NetChoice Comment for the Record: FTC Open Meeting, July 1, 2021

NetChoice[1] is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide American consumers. Our mission is to make the internet safe for free enterprise and for free expression. We also work to promote the integrity and availability of the internet on a global stage, and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

Introduction

We welcome the opportunity to provide the Federal Trade Commission with feedback about the many significant issues it will discuss at its open meeting on July 1st, 2021. As discussed below, we ask that the FTC:

1. Vote **against** "streamlining" Section 18 rulemaking procedures.
    - The proposal undermines the Magnuson-Moss Act and Congress's intent in passing it, and it greatly curtails public input in FTC rulemaking

2. Vote **against** rescinding or amending the adopted principles regarding "unfair methods of competition" under Section 5 of the FTC Act.
    - The 2015 Policy Statement provides affected parties and the public with notice of what conduct is permissible, supports the rule of law, and appropriately confines the FTC's discretion; and

3. Vote **against** changes to enforcement investigations.
    - Congress intentionally structured the FTC to be a multi-member, consensus-driven organization, and the proposed "streamlined" subpoena process would violate that structure

We appreciate the Commission's consideration of our views, and welcome the opportunity to provide any additional information or answer any questions.

[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org. The views expressed here do not necessarily represent the views of every NetChoice member.

Part 1. "Mag-Moss" Rulemaking

Section 18 of the FTC Act provides the Federal Trade Commission with the authority to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act.

Unlike traditional agency rulemaking under the Administrative Procedures Act (APA), rulemaking under Section 18, often referred to as "Magnuson-Moss" rulemaking after the Magnuson-Moss Warranty Act, comes with additional statutory requirements meant to curb the FTC's discretion. Those include requirements to provide interested parties with limited cross-examination rights during informal hearings and show that the practices the proposed rule seeks to regulate are "prevalent" before the rulemaking occurs.[2]

> These procedural safeguards are a benefit, not a drawback. The FTC should continue to adhere to them.

History Shows that Magnuson-Moss Rulemaking Authority is not Supposed to be "Streamlined."

To begin, the FTC likely does not have the authority to "streamline" Section 18 rulemaking procedures. Congress imposed these rulemaking requirements through explicit statutory text and intentionally curbed the FTC's discretion. While some may oppose the additional procedures, only Congress can substantively "streamline" or change them.

During the 1960s and 70s, the FTC's rulemaking activity became the subject of considerable controversy and debate. Many felt the Commission had become overzealous in its promulgation of rules. Consider the (in)famous example of the "Kid Vid" rule that would have basically prohibited any television advertising aimed at children.[3] This decision and the circumstances surrounding it resulted in the *Washington Post* dubbing the FTC the United States' "National Nanny."[4] As subsequent commentators have explained, "the FTC adopted the reformers' cause uncritically, seeing itself self-appointed champion of American children" such that "even its supporters acknowledge that the FTC made a serious political miscalculation."[5]

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[2] 15 U.S.C. § 57a(b)(3).
[3] Robert H. Mnookin & Susan Bartlett Foote, *The "kid vid" Crusade*, 61 The Public Interest 90 (1980).
[4] *The FTC as National Nanny*, Wash. Post (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/.
[5] Robert H. Mnookin & Susan Bartlett Foote, *The "kid vid" Crusade*, 61 The Public Interest 90, 91-105 (1980).

Congress passed the Magnuson-Moss Warranty of 1975 and the FTC Improvements Act of 1980 to curb the FTC's excessive rulemaking activity. Congress did not hide its justification for limiting the Commission's powers. In a series of hearings held in the late 1970s, "Congress publicly lambasted the Commission for its activist programs branding these as 'regulatory abuse' by a 'runaway, controllable bureaucracy.'"[6] Together, these Acts greatly limited the Commission's ability to promulgate rules at will.

The Commission Cannot Supersede Statutory Limits & Even if it Could, It Shouldn't.

With such clear congressional intent and statutory language supporting the goal of erecting, not lowering, barriers to agency rulemaking, at best the Commission has only limited ability to "streamline" such procedures through its own internal processes. And even if the Commission can, it shouldn't.

First, the concerns that motivated Congress to impose the requirements are no less prevalent today than they were in the late 20th Century. In fact, with a clearly expressed desire on the part of some commissioners to divorce FTC enforcement from the guide of consumer welfare and to use its enforcement power to promote vague and often ill-defined social goals, these procedural safeguards and restrictions will likely be more important than ever.[7]

Second, the market is a dynamic and ever-evolving process that brings with it incredible, consumer-benefiting innovation that is difficult, and often impossible, to predict before it occurs. By artificially locking in *per se* rules that prohibit specific types of conduct, the Commission risks chilling consumer-welfare-enhancing innovation. In contrast, since the Section 18 rulemaking requirements took effect, the FTC has focused primarily on adjudicating cases against specific defendants based on particularized allegations of consumer harm. This has allowed the FTC to address instances of consumer harm without undermining market-driven innovation. The FTC should therefore continue to focus on its adjudicative approach, which maximizes consumer benefits without kneecapping American innovation and the United States' competitiveness in the global arena.

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[6] Mark J. Moran & Barry R. Weingast, *Congress as the source of regulatory decisions: The case of the Federal Trade Commission*, 72 American Economic Review 109 (1982).
[7] *FTC Announces Agenda for July 1 Open Commission Meeting*, Federal Trade Commission (Jun. 24, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale Law Journal 564 (Jan. 2017), https://www.yalelawjournal.org/note/amazons-antitrust-paradox; Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.

Third, the FTC should consider that an increase in rulemaking would likely hurt small businesses and up-and-coming entrepreneurs.

More Rulemaking—Streamlined or Not—Will Hurt Small Businesses & the Economy.

Market entrants are already faced with an onslaught of overly restrictive rules and regulations. As of November 2019, for example, there were over 1 million regulatory restrictions in the U.S. Code of Federal Regulations.[8] Add to this the thousands of state regulations businesses must comply with: California and New York alone have over 695,000 regulatory restrictions.[9]

Small businesses and entrepreneurs have already taken a particularly tough hit as a result of the COVID-19 pandemic. Not only does the accumulation of rules hinder their ability to succeed, it strengthens the position of the dominant players by erecting artificial barriers to competition. The FTC's rulemaking ability is particularly threatening because it is not limited to one sector of the economy or confined to a particular social issue. Instead, the FTC has broad jurisdiction over the entire United States' economy. While the FTC's adjudicative approach focuses primarily on the largest players and those that pose the greatest risk of harm, rulemaking applies to all participants equally without regard to their particular needs or the context of their conduct.

The Proposal Discards the FTC's Consumer-First Focus.

As mentioned above, removing the restrictions on FTC rulemaking would open the door to a regulatory approach that focuses less on the welfare of consumers and more on the preferred policy considerations of a given commission. Rather than having to justify particular enforcement decisions or prove consumer harm in specific cases, the Commission could instead impose bright-line rules that govern commercial activity for the foreseeable future—whether or not consumers actually benefit.

Indeed, rules could be enacted because they advance unrelated social goals rather than out of some desire to protect consumers from anticompetitive conduct. While some social goals may be worthy of government attention, it is for Congress—not the FTC—to advance those goals.

For these reasons, we ask that you do not amend the statutorily-required procedures for Section 18 rulemaking.

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[8] James Broughel, Patrick McLaughlin & Michael Kotrous, *Quantifying Regulation in US States*, Mercatus Center (Nov. 13, 2019), https://www.mercatus.org/publications/regulation/quantifying-regulation-us-states.
[9] *Id.*

Part 2. UMC Policy Statement

When the FTC approved its UMC Policy Statement in 2015, it saved itself (from itself). While the statement is flexible—it allows the FTC to use its Section 5 authority for standalone claims, for example—it provides necessary guidance to both the FTC and the public. As the Commission surely knows, its authority under Section 5 has been controversial for decades. To be sure, most recognize that it encompasses the agency's antitrust authority under federal statutes like the Sherman Act. But whether it extends beyond those statutes was and is an open question.

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But even confining Section 5 authority to the antitrust statutes is legally murky. The agency's organic statute—the FTC Act—fails to define "unfair," for example. Without statutory guidance, and without the UMC Policy Statement, "unfair" will mean whatever at least three commissioners want it to mean.

The FTC Shouldn't Abandon Clear, Uniform, Predictable, & Objective Standards that Protect Consumers & Promote Innovation.

The movement away from clear guidance is a cause for concern. ***For starters***, it is unclear whether today's Supreme Court, which is far more skeptical of agencies than earlier courts, would countenance Section 5 agency action without such guidance. Indeed, the Policy Statement seems to be the agency's own effort to ward off constitutional and legal attack. Repealing or broadening it risks invalidation or judicially constructed limitations. At least for now, the Statement aligns with the Supreme Court's antitrust doctrines and thus stands a decent chance of surviving judicial review.

Second, it is unclear whether Congress would countenance such open-ended authority. Even if the current Congress is poised to support the agency's actions, future Congresses are likely to take issue with it. And if history is any indicator, the FTC's abuse of broad statutory language will spur hearings, condemnations, and reforms.

In the meantime, businesses and consumers will be left guessing. Even if the courts and Congress turn a blind eye, the rest of the country will be vulnerable to unexpected and open-ended regulation. This regulatory environment will likely dampen investment and chill innovation—which will be even worse if the agency also "streamlines" its Section 18 rulemaking processes. Even worse, without the

Statement, the agency could return to the past, when it used vague enforcement actions to coerce private parties into settling even when the alleged "harm" was far from clear.

It is against this backdrop that the FTC adopted the UMC Policy Statement in 2015. And it is for these reasons that the agency should maintain—and even *strengthen*—the Statement.

The Existing Policy is Flexible Enough to Respond to New Market Realities & Even Critics Should Support It.

Consider also that the Statement is flexible enough to adapt to new market realities. In brief, it simply notes that when the agency decides to use its Section 5 authority, it will do so based on the consumer welfare standard and will use the rule of reason to evaluate potential action. None of this is radical. As the Commission knows, the consumer welfare standard has been the guiding light of antitrust enforcement for decades. The rule of reason, even longer. That these standards are so established in federal law and so familiar to interested parties is a plus, not a minus.

Even critics of the consumer welfare standard should rejoice: the Statement accommodates a more "aggressive" approach to enforcement.[10] For example, the Statement does not include former-Commissioner Joshua Wright's idea to create a "safe harbor" from UMC enforcement if any business efficiency is shown. By rejecting this proposal (sensible as it may be) and by adopting a balancing method instead, the Commission left wiggle room to exercise its UMC enforcement power even when defendant businesses provide evidence of procompetitive effects. Under this balancing approach, the Commission retains the ability to weigh in on many business practices. The sole limitation is simply that the Commission must identify *some* consumer harm. That is, by any objective standard, not asking much.

Nor does the Policy Statement tie the FTC's hands in defining "consumer harm." Far from being limited to prices, the consumer welfare standard—and the Statement's use of it—leaves the Commission free to enforce actions against businesses that harm quality, innovation, and inflict other harms on consumers identified by the Commission and economic literature. In other words, all the Statement does is require the Commission to make its decisions based on *consumers*—not competitors, not lofty social goals (no matter how well-meaning), and not individual policy preferences. This objective standard developed over decades and represents the accumulated wisdom of the courts, agencies, economists, and lawyers. It

[10] N.B. We disagree with critics who claim the agency's enforcement has been "lax" for the last decade or more. As evidence shows, that's far from true. But because "lax" has a subjective meaning and its meaning does not change our argument above, we'll assume the criticism matters.

shouldn't be abandoned simply because it requires the FTC to shift through evidence using an objective measure to guide (and sometimes abandon) its enforcement actions.

The Existing Policy Supports the Rule of Law.

By conforming its Section 5 powers to its antitrust enforcement powers, the FTC in 2015 promoted clarity, predictability, and uniformity. These benefits should not be taken for granted. By promoting clarity and predictability, the Policy Statement insulates the FTC—to a degree—from legal challenges. And it gives businesses and consumers insight into what behavior may or may not be permissible. This, of course, helps businesses grow and innovate. Likewise, by promoting uniformity and predictability, the Statement protects against arbitrary or politicized enforcement. This supports the rule of law and fairness. Without guardrails that align with the agency's enforcement policies elsewhere, the Commission threatens to destabilize the law and raise questions about whether its Section 5 authority is even constitutionally or statutorily sound.

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Aside from those benefits, the 2015 Statement is good on its own merits. Because the FTC's authority extends so broadly, its actions can reshape entire markets and industries. As the old adage goes, with great power comes great responsibility. The Statement recognizes this, and reaches an appropriate balance between acting when necessary to protect consumers and leaving businesses free to innovate. And it appropriately situates the Commission's Section 5 powers: Instead of viewing "unfair methods of competition" as a standalone grant of power, the Statement treats it as a gapfiller to cover conduct that is not expressly prohibited by other federal antitrust statutes but that would, left unchecked, undermine the purposes of those statutes.

Part 3. Compulsory Process

When Congress created the FTC, it sought to fill the agency with independent experts and to insulate them from political pressure. As the Supreme Court long ago put it, the FTC was designed to be "non-partisan" and to "act with entire impartiality."[11] To be sure, the agency is not entirely separate from politics—presidents appoint commissioners based on their expertise *and* on their political affiliation. At any given time, for example, the Commission can have no more than three commissioners of the same political party. But even that small nod to

[11] *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935).

politics underscores the Commission's apolitical nature. Rather than let any party command the agency unfettered, Congress instead elevated bipartisanship and consensus.

Congress also double-downed on the agency's independence. Commissioners serve for staggered seven-year terms and can be removed only for cause. And Congress chose to make the FTC a multi-member Commission, not a unitary body like the CFPB. Had Congress wanted commissioners and the agency's staff to act unilaterally, it would not have gone through the trouble of structuring the agency this way. Whatever costs this multi-member, consensus-driven structure may impose on the Commission's speed, it more than makes up for in strengthening the Commission's reputation and insulating it from politics.

For that reason, the Commission should not "streamline" the subpoena process. By allowing staff to unilaterally ask a single commissioner to unilaterally approve compulsory process, the Commission risks undermining its reputation and undercutting public support for its decisions.

The FTC Should Not Empower a Single Commissioner To Unilaterally Approve Compulsory Process.

First, the FTC's portfolio is broad. It is both the nation's top consumer watchdog and its primary antitrust enforcer. Under these roles, the Commission touches almost every segment of our economy. And that sweeping jurisdiction—combined with the Commission's powers—means it has the potential to restructure entire markets and even overhaul the economy. With the exception of Congress and the possible exception of the Federal Reserve, few others have such capacity to affect so much so quickly.

Maintaining (or better yet, strengthening) the current process is therefore necessary to guard against claims—real or perceived—that the agency:

- Favors or disfavors certain markets, industries, or businesses;
- Does the bidding of the White House, Congress, or the opposition party; or
- Advances politics by other means.

It would indeed be strange to convert an independent agency into one that operates more likely an executive agency from the inside. Given Congress's intentional steps to insulate the FTC, those at its helm owe it to both their predecessors and successors to see to it that the agency lives up to Congress's ideals.

Second, the agency inevitably runs into politically thorny issues. When these issues arise, it is best for the agency to present a unified—or at least, mostly unified—front.

Consider the agency's current investigation into Stephen Bannon, former President Donald J. Trump's chief strategist.[12] Whether fair or not, the agency's investigation into Mr. Bannon is likely to elicit criticisms from those who believe the agency is politically motivated. Potential criticism should not sway the agency's actions, but common sense suggests that such criticism can be kept at bay through the current approach. By contrast, one that allows agency staff to get sign-off by a single commissioner (at their choosing) will be met with criticism—including from Congress.

Third, because compulsory process is ripe for abuse and mistakes, the FTC should require a majority of commissioners to approve a subpoena or other compulsory process.

The Proposal is Ripe for Political Abuse (Real or Perceived).

Even if every sitting commissioner respects the rule of law and remains mindful of the agency's mission, mistakes happen. Acting on a staff report, a commissioner may accidentally overlook a key consideration or fail to rigorously review the request. And because the FTC's duties are "neither political nor executive," but instead rely on "the trained judgment of a body of experts,"[13] it makes sense to vest such decisions in the collective body rather than in a single expert. As everyone knows, having multiple sets of eyes on something can be exhausting, but it often produces better results. Even if it doesn't, however, consensus benefits the Commission's reputation and is consistent with its founding.

Because compulsory process is ripe for abuse and mistakes, the FTC should require a majority of commissioners to approve a subpoena or other compulsory process.

And when FTC staffers do not know which commissioner may sign off on a subpoena application, they must tailor their arguments to the broader body and ensure their arguments are appealing to commissioners of both parties. This in turn supports Congress's vision for the FTC as an independent body of experts from across the political spectrum. But if a single commissioner can decide on behalf of the whole, the FTC will function less like a body of apolitical experts and more like an executive branch agency subject to unilateral dictates.

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[12] FTC, *Cases and Proceedings: Bannon, Stephen K.* (last updated Feb. 12, 2021), https://www.ftc.gov/enforcement/cases-proceedings/bannon-stephen-k.
[13] *Humphrey's Executor*, 295 U.S. at 624 (internal quotation marks omitted).

This is neither necessary nor appealing. Our Constitution and the government it establishes strongly prefers slow deliberation and painstaking consensus over quick and efficient lawmaking and law enforcement. But that does not mean every institution of government must operate the same way. While Congress designed the FTC to be independent and methodical, it allows executive agencies like the Department of Justice to act with greater speed. Given the overlapping jurisdiction between the FTC and DOJ, we needn't worry that procedural safeguards at the FTC will render bad actors outside the law's bounds. Far from it. The politically accountable branch may intervene quicker if the facts support doing so.

Conclusion

As always, we stand ready to work with the Commission to achieve beneficial outcomes that promote the interests of the United States and benefit American consumers and innovation. We appreciate your consideration of our views.

Sincerely,

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Trace Mitchell, Policy Counsel
NetChoice