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New Changes at the FTC: Return of the Rulemaking

By Leonard L. Gordon on July 19, 2021

With a new leader at the Federal Trade Commission comes new rules of practice. Chair Lina Kahn convened a **first-of-its-kind open Commission meeting**, allowing for live public comments following the meeting. In addition to issuing the **Made in the USA Final Rule** at the meeting, the FTC **revised the procedures** for issuing Magnuson-Moss Rules. This carries out Commissioner Chopra and now-Chair Khan's **call for more rulemaking**, and the next step to former Chair Slaughter's **creation of a rulemaking group** within the Commission. The changes concentrate the rulemaking process in the Chair's office and strip away many of the procedures that helped lead to rules based on bipartisan consensus among the commissioners and support from FTC staff.

By way of background, to pass a rule under the Magnuson-Moss Warranty Federal Trade Commission Improvements Act ("Mag-Moss"), the FTC must: (1) make a finding that the conduct at issue is "prevalent" and (2) conduct informal hearings allowing interested parties to cross-examine those making oral presentations. The FTC appears interested in applying Mag-Moss rulemaking in both the competition and consumer protection contexts. Though Mag-Moss has statutory requirements that the FTC must follow, such as publishing a notice of proposed rulemaking, allowing public comment from interested persons, providing the opportunity for informal hearings, and promulgating rules based on the final record, the FTC has enacted procedural rules to carry out these statutory requirements.

The Commission voted 3-2 along party lines to **change the FTC rules** for initiating and conducting rulemaking proceedings, including:

Previous Rule	Revised Rule
The Chief ALJ serves as the Chief Presiding Officer of the rulemaking hearing process.	FTC Chair serves as Chief Presiding Officer, retaining authority to designate another to serve as the Chief Presiding Officer.
The Presiding Officer maintains the conduct of the informal hearings.	Gives the Commission the authority to issue a notice of informal hearing, setting the hearing agenda, choosing the issues to discuss, selecting parties permitted to testify, and permitting cross-examination and offering of rebuttal evidence.
The Presiding Officer finalizes disputed issues of material fact after public comment.	Commission designates disputed issues of material fact necessary to be resolved with limited opportunity to add disputed issues of material fact.
Commission staff required to publish report analyzing the rulemaking record as to the final rule for public comment and making recommendations.	Eliminates staff report requirement because “the Commission believes [that] will provide for more efficient proceedings without undermining the Commission’s ability to formulate effective rules.”
Allows interested persons to petition the Commission or appeal rulings of the Presiding Officer during an informal hearing.	Eliminates appeal procedures because “they are unnecessary given the enhanced role the Commission will play in establishing the agenda of the informal hearing and designating disputed issues[.]”

According to Commissioners Slaughter, Khan, and Chopra, these changes will remove “extraneous and onerous procedures” that will only delay the issuance of Section 18 rules. However, Commissioners Wilson and Phillips allude to the old saying “those who fail to learn from history are doomed to repeat it.”

Though Commissioner Wilson, in her **dissenting statement** at the hearing, supported the effort for more robust public input, she questioned the wisdom of these procedural revisions, reminding all of the FTC’s rulemaking history. Commissioner Wilson explained how the FTC’s sweeping rulemaking efforts of the 1970’s caused “excessive ambiguity, confusion, and uncertainty[,]” and ultimately led to self-imposed procedural safeguards following the Federal Trade Commission Improvements Act of 1980. Specifically, Commissioner Wilson contends that without requiring expert staff reports analyzing the rulemaking record, the Commission may fail to identify unintended consequences of a final rule. The commissioner’s

ultimate concern is a “return to aggressive, unbounded rulemaking efforts that could transform entire industries without clear theories of law violations[.]”

Commissioners Wilson and Phillips also issued a **dissenting statement** on the adoption of the revised Section 18 rulemaking procedures. The dissenting commissioners emphasize that swift, poorly conceived regulation can do more harm than good. Specifically, Mag-Moss rulemaking was enacted to promulgate rules based on solid evidence, drawn from an independent hearing process. However, changing the Presiding Officer to the Chair of the Commission, or the person hand-picked by the Chair, cuts against this objective. Further, the revisions give the Commission the power to omit disputed material issues of fact from the notice of public comment, limiting the public’s input. Ultimately, it appears the revised procedures will streamline the process for the FTC to promulgate more Mag-Moss rules. Whether this be for the better, or for the worse, remains to be seen.

As the FTC’s enforcement priorities and the mechanisms which they use to carry out those priorities are quickly developing, it remains to be seen whether the FTC’s Mag-Moss rulemaking will strike back in unforeseen ways. **Commissioner Chopra has indicated** that swifter rulemaking can help combat “emerging harms, including illegal targeted marketing and deceptive data harvesting.” As we regularly defend those subject to FTC investigations and enforcement actions, we will continue to monitor the FTC’s rapidly developing enforcement processes.

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