

**PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION**

on

**The FTC's Regulatory Reform Program:
Twenty Years of Systematic Retrospective Rule Reviews
&
New Prospective Initiatives to Increase Public Participation and
Reduce Burdens on Business**

Before the

**House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations**

**Washington, D.C.
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I. Introduction

Chairman Stearns, Ranking Member DeGette, and Members of the Subcommittee, we are Chairman Jon Leibowitz and Commissioner William Kovacic of the Federal Trade Commission (“FTC” or “Commission”).¹ As the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy, the FTC’s work touches the economic life of every American. We appreciate the opportunity to appear before you today to testify about the FTC’s ongoing and comprehensive regulatory review program. Since 1992, we systematically and rigorously have reviewed our rules to ensure that they enhance consumer welfare without imposing undue burdens on business. Going forward, the FTC will continue an aggressive schedule of regulatory reviews and is seeking public comment to improve our regulatory review program.

Through Executive Order 13563, the President recently directed all Executive Branch agencies to engage in a regulatory review process. While the FTC, as an independent agency, is not bound by this Order, it fully supports the Order’s goals. In a rapidly changing marketplace, effective regulations and industry guidance can become outdated, ineffectual, and unduly burdensome. To ensure that the Commission’s regulations and compliance advice remain cost-effective, the FTC has engaged in a systematic review program for the last two decades, scheduling all rules and industry guides for review on a ten-year cycle. Pursuant to that

¹ This written statement represents the views of the Commission. Our oral presentations and responses to questions are our own and do not necessarily reflect the views of the Commission or any other Commissioner.

program, the Commission has rescinded 37 rules and guides and updated dozens of others since the early 1990s.²

After 20 years, the Commission is taking a fresh look at our regulatory review program. The FTC currently is seeking public comments on ways it can improve its regulatory review process to better serve consumers and businesses. In addition, the FTC just announced an updated schedule of rule and guide reviews for the next decade, which included accelerating two rule reviews. To enhance these efforts, the Commission is launching a new web page on FTC.gov dedicated to our regulatory review program to increase transparency, foster public participation, and make it easier for the public to comment on ongoing reviews.³

The Commission currently has a robust regulatory review docket, with 13 rules and guides under review and 10 additional reviews scheduled to start this year. In other words, more than a third of the Commission's 66 rules and guides will be under review, or will have just been reviewed, by the end of 2011.⁴

As part of its commitment to regulatory review, the Commission does not wait ten years to review a rule or guide if there is reason to believe that changes may be appropriate. The

² The Commission has rescinded 24 guides and 13 trade rules that had been promulgated under the FTC's general authority. The Commission began using a ten-year calendar in 1992, but rescinded two rules using a similar process in 1990. Although it has been many years since a rule has been fully rescinded using this review process (the Commission rescinded its Smokeless Tobacco Rule, 16 C.F.R. Part 307, pursuant to statute in 2010), the Commission has made significant updates and improvements to its rules and guides in recent years.

³ Federal Trade Commission, Regulatory Review, <http://www.ftc.gov/regreview>.

⁴ An additional nine rules that had previously been scheduled for review are being transferred to the Consumer Financial Protection Bureau ("CFPB") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, Sec. 1061(b)(5), 124 Stat. 2004 (July 21, 2010) ("Dodd-Frank Act").

Commission has recently accelerated the scheduled review of six rules and guides that require attention. For example, the Commission just completed review of its Hart-Scott-Rodino Transmittal Rule and promulgated a revised rule that reduces the filing burden on companies seeking to merge and streamlines the premerger notification form from 15 to 10 pages. Another example of the Commission's proactive approach to regulatory review is its accelerated review of its Alternative Fuels and Alternative Fueled Vehicles Rule, where it is working with a sister agency to harmonize our rules and ensure that automobile manufacturers need not apply redundant labels.

II. FTC Rules and Guides Protect Consumers and Level the Playing Field for Businesses

The Commission works to protect consumers from deceptive and unfair commercial practices, and to ensure a vibrant and competitive marketplace. The FTC performs these dual missions through a variety of tools, including law enforcement, research, studies of marketplace trends and legal developments, consumer and business education, as well as rules and guides.

Congress often delegates rulemaking authority to the Commission to use its expertise to implement statutes, and most of the FTC's rules have been promulgated pursuant to such specific delegations. The Commission's regulations and guides serve an important public interest, protecting consumers from deceptive and unfair business practices, and creating a level playing field for legitimate businesses.

The agency administers and enforces 15 "trade regulation rules" authorized by the FTC Act and 35 rules authorized by other statutes.⁵ Further, the Commission currently publishes 16

⁵ This excludes nine statutory rules that are being transferred to the CFPB pursuant to the Dodd-Frank Act. The FTC has not issued an entirely new trade regulation under its FTC Act Section 5 authority (using Magnuson-Moss procedures) since 1984.

industry guides. These guides set forth the Commission’s interpretation of the prohibition on deceptive practices in Section 5 of the FTC Act.⁶ In this way, they help clarify the line between deceptive and legitimate conduct, thereby giving marketers greater certainty when seeking to avoid running afoul of the law. The Commission understands the importance of avoiding undue burden on business, and seeks to promulgate rules and guides that improve the ability of legitimate businesses to compete in a marketplace free from deceptive and unfair practices.

To provide just two examples, the Children’s Online Privacy Protection Rule (“COPPA Rule”),⁷ which was promulgated pursuant to the Children’s Online Privacy Protection Act of 1998, helps protect the privacy of children online. It requires operators of websites and online services directed to children under the age of 13, as well as operators of general audience sites and services having knowledge that they collect information from children, to provide notice to parents and obtain their consent before collecting, using, or disclosing children’s personal information. In the past ten years, the Commission has brought 16 law enforcement actions alleging COPPA rule violations and has collected more than \$6.2 million in civil penalties. The comments submitted during the Commission’s ongoing regulatory review of the COPPA rule⁸

⁶ 15 U.S.C. § 45(a).

⁷ 16 C.F.R. Part 312.

⁸ Although the Commission generally reviews its rules approximately every ten years, the agency accelerated its COPPA review by five years (from 2015 to 2010) due to the rapid pace of technological developments, including a dramatic increase in children’s use of mobile devices and changes in the way they use and access the internet.

indicate widespread agreement, including among industry members, that the regulation is an important part of an effective government program to address children's online privacy.⁹

Similarly, the Telemarketing Sales Rule ("TSR")¹⁰ has been widely hailed both for its effective anti-fraud provisions and the important privacy protections provided by the Do Not Call provisions. Our 1999 regulatory review of the TSR revealed a broad consensus among consumers that the original Rule's provisions designed to decrease intrusive and unwanted telemarketing calls were ineffective in reducing those calls.¹¹ As a result, the Commission adopted a revised and strengthened TSR in January 2003 by establishing the National Do Not Call Registry. The amended Rule is widely-recognized as an important bulwark against fraud and an important privacy protection, empowering consumers, not telemarketers or government, to decide whether they want to receive telemarketing calls. Over 208 million numbers are on the Registry.

III. The Commission's Regulatory Review Program

This section discusses the FTC's program for scheduling periodic reviews of its rules and guides, the method the Commission uses to review rules and guides, and steps it is taking to improve this process.

⁹ See Prepared Statement of the Federal Trade Commission on Consumer Privacy and Protection in the Mobile Marketplace Before the Committee on Commerce, Science, and Transportation, 112th Cong. (May 19, 2011), *available at* <http://www.ftc.gov/os/testimony/110519mobilemarketplace.pdf>.

¹⁰ 16 C.F.R. Part 310.

¹¹ Under the earlier rule, consumers had to ask each business that made a telemarketing call not to call again, and those businesses then had to put that consumer's telephone number on an internal do not call list.

A. Scheduling Regulatory Reviews

The Commission currently schedules its rules and guides for review on a ten-year cycle; *i.e.*, all rules and guides are scheduled to be reviewed ten years after implementation and ten years after completion of a regulatory review. The Commission publishes this schedule annually, with adjustments in response to public input, changes in the marketplace, and resource demands. As a result of this process, the Commission accelerated four reviews in recent years and just announced that it would accelerate the review of two others.

Because of recent increases in the use of environmental marketing claims, in 2007, the Commission accelerated its review of its Guides for the Use of Environmental Marketing Claims, also known as the Green Guides.¹² The Commission accelerated in 2010 its review of the Children’s Online Privacy Protection Rule¹³ to address rapid changes in technology and children’s use of online media. The Commission accelerated from 2014 to 2010 possible amendments to the Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles¹⁴ that would harmonize FTC rules with EPA rules and eliminate the need for automobile manufacturers to apply redundant labels from different agencies. The Commission also just completed review of the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”) Transmittal Rule to streamline the premerger notification form,¹⁵ and is accelerating its review of

¹² 16 C.F.R. Part 260.

¹³ 16 C.F.R. Part 312.

¹⁴ 16 C.F.R. Part 309.

¹⁵ 16 C.F.R. Part 803.

the HSR Coverage Rule¹⁶ from 2013 to 2011, to more rapidly alleviate any unnecessary burden on merger filers. Finally, the Commission is accelerating review of the Appliance Labeling Rule,¹⁷ previously scheduled for 2018, to 2012 to address rapid changes in appliance technology and help ensure that consumers have the information about the energy efficiency and operating costs of appliances and electronic devices in the marketplace.

B. Current Regulatory Reviews

As part of its ongoing regulatory review program, the Commission has pending reviews relating to 13 of its rules and guides.¹⁸ Of the 13 additional rules and guides originally scheduled to be reviewed in 2011, the Commission is postponing review of four of them due to resource constraints resulting from the acceleration of the reviews noted above, and because staff has determined that there is no pressing need for review this year.¹⁹ As noted above, the

¹⁶ 16 C.F.R. Part 801.

¹⁷ 16 C.F.R. Part 305.

¹⁸ Guides for Private Vocational and Distance Education Schools, 16 C.F.R. Part 254; Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. Part 259; Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260; Automotive Fuel Ratings, Certification and Posting Rule, 16 C.F.R. Part 306; Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 [Pay Per Call Rule], 16 C.F.R. Part 308; Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles Rule, 16 C.F.R. Part 309; Children's Online Privacy Protection Rule, 16 C.F.R. Part 312; Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended Rule, 16 C.F.R. Part 423; Use of Prenotification Negative Option Plans Rule, 16 C.F.R. Part 425; Rule Concerning the Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. Part 429; Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435; Disclosure Requirements and Prohibitions Concerning Business Opportunities Rule, 16 C.F.R. Part 437; and Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455.

¹⁹ Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements, 16 C.F.R. Part 14; Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. Part 23 (recently amended to keep pace with developments in the platinum market); Preservation of Consumers' Claims and Defenses Rule ("Holder in Due Course Rule"), 16

Commission is accelerating one rule review to 2011.²⁰ Thus, the Commission intends to initiate a review of, and solicit public comments on, 10 additional rules and guides during 2011, for a total of 23 rule reviews this calendar year.²¹

C. Process for Reviewing Rules and Guides

When the Commission reviews a rule or guide, it publishes a notice in the Federal Register seeking public comment.²² This notice asks all interested parties to comment on the continuing need for the regulation or guide as well as its costs and benefits, both to consumers and businesses. Additionally, the Commission asks whether current or impending technological or economic changes affect the need for, or require modification of, the regulation or guide and whether the regulation or guide conflicts with state, local, or other federal law. The Commission

C.F.R. Part 433; and Credit Practices Rule, 16 C.F.R. Part 444.

²⁰ HSR Coverage Rule, 16 C.F.R. Part 801.

²¹ Guides for the Advertising of Warranties and Guaranties, 16 C.F.R. Part 239; Rules and Regulations under the Wool Products Labeling Act of 1939, 16 C.F.R. Part 300; Rules and Regulations under Fur Products Labeling Act, 16 C.F.R. Part 301; Rules and Regulations under the Textile Fiber Products Identification Act, 16 C.F.R. Part 303; Retail Food Store Advertising and Marketing Practices Rule, 16 C.F.R. Part 424; Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. Part 700; Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. Part 701; Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702; Informal Dispute Settlement Procedures, 16 C.F.R. Part 703; and HSR Coverage Rule, 16 C.F.R. Part 801.

²² Rules and guides serve very different purposes; review of each is important for different reasons. The Commission periodically reviews rules to ensure they remain relevant in a changing marketplace and continue to serve their intended purpose without unduly burdening commerce. Guides, on the other hand, help clarify the line between deceptive and non-deceptive marketing in a particular context. As such, they help companies avoid incurring the risks and cost of determining how their claims may be interpreted. Because the meaning of advertising terms is established by what reasonable consumers understand in the real world, and not what the Commission believes they should mean, it is important to periodically update the Commission's guides to ensure they reflect evolving consumer understanding.

also asks specific questions about how the rule or guide can be improved and for data, studies, or other evidence to support the commenter's recommendation.²³ Typically, the Commission receives substantive comments from businesses, trade associations, consumer and other public interest groups, state law enforcement, individual consumers, and other interested stakeholders. It also often holds workshops at which interested parties can express their views to the Commission staff and respond to the views of others.

Using this feedback, the Commission determines whether there is continuing need for the rule or guide, and, if so, whether it still serves its intended purpose without unduly burdening commerce. After analyzing the comments, the Commission either initiates a proceeding to modify or repeal the regulation or guide in question, or determines no changes are warranted.²⁴

If the Commission determines that a rule should be modified, it issues either an Advance Notice of Proposed Rulemaking or a Notice of Proposed Rulemaking, in which it summarizes the public comments, sets forth the proposed modifications, explains the costs and benefits of the proposed modifications and why they are justified, and seeks additional public comment.²⁵ At

²³ See, e.g., Review of Regulations under the Fur Product Labeling Act, 76 Fed. Reg. 13550 (Mar. 14, 2011); Review of Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended, *available at* <http://www.ftc.gov/os/fedreg/2011/07/1107carelabelingfrn.pdf>.

²⁴ As noted above, in the last two decades, the Commission has rescinded 37 rules and guides whose costs exceeded their benefits.

²⁵ The procedures the Commission follows when amending a rule depend on whether the regulation in question is a trade regulation rule. After the Commission gets to the stage of a Notice of Proposed Rulemaking, it will either follow the relatively streamlined notice-and-comment processes under the Administrative Procedure Act, 5 U.S.C. § 553, available for Commission rulemakings with respect to unfair methods of competition, 15 U.S.C. § 46(g), or when Congress directs the Commission to promulgate rules for a particular statute pursuant to APA notice-and-comment procedures, or it will take further steps to comply with the provisions for trade regulation rulemaking under Section 18 of the FTC Act, 15 U.S.C. § 57a.

the same time, it also publishes a burden estimate under the Paperwork Reduction Act and seeks comment on that estimate. The Commission actively looks for means to reduce burden while preserving the effectiveness of a rule. For example, as part of its ongoing review of the Business Opportunity Rule,²⁶ the Commission approved issuance of a Staff Report recommending changes designed to significantly decrease the disclosure burdens on covered sellers of business opportunities, reducing the categories of information they must provide from 23 to five.²⁷

D. Improvements to Regulatory Review Process

As part of the Commission's commitment to robust and effective regulatory review, it recently asked for public comment on how the FTC can improve its regulatory review program to better serve consumers and businesses.²⁸ The Commission asked ten distinct questions, including questions about how often it should review rules and guides; how it can modify its regulatory review program to make it more responsive to the needs of consumers and businesses; how it should identify those rules and guides that can, and should, be modified, streamlined, expanded, or repealed; whether it should consider other federal or state models for regulatory review; and whether there are specific rules or guides that are ripe for review. By working to improve this long-standing, successful program, the Commission will ensure that all of its

²⁶ 16 C.F.R. Part 437.

²⁷ See Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule, Disclosure Requirements and Prohibitions Concerning Business Opportunities, *available at* <http://www.ftc.gov/os/fedreg/2010/october/101028businessopportunitiesstaffreport.pdf>.

²⁸ Regulatory Review Schedule, Notice of Intent to Request Public Comments, and Request for Information and Comment, *available at* <http://www.ftc.gov/os/fedreg/2011/07/1107regreviewfrn.pdf>; *see also* Federal Trade Commission, Regulatory Review, <http://www.ftc.gov/regreview>.

regulations continue to protect American consumers while minimizing the burden on businesses that provide the products and services consumers want.

The FTC has also created a new web page on [FTC.gov](http://www.ftc.gov) to help consumers, businesses, lawmakers, and other interested parties learn more about the FTC's regulatory review program and allow interested parties to comment on ongoing reviews and on the review process itself.²⁹ On the FTC Regulatory Review page, the public can find the ten-year schedule of regulatory reviews, links to comment on rules that are under review, a link to provide direct feedback on the FTC's regulatory review program, and a list of rules and guides that have been eliminated over the years. The web page will also provide direct and easy access to the new streamlined form for merger filings, which resulted from the FTC's recent review of the HSR rules.

Furthermore, consistent with the goal of reducing unnecessary burdens, within and outside the government, Commission staff are in the process of identifying reports required by statute as well as statutes themselves that appear to be of limited value, but that divert business or Commission resources from more pressing work. Thus far, staff preliminarily have identified two reports that do not appear to be useful. The first is a report, required annually, on concentration in the ethanol market. The Commission has found each year that the market is extremely unconcentrated, and that entry is easy and ongoing. Therefore, this report seems to provide little useful information.³⁰ The second report is prepared by the Commission together

²⁹ Federal Trade Commission, Regulatory Review, <http://www.ftc.gov/regreview>.

³⁰ Under the FTC and DOJ Horizontal Merger Guidelines, market concentration is calculated using the Herfindahl-Hirschman Index ("HHI"). The HHI measures concentration by summing the squares of each participant in a market. An HHI can be no higher than 10,000, which is reached when a market is a monopoly. The Merger Guidelines regard an HHI below 1500 as unconcentrated. Mergers resulting in an HHI of up to 1500 are unlikely to have anticompetitive effects and generally require no additional analysis. *See* U.S. Department of Justice and the

with the Department of Justice and the Department of Education, and simply describes actions taken to address scholarship scams. Though stopping scholarship scams is an important priority, the report appears to provide little valuable information. Accordingly, the Commission will make appropriate recommendations to Congress at the conclusion of this review.

IV. Conclusion

Thank you for providing the Commission an opportunity to appear before the Committee to discuss our ongoing regulatory review program and new initiatives to help maximize effectiveness for American consumers while minimizing the burden for U.S. businesses.

Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, at 24-26, available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>. The HHI in the ethanol industry is less than 700, which represents a highly unconcentrated market.