20</sup>

Under the APA, the notice requirement of informal rulemaking is meant to “afford[] interested persons a reasonable and meaningful opportunity to participate in the rulemaking process.”<sup>21</sup> This is generally achieved by a notice of proposed rulemaking (“NPRM”) published in the *Federal Register*.<sup>22</sup> There is an exemption to the notice requirement for some rules, such as interpretative rules and general statements of policy, or under a narrowly-construed good cause exception.<sup>23</sup> An NPRM must include:

- (1) the time, place, and nature of public rulemaking proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved

The comment requirement focuses on giving the public an opportunity to participate in the rulemaking process. This participation can consist of the “submission of written data, views, or arguments with or without opportunity for oral presentation.”<sup>24</sup> After considering the points presented from such participation, the agency must “incorporate in the rules adopted a concise general statement of their basis and purpose.”<sup>25</sup> The statement of basis and purpose is often a major element of the rulemaking record and serves to provide the public with the agency’s basic justification for the final rule. This isn’t to say that all comments must be addressed in the final rule, but the agency is required to consider “significant comments” that would affect the final rule.<sup>26</sup> The final rule can differ from the proposed rule, but it is generally required to be a reasonably foreseeable “logical outgrowth” of the originally-proposed rule.

After the agency has completed the comment process, the final rule and general statement of the basis and purpose must be published 30 days before the rule’s effective date.<sup>27</sup> Following the final rule, there is a statutorily-mandated right to petition for the issuance, amendment, or repeal of the rule.<sup>28</sup> Informal rulemaking can be completed in a few months, but more substantive rules may take a year or more.<sup>29</sup>

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<sup>20</sup> See Jeffrey Lubbers, *It’s Time to Remove the ‘Mossified’ Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1789, 1991-92 (Nov. 2015).

<sup>21</sup> *Forester v. CPSC*, 559 F.2d 774 (D.C. Cir. 1977).

<sup>22</sup> 5 U.S.C. § 553(b). Publication in the *Federal Register* is not required when the “persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.” *Id.*

<sup>23</sup> *Id.* at (b)(A)–(B). See also *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87 (D.C. Cir. 2012) (holding the good cause exception is to be narrowly construed).

<sup>24</sup> *Id.* at (c).

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., *Am. Mining Cong. v. EPA*, 965 F.2d 759 (9th Cir. 1992) (Significant comments “raise relevant points and which, if adopted, would require a change in the agency’s proposed rule.”).

<sup>27</sup> 5 U.S.C. § 553(d).

<sup>28</sup> 5 U.S.C. § 553(e).

<sup>29</sup> Pre-Magnuson-Moss rules at the FTC took an average of about 3 years and more recent rules under the APA process averaged 287 days. Lubbers, *supra* note 20, at 1987.

## 2. Hybrid & Magnuson-Moss Rulemaking

Hybrid rulemaking refers to Congressionally-specified rulemaking procedures that impose additional requirements beyond those of informal rulemaking but stop short of the full requirements of formal rulemaking. Hybrid rulemaking was popular in the 1970s following the initial shift towards informal rulemaking but became less common over time.

The FTC’s Magnuson-Moss rulemaking is perhaps the most frequently-cited example of hybrid rulemaking. In 1975, the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act authorized the FTC to promulgate legislative rules under Section 18 of the FTC Act.<sup>30</sup> Such rules are called trade regulation rules (“TRRs”), “which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” and may “include requirements prescribed for the purpose of preventing [unfair or deceptive] acts or practices.”<sup>31</sup> Despite a flurry of activity following its inception, Magnuson-Moss rulemaking has been dormant for nearly 40 years, with the procedures used only for updates to existing TRRs.<sup>32</sup>

Magnuson-Moss rulemaking imposes additional procedural requirements beyond the standard notice-and-comment procedures under the Administrative Procedure Act (“APA”), but fewer than formal rulemaking<sup>33</sup>—resulting in a “hybrid” rulemaking process.<sup>34</sup> Additional Magnuson-Moss rulemaking requirements begin with an advance notice of proposed rulemaking before the standard notice of proposed rulemaking, published in the Federal Register and submitted to Congressional committees.<sup>35</sup> Going beyond APA requirements, the notice of proposed rulemaking must state “with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule.”<sup>36</sup> Throughout the Magnuson-Moss rulemaking process, the FTC must make a public record of its meetings and communications with relevant parties.<sup>37</sup>

Magnuson-Moss rulemaking also requires an informal hearing, if requested, with numerous procedural requirements, including cross-examination by interested parties.<sup>38</sup> Following such a hearing, the hearing officer must prepare a staff report and recommendation, which is published in the Federal Register seeking comments for at least 60 days.<sup>39</sup>

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<sup>30</sup> See, e.g., *FTC Authority Overview*, *supra* note 4.

<sup>31</sup> Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93–637, § 202, 88 Stat. 2183, 2193 (1975) (codified as amended at 15 U.S.C. §§ 45–46, 49–52, 56–57c, 2301–2312 (2012)); 15 U.S.C. § 57a(a)(1)(B).

<sup>32</sup> See, e.g., Timothy Muris, *Rules Without Reason: The Case of the FTC*, 6 Regulation 20 (September/October 1982) (noting that of the first 19 rulemaking proceedings—all of which started before the end of 1978—only 5 resulted in final rule as of 1982, and most of those had been remanded or overturned).

<sup>33</sup> Formal rulemaking is required to be fully “on the record” with strict procedures observed, 5 U.S.C. §§ 556-557, and is very infrequently used.

<sup>34</sup> Compare 5 U.S.C. § 553, with 15 U.S.C. § 57a. See also, e.g., Admin. Conference of the U.S., *Hybrid Rulemaking Procedures of the Federal Trade Commission* (June 1979), <https://www.acus.gov/recommendation/hybrid-rulemaking-procedures-federal-trade-commission>.

<sup>35</sup> 15 U.S.C. §§ 57a(b)(2)(A), 7a(b)(2)(C).

<sup>36</sup> 15 U.S.C. § 57a(b)(1).

<sup>37</sup> See, e.g., 15 U.S.C. §§ 57a(i), 57a(j).

<sup>38</sup> See, e.g., 15 U.S.C. § 57(c).

<sup>39</sup> See, e.g., 15 U.S.C. § 57(c)(1)(B).

Further, the FTC must prepare a regulatory analysis of the final rule and a statement of basis and purpose to accompany the final rule. The statement of basis and purpose must include:

- (A) a statement as to the prevalence of the acts or practices treated by the rule;
- (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and
- (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.<sup>40</sup>

The final regulatory analysis must include:

- (A) a concise statement of the need for, and the objectives of, the final rule;
- (B) a description of any alternatives to the final rule which were considered by the Commission;
- (C) an analysis of the projected benefits and any adverse economic effects and any other effects of the final rule;
- (D) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and
- (E) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.<sup>41</sup>

Ultimately, the lengthy and complicated process to promulgate rules through Magnuson-Moss rulemaking fell out of favor. Only seven rules and nine amendments have been issued under Magnuson-Moss rulemaking.<sup>42</sup> Those rules each took, on average, over five years to issue.<sup>43</sup> In contrast, when the FTC has been authorized to promulgate rules under notice and comment APA procedures, the process averages under a year to complete.<sup>44</sup> The Commission, over the objection of Commissioners Wilson and Phillips, recently trimmed its own procedural rules for Magnuson-Moss rulemaking to eliminate requirements for an internal staff report and neutral appointment of a presiding officer, giving the majority Commissioners more direct control over the shape of rulemaking hearings.<sup>45</sup> While these changes could result in faster Magnuson-Moss rulemaking than in the past, they also remove safeguards that were originally adopted in response to valid concerns over bias, public input, and accountability for the Commission.<sup>46</sup>

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<sup>40</sup> 15 U.S.C. § 57a(d)(1).

<sup>41</sup> 15 U.S.C. § 57b-3(b)(2).

<sup>42</sup> Jeffrey Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1789, 1997 (Nov. 2015).

<sup>43</sup> *Id.* at 1997-98 (“[I]t took the agency 5.57 years, on average, to issue the seven rules it managed to issue using these formalized procedures.”).

<sup>44</sup> *Id.*

<sup>45</sup> Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591702/p210100\\_wilsonphillips\\_joint\\_statement\\_-\\_rules\\_of\\_practice.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf).

<sup>46</sup> *Id.* at 4-5.

### **3. The Role of Targeted Informal and Magnuson-Moss Rulemaking in the FTC's Mission**

Although the processes for promulgating statute-specific rules under informal notice-and-comment rulemaking and Magnuson-Moss rulemaking are quite different, they share one essential characteristic: the fact that Congress has made a clear grant of authority to the FTC, with either particular procedures for rulemaking spelled out in detail (in the case of Magnuson-Moss) or detailed guidance on rulemaking topics and goals in the case of targeted notice-and-comment. In both cases the Congressional delegation of power to FTC is well-defined, either in terms of the substantive scope of the proposed rule or the procedural path that must be taken to provide the rule with force of law. Put differently, the Commission either has greater discretion with regard to the substantive content of a rule or has greater freedom in implementing it through quicker and less burdensome procedures – but not both. This dichotomy reflects Congress's prerogative to prioritize speed over flexibility, or vice versa, without simply handing over its legislative duties to an independent agency.

The fact that Congress has chosen to maintain the Magnuson-Moss rulemaking framework despite its procedural burdens strongly indicates that Congress views those strictures as important safeguards against hasty or reactionary rulemaking by FTC on broad matters of substance. Despite several decades in which to consider loosening these rulemaking requirements, Congress has chosen to leave them in place as a check on FTC's authority.

On the other side of the equation, Congress clearly knows how to lay out a specific path for rulemaking and give FTC greater rein to follow it with simplified procedures when it deems particular subject matter to be in need of expedited rulemaking treatment, as with the Children's Online Privacy Protection Act<sup>47</sup> and similar statutes. The fact that the rulemaking authorizations from these statutes do not simply "default" to informal notice-and-comment, but explicitly exempt the process from Magnuson-Moss procedures,<sup>48</sup> lends additional weight to the conclusion that Congress views the constraints of Magnuson-Moss as important institutional safeguards against overzealous regulation by the FTC.

#### **B. Broad "Unfair Methods of Competition" Rulemaking is Inconsistent with FTC's Mission**

In sharp contrast with these well-defined grants of power, broad legislative-style rulemaking against unfair methods of competition under Section 6(g) of the FTC Act would be bounded neither by meticulous procedural requirements nor by a specific Congressional mandate. Instead, the purpose of such rules could only be to expand the scope of liability currently recognized by the courts by attempting to create new bright-line conduct or merger-related prohibitions, loosen substantive liability standards, or lower burdens of proof for the Commission as antitrust plaintiff.<sup>49</sup> In the case of bright-line conduct prohibitions, the result will be rules frozen in time and unresponsive to rapidly changing industry dynamics. Unlike case-by-case

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<sup>47</sup> Children's Online Privacy Protection Act of 1998, Pub. L. 105-277, codified at 15 U.S.C. §§ 6501-06.

<sup>48</sup> See, e.g., 15 U.S.C. § 6502(b)(1) (directing that "the Commission shall promulgate *under section 553 of title 5*," the statute governing informal notice-and-comment rulemaking, regulations regarding child online privacy).

<sup>49</sup> See Chopra & Kahn, *supra* note 18, at 372-74 (suggesting the possibility of UMC rulemaking to condemn "pay-for-delay" settlements and employment non-compete agreements).

adjudication, which benefits from the continued evolution of economic and industrial learning, substantive unfair methods of competition rulemaking would rely on static and potentially inaccurate views of how markets function. Any such misguided rules would then require additional rulemaking or an act of Congress to correct, undermining the flexibility of future FTC adjudications.

As described below, broad rulemaking of this sort would also be very likely to encounter stiff resistance in the courts due to its tenuous statutory basis and the myriad constitutional and institutional problems it creates. But even aside from the issue of legality, such a move would be a major distraction from FTC's core mission as an expert case-by-case adjudicator of competition issues. Rather than applying its expertise to specific facts and complex legal issues through administrative adjudication and influencing the development of antitrust law through hard-earned victories supported by substantial evidence, it would be far too tempting for the Commission to simply regulate its way to the desired outcome, bypassing all neutral arbiters along the way. And by seeking to promulgate such rules through abbreviated notice-and-comment rulemaking, FTC would be claiming extremely broad substantive authority to directly regulate business conduct across the economy with relatively few of the procedural protections that Congress felt necessary for FTC's trade regulation rules in the consumer protection context. This approach risks not only a diversion of scarce agency resources from meaningful adjudication opportunities, but also potentially a loss of public legitimacy for the Commission should it try to exempt itself from these important rulemaking safeguards.

### **III. FTC Lacks Authority to Promulgate Legislative-Style Competition Rules**

The FTC has historically been hesitant to exercise UMC rulemaking authority under Section 6(g) of the FTC Act, which simply states that FTC “shall have power ... [f]rom time to time to classify corporations and ... to make rules or regulations for the purpose of carrying out the provisions” of the FTC Act.<sup>50</sup> Current proponents of UMC rulemaking argue for a broad interpretation of this clause allowing for legally binding rulemaking on any issue, including antitrust, subject to FTC's jurisdiction. But the FTC's past reticence to exercise such sweeping powers is not a result of mere timidity; rather, it is likely due to the existence of significant and unresolved questions of the FTC's UMC rulemaking authority from a statutory and constitutional perspective.

#### **A. Absence of Statutory Authority**

The FTC's authority to conduct rulemaking under Section 6(g) has been tested in court only once, in *National Petroleum Refiners Association v. FTC* (also known as the “Octane Ratings” case).<sup>51</sup> In that case, FTC had attempted to promulgate a rule defining the failure to post octane rating numbers on gasoline pumps at service stations as “an unfair method of competition and an unfair or deceptive act or practice.”<sup>52</sup> The D.C. Circuit found that Section 6(g) did confer such authority, but Congress responded two years later with the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975. The Magnuson-Moss Act created a new, far more complex rulemaking scheme that applied to FTC's consumer protection rules only,

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<sup>50</sup> 15 U.S.C. § 46(g).

<sup>51</sup> 482 F.2d 672 (D.C. Cir. 1973).

<sup>52</sup> *Id.* at 674.

expressly excluding rulemaking on unfair methods of competition from its grant of authority.<sup>53</sup> The statute’s provision that unfair methods of competition rulemaking is unaffected by the legislation manifests strong congressional design that such rules would be governed not by Magnuson-Moss but by the FTC Act itself.<sup>54</sup> Proponents of UMC rulemaking argue that Magnuson-Moss left FTC’s competition rulemaking authority intact and entitled to *Chevron* deference,<sup>55</sup> but as has been pointed out by many commentators over the decades, that would be highly incongruous given that *National Petroleum Refiners* dealt with both UMC and UDAP authority under Section 6(g)<sup>56</sup> yet Congress’ reaction was to provide specific UDAP rulemaking authority and expressly take no position on UMC rulemaking. As further evidenced by the fact that the FTC has never even attempted to promulgate a UMC rule in the years following enactment of Magnuson-Moss,<sup>57</sup> the Act is best read as declining to endorse the FTC’s UMC rulemaking authority and instead leaving the question open for future consideration by the courts.

Turning to the terms of the FTC Act, modern statutory interpretation takes a far different approach than the court in *National Petroleum Refiners*, which discounted the significance of Section 5’s enumeration of adjudication as the means for restraining UMC and UDAP, reasoning that Section 5(b) did not use limiting language and that Section 6(g) provides a source of substantive rulemaking authority. 482 F.2d at 675–76. This approach is in clear tension with the elephants-in-mouseholes doctrine developed by the Supreme Court in recent years. “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). The FTC’s recent claim of broad substantive UMC rulemaking authority based on the absence of limiting language and a vague, ancillary provision authorizing rulemaking alongside the ability to “classify corporations” stands in conflict with the Court’s admonition in *Whitman*. The Court in *AMG* recently applied similar principles in the context of the FTC’s authority under the FTC Act:

But to read those words as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to

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<sup>53</sup> 15 U.S.C. § 57a(a)(2).

<sup>54</sup> *Id.* (“The Commission shall have no authority under this subchapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce . . . . The preceding sentence shall not affect any authority of the Commission to prescribe rules . . . with respect to unfair methods of competition in or affecting commerce.”). The reference to “any authority” of the FTC to engage in UMC rulemaking—as opposed to “the authority”—reflects Congress’s agnostic view on whether the FTC possesses any such authority. It simply means that whatever authority exists for UMC rulemaking, these other provisions do not affect it, and Congress left the question open for the courts to resolve.

<sup>55</sup> See Chopra & Khan, *supra* note 18, at 375-79 (arguing that FTC has UMC rulemaking authority through Section 6(g) and that such rules would be entitled to *Chevron* deference); *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>56</sup> See, e.g., American Bar Ass’n, *Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues”* 57 (April 24, 2020), [https://ourcuriousamalgam.com/wp-content/uploads/Comment-on-Non-Competes-in-the-Workplace\\_Final\\_4.24.2020.pdf](https://ourcuriousamalgam.com/wp-content/uploads/Comment-on-Non-Competes-in-the-Workplace_Final_4.24.2020.pdf) (“And given that Magnuson-Moss was enacted to address concerns raised by *National Petroleum Refiners* and similar cases, it’s hard to see Section 6(g), with its vague and broad language, as providing a firm footing for informal antitrust rulemaking by the Commission.”)

<sup>57</sup> Royce Zeisler, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 282 (2014).

obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter. In light of the historical importance of administrative proceedings, that reading would allow a small statutory tail to wag a very large dog.

141 S. Ct. at 1348; *see also id.* at 1349 (using elephants-in-mouseholes doctrine to explain that FTC's "broad reading" of Section 13(b) "could not have been Congress' intent"). The "dog" here, substantive UMC rulemaking authority, is at least as large as the canine in *AMG*, for it carries the authority to declare large swaths of conduct illegal under the antitrust laws in a way that would dramatically affect business in the U.S. economy. The Court in *AMG* also looked to "the structure of the Act" and emphasized that it should be read to "produce[] a coherent enforcement scheme." *Id.* at 1348–49. Applying the principles enunciated in *Whitman* and *AMG*, Section 5 is best read as specifying the sole means of UMC enforcement (adjudication), and Section 6(g) is best understood as permitting the FTC to specify how it will carry out its adjudicative, investigative, and informative functions. Thus, Section 6(g) grants ministerial, not legislative, rulemaking authority. In *AMG*, the Court emphasized "the historical importance of administrative proceedings" and declined to give the FTC a shortcut to desirable outcomes in federal court. 141 S. Ct. at 1348. Similarly, granting broad UMC rulemaking authority to the FTC would permit it to circumvent the FTC Act's defining feature of case-by-case adjudications.

Notably, this reading of the FTC Act would accord with how the FTC viewed its authority until 1962, a fact that the D.C. Circuit found insignificant, but that later doctrine would weigh heavily. *Nat'l Petroleum Refiners*, 482 F.2d at 693–94. In *AMG*, for example, the Supreme Court stated that "[i]n construing § 13(b), it is helpful to understand how the Commission's authority (and its interpretation of that authority) has evolved over time." 141 S. Ct. at 1345–46. Courts should consider an agency's "past approach" toward its interpretation of a statute, and an agency's longstanding view that it lacks the authority to take a certain action is a "rather telling" clue that the agency's newfound claim to such authority is incorrect. *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (Kavanaugh, J.) ("In light of the text, history, structure, and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason: It is incorrect."); *see Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007) ("[A]n additional weakness exists in the SEC's interpretation: It flouts six decades of consistent SEC understanding of its authority under [the statute].").<sup>58</sup> Conversely, even widespread judicial acceptance of an interpretation of an agency's authority does not necessarily mean the construction of the statute is correct. *AMG*, 141 S. Ct. at 1351. In *AMG*, the Court gave little weight to the FTC's argument that "the courts of appeals have, until recently, consistently accepted its interpretation." *Id.* (noting 8-2 circuit split). It also rejected the FTC's argument that "Congress has in effect twice ratified that interpretation in subsequent amendments to the Act." *Id.* "Congress' acquiescence to a settled judicial interpretation can suggest adoption of that interpretation"; however, "when Congress has

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<sup>58</sup> *See also Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (noting that courts are properly "skeptical" when "an agency claims to discover in a long-extant statute an unheralded power" to issue major regulations); *Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."); *cf. Printz v. United States*, 521 U.S. 898, 905 (1997) (reasoning that if an asserted government power would be "highly attractive" but nevertheless went long unused, "we would have reason to believe that the power was thought not to exist").

not comprehensively revised a statutory scheme but has made only isolated amendments it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of a court's statutory interpretation." *Id.* (cleaned up). Because the amendments did not address the scope of Section 13(b), they did not convince the Court in *AMG* that Congress had acquiesced in the lower courts' interpretation. *Id.*

The court in *National Petroleum Refiners* also lauded the benefits of rulemaking authority and emphasized that the ability to promulgate rules would allow the FTC to carry out the purpose of the Act. *Nat'l Petroleum Refiners*, 482 F.2d at 681–91. But the Supreme Court has emphasized that “however sensible (or not)” an interpretation may be, “a reviewing court’s task is to apply the text of the statute, not to improve upon it.” *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 508–09 (2014) (cleaned up). “[P]ractical difficulties . . . do not justify departure from [a statute’s] plain text.” *Id.* at 509. Whatever benefits UMC rulemaking authority may confer on the FTC, they cannot justify departure from the text of the FTC Act.

In sum, even *Chevron* requires the agency to rely on a “permissible construction” of the statute,<sup>59</sup> and it is doubtful that the current Supreme Court would see a broad assertion of substantive antitrust rulemaking as “permissible” under the vague language of Section 6(g).

Additionally, because the FTC Act fails to provide for any sanctions for violations of rules promulgated pursuant to Section 6, this seems to indicate that Congress never intended to give the FTC substantive rulemaking authority at all.<sup>60</sup> Even scholars who believe Section 6(g) confers competition rulemaking authority have noted this ambiguity and have pointed out that while the FTC Act may technically confer rulemaking authority, the Act does not specify that those rules would be binding.<sup>61</sup> Importantly, the FTC is the only entity with authority to enforce the FTC Act’s prohibition on unfair methods of competition.<sup>62</sup> It would therefore be very odd for Congress to grant the FTC sole unfair methods of competition rulemaking authority, yet not arm the agency (or anyone else) with the means to enforce violations of those rules. By contrast, Congress clearly provided the FTC in Magnuson-Moss the authority to initiate civil actions for UDAP rule violations. Section 205(a) of Magnuson-Moss, codified at 15 U.S.C. § 45(m), amended Section 5 of the FTC Act to permit the FTC to commence a civil action to recover a civil penalty against a party that knowingly violates a UDAP rule, 15 U.S.C. § 45(m)(1)(A), and Section 206(a) of Magnuson-Moss, codified at 15 U.S.C. § 57b, created a Section 19 of the FTC Act that authorizes the FTC to commence a civil action against a party that violates a UDAP rule, 15 U.S.C. §

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<sup>59</sup> 467 U.S. at 843.

<sup>60</sup> American Bar Ass’n, *Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues”* at 54 (asserting that the Act’s “fail[ure] to provide any sanctions for violating any rule adopted pursuant to Section 6(g) . . . strongly suggest[s] that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act.”) (internal citations omitted).

<sup>61</sup> Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1286 (2011) (“But Congress’s delegation of rulemaking authority to the FTC was ambiguous in scope, allowing it to “make such rules and regulations” but not specifying whether those rules would be binding”) (quoting Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 Am. J. Comp. L. 615, at 619 & n.22 (2006)).

<sup>62</sup> See, e.g., *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

57b(a)(1).<sup>63</sup> Notably, Magnuson-Moss did not authorize civil actions by the FTC for UMC rule violations. The creation of an enforcement scheme for violations of UDAP rules and the lack of any such scheme for UMC rules strongly signals that Congress did not ratify the holding of *National Petroleum Refiners* for UMC rulemaking.

Further, both the FTC's arguments in *AMG* and the prospect of UMC rulemaking reflect a turn away from the FTC's traditional role as an influencer in the antitrust arena through its expert case-by-case adjudications, instead taking a "shortcut" to results in federal court or through broad rulemaking. The Supreme Court clearly noted "the historical importance of [FTC's] administrative proceedings" in *AMG*, tracing the history of FTC's enforcement methods; observed that the Commission "has been authorized to enforce the [FTC] Act through its own administrative procedures" since its creation in 1914; and stated that the Act includes special allowances of authority when FTC uses its administrative process to impose "cease and desist orders." *Id.* at \*9. While any challenge to future FTC competition rulemaking would be primarily focused on the specific text of the statute at issue, the Court has indicated that (at least where such language is ambiguous) its interpretation may be colored by the historic importance of the FTC administrative process and ways that the challenged authority deviates from that norm.

Some advocates for UMC rulemaking suggest that the widely accepted Merger Guidelines issued jointly by FTC and DOJ can serve as a model for such rules.<sup>64</sup> But there is a fundamental difference between nonbinding guidelines drafted to provide transparency to the public about the standards used in antitrust enforcement and rules promulgated with force of law. The Horizontal Merger Guidelines were accepted as persuasive – rather than binding – authority after many federal courts had the opportunity to evaluate them, judge their consistency with the antitrust laws the agencies are tasked with enforcing, and apply their principles to the facts of numerous merger cases in conjunction with other evidence of competitive effects. An "unfair method of competition" rule would short-circuit that process because it would immediately have the force and effect of law, creating immediate liability for conduct that otherwise would have been subject to detailed, case-specific factual and economic analysis.

## **B. Constitutional Vulnerabilities**

Compounding the shifting statutory sands underneath FTC's claimed authority for UMC rulemaking is the fact that the potential breadth of such rules and lack of clear guidance in Section 6(g) itself leads to the distinct possibility that any such rule promulgated under Section 6 runs afoul of the constitutional nondelegation doctrine.

The nondelegation doctrine requires Congress to provide "an intelligible principle" to assist the agency to which it has delegated legislative discretion.<sup>65</sup> Although long considered moribund,

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<sup>63</sup> These provisions also granted the FTC authority to initiate civil actions for certain violations of cease and desist orders respecting UDAP. 15 U.S.C. §§ 45(m)(1)(B), 57b(a)(2).

<sup>64</sup> See Chopra & Khan, *supra* note 18, at 367 ("While they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to serve as rules once courts adopted them. The merger guidelines stipulate the analytical framework that the agencies rely on to enforce the merger law. Agency rulemaking could do the same for 'unfair methods of competition.'").

<sup>65</sup> *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

the doctrine was recently addressed by the U.S. Supreme Court in *Gundy v. United States*,<sup>66</sup> underscoring that limits to Congress’s ability to transfer unfettered legislative-like powers to federal agencies remain relevant. Although the statute in that case was ruled permissible by a plurality of justices, a majority of the Court’s current members expressed concerns that the Court has long been too quick to reject nondelegation arguments, arguing for stricter controls in this area. In a concurrence, Justice Alito lamented that the Court has “uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards,” while Justices Gorsuch, Roberts, and Thomas dissented, decrying the “unbounded policy choices”<sup>67</sup> Congress had bestowed, stating that it “is delegation running riot” to “hand off to the nation’s chief prosecutor the power to write his own criminal code.”<sup>68</sup>

The *Gundy* dissent cited to *A.L.A. Schechter Poultry Corp. v. United States*,<sup>69</sup> where the Supreme Court struck down Congress’s delegation of authority based on language very similar to Section 5 of the FTC Act. *Schechter Poultry* examined whether the authority that Congress granted to the President under the National Industrial Recovery Act (NIRA) violated the nondelegation clause. The offending NIRA provision gave the President authority to approve “codes of fair competition,”<sup>70</sup> which comes uncomfortably close to the FTC Act’s “unfair methods of competition” grant of authority. Notably, *Schechter Poultry* expressly differentiated NIRA from the FTC Act based on distinctions that do not apply in the rulemaking context. Specifically, the Court stated that despite the similar delegation of authority, unlike NIRA, actions under the FTC Act are subject to an adjudicative process. The Court observed that the Commission serves as “a quasi-judicial body” and assesses what constitutes unfair methods of competition “in particular instances, upon evidence, in light of particular competitive conditions.”<sup>71</sup> That essential distinction disappears in the case of rulemaking, where the Commission acts in quasi-legislative role and promulgates rules of broad application.

Although Justice Kavanaugh did not participate in the *Gundy* ruling because he was not on the Court when the case was argued, he suggested shortly after *Gundy* that he too was interested in revisiting the Court’s nondelegation jurisprudence, stating that “Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.” *Paul v. United States*, (2019) (statement respecting denial of certiorari). Further, Justice Kavanaugh recently highlighted the need to maintain the separation of powers demanded by the Constitution, suggesting a majority of the current Court may be inclined to strike down as excessively broad and amorphous a claim of rulemaking authority over “unfair methods of competition.”

During the oral argument for *AMG Capital Management, LLC v. Federal Trade Commission*,<sup>72</sup> discussed above, Justice Kavanaugh made comments implying a strong reticence to allow an expansive interpretation of the FTC’s authority: “with good intentions the agency

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<sup>66</sup> 139 S. Ct. 2116 (2019).

<sup>67</sup> *Id.* at 2133.

<sup>68</sup> *Id.* at 2148.

<sup>69</sup> 295 U.S. 495 (1935).

<sup>70</sup> *Id.* at 521-22 (citing National Industrial Recovery Act § 3).

<sup>71</sup> *Id.* at 532-34.

<sup>72</sup> S. Ct. (No. 19-508), <https://www.supremecourt.gov/docket/docketfiles/html/public/19-508.html>.

pushes the envelope and stretches the statutory language to do the good or prevent the bad. The problem is this results in a transfer of power from Congress to the executive branch on whether to exercise this authority.”<sup>73</sup> The same concerns apply with even greater force to FTC competition rulemaking, which casts the FTC directly in a legislative role under a highly vague grant of statutory authority.

It appears that the nondelegation doctrine may be poised for a revival and may play a significant role in the Supreme Court’s evaluation of expansive attempts by the Biden Administration to exercise legislative-type authority without explicit Congressional authorization. This would create a challenging backdrop for the FTC to attempt aggressive new UMC rulemaking.

#### **IV. Antitrust Rulemaking by FTC is Likely to Lead to Inefficient Outcomes and Institutional Conflicts**

Aside from these significant statutory and constitutional issues raising doubts as to the legality of competition rulemaking by the FTC, there are also a number of policy and institutional factors counseling against broad, legislative-style antitrust rulemaking.

##### **A. Legislative Rulemaking on Competition Issues Runs Contrary to the Purpose of Antitrust Law**

The core of U.S. antitrust law is based on broadly drafted statutes that, at least for violations outside the criminal conspiracy context, leave determinations of likely anticompetitive effects, procompetitive justifications, and ultimate liability up to fact-finders charged with highly detailed, case-specific determinations. Indeed, it is inherent in the “rule of reason” – the default legal framework for any antitrust claim not falling within the “red zone” of *per se* prohibited conduct – that the inquiry is deeply rooted in the history, effects, and context of each particular industry and practice being challenged. Although no fact-finder is infallible, this requirement for highly fact-bound analysis helps to ensure that each case’s outcome has a high likelihood of preserving or increasing consumer welfare. As detailed above, the FTC’s administrative process is in some ways the pinnacle of this model, combining the concept of detailed case-specific factual inquiry with administrative law judges focused entirely on competition and consumer protection issues. On appeal, an ALJ’s determinations are evaluated first by another panel of typically seasoned, well-advised antitrust experts – the Commission itself – and the final determinations of the Commission are entitled to significant deference should they be challenged in the Courts of Appeal.

Legislative rulemaking would replace this quintessential fact-based process with one-size-fits-all bright-line rules. Competition rules would function as *per se*-like prohibitions, but based on notice-and-comment procedures rather than the broad and longstanding legal and economic consensus usually required for *per se* condemnation under the Sherman Act. Past experience with similar regulatory regimes should give reason for pause here: the Interstate Commerce Commission, for example, failed to efficiently regulate the railroad industry before being abolished with bipartisan consensus in 1996, by some estimates costing consumers as much as several billion

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<sup>73</sup> Transcript of Oral Argument at 53:11-17, [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2020/19-508\\_3f14.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-508_3f14.pdf).

(in today's dollars) per year in lost competitive benefits.<sup>74</sup> As FTC Commissioner Christine Wilson observes, regulatory rules “frequently stifle innovation, raise prices, and lower output and quality without producing concomitant health, safety, and other benefits for consumers.”<sup>75</sup> By sacrificing the precision of case-by-case adjudication, rulemaking advocates are also losing one of the best tools we have to account for “market dynamics, new sources of competition, and consumer preferences.”<sup>76</sup>

## **B. Potential for Institutional Conflict with DOJ**

In addition to these substantive concerns, UMC rulemaking by FTC would also create institutional conflicts between the FTC and DOJ and lead to divergence between the legal standards applicable to the FTC Act on the one hand and the Sherman and Clayton Acts on the other. At present, courts have interpreted the FTC Act to be generally coextensive with the prohibitions on unlawful mergers and anticompetitive conduct under the Sherman and Clayton Act, with the limited exception of invitations to collude. But because the FTC alone has the authority to enforce the FTC Act, and rulemaking by FTC would be limited to interpretations of that Act (and could not directly affect or repeal caselaw interpreting the Sherman and Clayton Acts), it would create two separate standards of liability. Given that the FTC and DOJ historically have divided enforcement between the agencies based on the industry at issue, this could result in different rules of conduct depending on the industry involved.<sup>77</sup> Types of conduct that have the *potential* for anticompetitive effects under certain circumstances but generally pass a rule-of-reason analysis could nonetheless be banned outright if the industry is subject to FTC oversight. Dissonance between the two federal enforcement agencies would be even more difficult for companies not falling firmly within either agency's purview; those entities would lack certainty as to which guidelines to follow: rule-of-reason precedent or FTC rules. In a further whipsaw, the agencies have of late opened competing investigations of the same conduct by the same company, which leads to additional legal dissonance and burden on the subject of the investigation. It could also create an uneven playing field between competitors who are overseen by different agencies, such as common carriers or banks (overseen solely by DOJ due to exemptions in the FTC Act) and non-common carrier communication providers or non-bank financial institutions, who may be subject to FTC oversight.

These institutional conflicts highlight a risk to the FTC from pursuing aggressive legislative-style rulemaking of triggering rebukes from Congress, much like the passage of the Magnuson-Moss Act after FTC's last rulemaking spree in decades past. For example, the “One

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<sup>74</sup> Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating Those Mistakes with Big Tech*, 8 J. ANTITRUST ENF'T 13 (Nov. 7, 2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371> (citing Brookings Institute study showing annual consumer harm of at least \$500 million in the late 1960s, or around \$4 billion per year adjusted for inflation).

<sup>75</sup> Christine S. Wilson, *Antitrust on the Antiques Roadshow: Appraising U.S. Antitrust Laws in a Modern Economy* (Apr. 27, 2021), at 11, [https://www.ftc.gov/system/files/documents/public\\_statements/1589480/wilson-netchoice-keynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589480/wilson-netchoice-keynote.pdf).

<sup>76</sup> *Id.* at 12.

<sup>77</sup> See Maureen K. Ohlhausen, *Section 5: Principles of Navigation*, 2 J. ANTITRUST ENF'T 1, 14, (2014) (“Of even greater concern, such use of UMC subjects businesses engaged in the same conduct to different liability standards based solely on the agency to which an investigation happens to be cleared. This could transform the FTC and DOJ's informal clearance procedures from a matter of administrative efficiency to a deciding factor for liability for certain conduct.”).

Agency Act,” introduced this year by Sen. Lee, would abolish the FTC’s antitrust enforcement authority and consolidate its competition-related resources and cases with the DOJ Antitrust Division, citing “the risk of different industries receiving different antitrust enforcement” and the principle that “antitrust enforcement shouldn’t hinge on a coin toss.”<sup>78</sup> The One Agency Act is just the latest salvo by critics of the FTC in Congress; the Standard Merger and Acquisition Reviews Through Equal Rules Act, or “SMARTER” Act has been a perennial threat to FTC’s merger review authority for the last several years, passing in the House of Representatives several times over the past decade. Reintroduced most recently in October 2020, the SMARTER Act would strip FTC of its ability to adjudicate merger cases through its administrative process, forcing the Commission to litigate all mergers in federal court as DOJ currently does.<sup>79</sup> The prospect of legislative UMC rulemaking would only serve to widen the disparity in standards applied by the FTC and DOJ, and thus add even more fuel to the fire of calls for reform of FTC’s authority in this area.

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Following its rebuke at the Supreme Court in the *AMG Capital Management* case, now is the time for the FTC to focus on its core, case-by-case administrative mission, taking full advantage of its unique adjudicative expertise, while also using its clearly-authorized, targeted rulemaking authority where appropriate. Broad unfair methods of competition rulemaking, however, would be an aggressive step in the wrong direction – away from FTC’s core mission and towards a no-man’s-land far afield from FTC’s governing statutes.

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<sup>78</sup> Senator Mike Lee, *One Agency for Antitrust*, WALL. ST. J., Nov. 17, 2020, [https://www.wsj.com/articles/one-agency-for-antitrust-11605653810?fbclid=IwAR2uA1q6Z27XleHsL3Z0JB\\_gE2qKQvAia2KyhucRqbj2WgkFNAZBeTYY2v0](https://www.wsj.com/articles/one-agency-for-antitrust-11605653810?fbclid=IwAR2uA1q6Z27XleHsL3Z0JB_gE2qKQvAia2KyhucRqbj2WgkFNAZBeTYY2v0).

<sup>79</sup> Sens. Lee, Tillis, and Grassley Introduce SMARTER Antitrust Reform (Oct. 27, 2020), <https://www.lee.senate.gov/public/index.cfm/2020/10/sens-lee-tillis-grassley-introduce-smarter-antitrust-reform>.