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Rule-A-Palooza: Realities and Repercussions

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[*] The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisors, Thomas J. Klotz and Nina Frant, for assisting in the preparation of these remarks.

Introduction

Many thanks to Professor Aaron Neilson and his colleagues at Brigham Young University for organizing this event and inviting me to speak. The topic of FTC rulemaking is an important and timely one. But before I begin, let me give the standard disclaimer: I speak only for myself, not for the FTC or any other Commissioner.

I'd like to set the stage by telling a war story that provides context for my views on rules. When I was in private practice more than a decade ago, I represented a low-cost, low-price retailer that sought to expand into California. But the rivals of this retailer knew from experience in other states that they would lose customers and market share to the new entrant, so they launched a campaign to keep my client out. City by city, town by town, they manipulated state and local laws, rules, and regulations to their advantage. They delayed my client's entry and raised my client's costs — beneficial to these less efficient rivals, but detrimental to consumers.

During the course of my work for this client, I came across a book written by Professor G. Richard Shell at Wharton. It was titled, fittingly, "Make the Rules or Your Rivals Will."[1] Professor Shell asserts that "[f]or every simple, neutral law we pass, there are ten designed to tilt the playing field. In other words, laws and legal institutions can make or break a business—or an entire industry."[2] He then makes this key point:

> Laws not only define markets—they set the rules of competition within them. To put it another way, law provides the steel from which we build our economic superstructure. Change even the smallest legal rule in this superstructure and costs, profits, and market share shift by significant amounts in the market itself. By leaving law and legal maneuvering to your rivals, you place the fate of your business in their hands.[3]

In other words, the rulemaking process creates a rich environment for maneuvering to gain a competitive advantage. And this is one reason why I maintain a deep skepticism about the supposed benefits of most rules.

With this context, I'm sure you can imagine my reaction when the Biden FTC unveiled its plans for an ambitious rulemaking agenda in December 2021,[4] and began implementing that agenda in 2022. My team and I have labeled this rulemaking extravaganza the Rule-A-Palooza. It is a light-

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[1] G. RICHARD SHELL, MAKE THE RULE OR YOUR RIVALS WILL (2004).

[2] *Id.* at 92.

[3] *Id.* at 105.

[4] Fed. Trade Comm'n, Semiannual Regulatory Agenda (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Preamble_3084_FTC.pdf ; Fed. Trade Comm'n, Statement of Regulatory Priorities (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf; Fed. Trade Comm'n, Agency Rule List - Fall 2021 Federal Trade Commission, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIS. See also Christine S. Wilson, Dissenting Statement Regarding Annual Regulatory Plan and Semi-Annual Regulatory Agenda (Dec. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf.

hearted label for an initiative that, unfortunately, carries grave consequences for consumers, competition, the FTC and the U.S. economy.

During my brief time with you today, I'd like to explain the dangers of unchecked FTC rulemaking. First, I will outline the negative impacts of rulemaking. Second, I will discuss the agency's competition rulemaking efforts and the shaky legal footing for any substantive competition rules. Third, I will discuss developments in the consumer protection mission, including changes to the agency's Rules of Practice that undermine Congressional intent by fast-tracking consumer protection rules.

The Costs of Rules

Throughout my tenure at the Commission, I have expressed concern about the negative impacts of rulemaking. In fact, my first dissent was issued in the context of the Energy Labeling Rule; there, I encouraged the Commission to "review its roster of rules with a deregulatory mindset."[5] Although the Commission under Chairman Joe Simons did repeal one rule and one guide,[6] I am disappointed that it did not participate more vigorously in the deregulatory agenda of the Trump Administration.[7]

Let's discuss those negative impacts.

First, historical experience teaches that rules stifle innovation, increase costs, raise prices, limit choice, and decrease output. In fact, they frequently harm the very parties they are intended to benefit. Prime examples include the disastrous regulatory frameworks in the transportation industry — the Civil Aeronautics Board and the Interstate Commerce Commission.[8] A Senate subcommittee lead by Senator Ted Kennedy in 1975 found that the CAB failed to cultivate the low-fare service that was technically feasible and that consumers certainly sought.[9] Railroad

[5] Christine S. Wilson, Dissenting Statement Regarding Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1433166/2018-12-7_statement_of_c_wilson_energy_labeling.pdf.

[6] Deceptive Advertising as to Sizes of Viewable Pictures Shown By Television Receiving Sets ("The Picture Tube Rule"), 83 Fed. Reg. 50484-87 (Oct. 9, 2018) (Federal Register Notice repealing the Picture Tube Rule); Guides for the Nursery Industry, 84 Fed. Reg. 20776-77 (May 13, 2019) (Federal Register Notice repealing the Nursery Guides).

[7] Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017), https://www.govinfo.gov/content/pkg/FR2017-02-03/pdf/2017-02451.pdf.

[8] *See* Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF'T 10 (2019), https://academic.oup.com/antitrust/article/8/1/10/5614371; Remarks of Commissioner Christine S. Wilson at British Institute of International and Comparative Law, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biicl_6-2819.pdf.

[9] Edward M. Kennedy, *Airline Regulation by the Civil Aeronautics Boards*, 41 J. OF AIR L. AND COM. 607, 608 ("The Board's practices … have not been effective in maintaining low prices. It is economically and technologically possible to provide present air service at significantly lower prices, bringing air travel within the reach of the average American citizen.").

regulation fared no better. A study of the ICC estimated that it cost consumers at least $500 million per year (in 1960s dollars).[10]

Second, competition rulemaking will hinder the rational development and refinement of economic and legal analysis.[11] Adopting a rules-based approach to competition law will diminish the effects-based analysis built through more than four decades of careful assessment (although that may be considered a benefit by current FTC leadership that favors bright-line rules over consideration of procompetitive effects of conduct). Improved economic analysis rightly led to the reassessment of per se bans on many vertical restraints and altered merger enforcement.[12] But competition rulemaking will freeze the legal and economic analysis of any conduct subject to a rule. This approach is not compatible with today's sound, fact-specific and evolving approach to antitrust law. Why throw out several decades of learning?

Third, rulemaking must rely on a one-time snapshot of industry dynamics, but industries rapidly evolve. The rulemaking process is unable to adapt quickly to changes in market dynamics because it is lengthy and cumbersome. For example, amendments to the Contact Lens Rule took more than five years to complete.[13] And this rule is not an outlier – one study found that the FTC takes more than five years on average to formulate a consumer protection rule.[14] Although modern FTC consumer protection rules follow a procedure with some differences from the Administrative Procedure Act, examples of rulemaking in other agencies show a similarly slow

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[10] Wilson & Klovers, *supra* note 8, at 12-13 (citing a background paper prepared at the request of the Brookings Institution for a conference held in 1967) (internal quotations omitted).

[11] Christine S. Wilson, Remarks for the Federalist Society at the Future of Rulemaking at the FTC Event, *Hey, I've Seen This One: Warnings for Competition Rulemaking at the FTC* (June 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf.

[12] Remarks of Commissioner Christine S. Wilson at the University of Florida Competition Policy Enforcement Conference, There's Nothing New Under the Sun: Why Professor Roger Blair of the University of Florida Is Still Right About Vertical Integration (Nov. 1, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552631/wilson_remarks_-_florida_competition_policy_enforcement_conference_11-1-19.pdf.

[13] Contact Lens Rule: Supplemental notice of proposed rulemaking, 84 Fed. Reg. 24,664, 24,666-67 (May 28, 2019) ("The comment period closed on October 26, 2015. … After a review of comments, surveys, other submitted information, and its own enforcement experience, the Commission determined that the overall weight of the evidence demonstrated need to improve compliance with the Rule's automatic prescription-release requirement, as well as a need to create a mechanism for monitoring and enforcing the Rule. … The NPRM sought comment on this proposal, and also about the following issues: The provision of additional copies of prescriptions, the amount of time for a prescriber to respond to such a request, the use of patient portals to release prescriptions, and potential modifications to address concerns about automated telephone verification calls. The sixty-day comment period for the Commission's NPRM closed on January 30, 2017. … To obtain additional input and more fully consider commenter concerns, the Commission solicited additional comments and held a public workshop on the Contact Lens Rule and the Evolving Contact Lens Marketplace on March 7, 2018. … After reviewing the comments, the Commission now proposes to modify its prior proposal—put forth in the NPRM—that would have required prescribers to request a signed statement from their patients acknowledging receipt of the patient's prescription."); Contact Lens Rule: Final Rule, 85 Fed. Reg. 50,668 (Aug. 17, 2020) ("The FTC is publishing a final rule to implement amendments to the Contact Lens Rule. … This rule is effective October 16, 2020.).

[14] Jeffrey S. Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO.WASH. L. REV. 1979 (2015), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch_lawrev.

process.[15] All the while, business practices are changing, new competitors are emerging, and consumer preferences are shifting.

Fourth, by their very nature, regulations risk inhibiting innovation. Some of this detrimental effect flows from the time-consuming nature of rulemaking. Take, for example, the FTC's Care Labeling Rule that specifies which care instructions can be placed on garment labels.[16] Industry associations continually develop new types of care instructions for both existing and new types of fabrics.[17] But the FTC is woefully out of date in updating the rule, so several years of care instructions adopted by the industry are not recognized by the FTC's rule.[18] Even more notably, the FTC does not acknowledge the existence of an emerging rival to dry cleaners known as wet cleaners.[19] Due to lack of visibility, consumers do not know about and cannot demand clothes with this form of cleaning technology.[20] The FTC is effectively inhibiting innovation and blocking competition that would benefit consumers and the environment.

Fifth, particularly on the consumer protection side of the house, I am concerned that there are existing or emerging threats to consumers we are not pursuing because resources are focused on rules instead of cases. In calendar year 2020, under Chairman Joe Simons, the FTC brought 79 consumer protection actions. But in 2021, that number declined by more than half, to 32.In 2022, this number increased to 46 — an improvement, but still well short of Chairman Simons' 79 actions in 2020. As the FTC held its fire, fraudsters doubled down: in 2022, consumers reported losing nearly $8.8 billion to fraud, an increase of more than 30 percent

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[15] For example, the National Advisory Committee on Occupational Safety and Health noted that it takes the Occupational Safety and Health Administration (OSHA) within the Department of Labor an average of 10 years to develop and promulgate a health or safety standard. NATIONAL ADVISORY COMMITTEE ON OCCUPATIONAL SAFETY AND HEALTH, REPORT AND RECOMMENDATIONS RELATED TO OSHA'S STANDARDS DEVELOPMENT PROCESS (2000), https://www.osha.gov/advisorycommittee/nacosh_report_06062000.

[16] FED. TRADE COMM'N, *Clothes Captioning: Complying with the Care Labeling Rule*, https://www.ftc.gov/tips-advice/business-center/guidance/clothes-captioning-complying-care-labeling-rule.

[17] Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods: Supplemental notice of proposed rulemaking, 85 Fed. Reg. 44,485, 44,490 (July 23, 2020), https://www.federalregister.gov/documents/2020/07/23/2020-13919/trade-regulation-rule-on-care-labeling-of-textile-wearing-apparel-and-certain-piece-goods ("To the extent that current mandated labels may be imperfect or limited, a benefit of the Rule's repeal would be to afford manufacturers and sellers the freedom to improve existing labels, to label new cleaning methods as they enter the market, and to use widely recognized care symbol systems without waiting for updates to the Rule.").

[18] *Id.* at 44,485-86 (July 23, 2020) (following multiple periods of comments and a roundtable in March 2014 and finding "the record suggests that the Rule may not be necessary to ensure manufacturers provide care instructions, may have failed to keep up with a dynamic marketplace, and may negatively affect the development of new technologies and disclosures.").

[19] *Id.* at 44,491 ("Repeal would also eliminate any possibility the Rule negatively affects market innovation. Over the course of the proceeding, some commenters suggested that the Rule might have had a negative impact on the adoption of new cleaning technologies. For example, commenters and workshop participants explained that the Rule's failure to address wetcleaning has placed professional wetcleaners at a competitive disadvantage and discouraged greater use of that technology.")

[20] *Id.* at 44,488 ("As noted earlier, some commenters presented evidence that many consumers would prefer wetcleaning if they knew of the option and the quality and cost were comparable.").

from the previous year.[21] I fear that the avalanche of new rules, and its corresponding diversion of resources, is at least partially accountable for this decline in enforcement.

My sixth aversion to FTC rulemaking — particularly on the competition side — is that we will repeat the mistakes of the past and incur the wrath of Congress. More on this momentarily.

And finally, as I highlighted in my introduction, each rulemaking encourages companies to shift resources from competition and innovation to rent-seeking and regulatory gamesmanship.[22]

Competition Rules

With that background in mind, let's talk about competition rulemaking. Seven weeks ago, the FTC issued a Notice of Proposed Rulemaking ("NPRM") regarding non-compete clauses.[23] The proposed rule would declare non-competes an unfair method of competition and ban their use, with an exception for non-compete provisions associated with the sale of a business.

Before discussing the problems with the proposed Non-Compete Clause Rule, let's take a step back. It's important to recognize that the Commission needed to find a hook for the FTC to ban non-compete provisions. Congress did not pass a new law banning non-competes and directing the FTC to design implementing rules, which it frequently does on the consumer protection side.[24] The antitrust statutes do not provide a basis to prohibit non-compete clauses. State and district courts repeatedly have held that when non-compete agreements are *reasonable*, they do not violate the antitrust laws.[25] And the Seventh Circuit held that unless non-compete clauses are *unreasonable*, they are legal under Section 5 of the FTC Act.[26]

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[21] Press Release, Fed. Trade Comm'n., New FTC Data Show Consumers Reported Losing Nearly $8.8 Billion to Scams in 2022 (Feb. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/new-ftc-data-show-consumers-reported-losing-nearly-88-billion-scams-2022.

[22] Christine S. Wilson, Remarks at the Open Commission Meeting on September 15, 2021 at 5 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596380/cw_remarks_open_commission_meeting_9_16_2021.pdf ("When I was in private practice, I saw firsthand how the citizens' petition process at the Food and Drug Administration was abused by branded drug companies to delay and exclude competition from generic drug companies. For years, I represented the generic drug companies as they fought back against those tactics. The problem got so bad that in 2018, with input from the FTC, the FDA overhauled its citizens' petition process.") (citation omitted).

[23] Notice of Proposed Rulemaking for Non-Compete Clause Rule (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf.

[24] For example, Congress passed the Children's Online Privacy Protection Act in 1998 and empowered the FTC to engage in rulemaking in this area. 15 U.S.C. §§ 6501-505. Rulemaking allows the FTC to maintain the relevance of COPPA in the face of evolving technologies and emerging issues.

[25] *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd in relevant part*, 175 U.S. 211 (1899); United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974)\.

[26] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963) (finding "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope" under Section 5 of the FTC Act).

So what is an ambitious Commission to do? Enter stage left — the Section 5 Policy Statement regarding enforcement of "unfair methods of competition,"[27] issued just two months before the NPRM. Admittedly, it is a detour from the topic of today's conference – FTC rulemaking – but to fully understand the proposed Non-Compete Clause Rule, it is necessary to discuss the Policy Statement.

In practice, Section 5 of the FTC Act contains two separate prohibitions – one on unfair methods of competition and the other on unfair and deceptive acts and practices, or UDAP. The Section 5 Policy Statement sets out a new approach for invoking the unfair methods of competition provision. Specifically, the Policy Statement provides that a violation of Section 5 occurs when a company engages in (1) a method of competition that (2) is "unfair."

There are two criteria to consider when analyzing whether a method of competition is unfair. First, conduct may be unfair when it is "coercive, exploitive, collusive, abusive, deceptive, predatory," and so on.[28] Second, "the conduct must tend to negatively affect competition conditions" by "affecting consumers, workers or other market participants."[29] When conduct is labeled "facially unfair" pursuant to the first criterion, the second criterion is rendered essentially irrelevant, as subsequent cases have demonstrated.[30] Thus, conduct may be considered unfair based only on the assignment of nefarious-sounding adjectives, such as "coercive" or "exploitive."

I dissented from the Section 5 Policy Statement for several reasons.[31] It abandons long-accepted principles of antitrust. It fails to provide clear guidance to businesses regarding what conduct is and is not lawful. And, as the Policy Statement itself acknowledges, the approach may lead to conclusions – that is, finding violations of the law – that are inconsistent with precedent under the antitrust laws.[32]

With that knowledge under our belts, let's return to the proposed Non-Compete Clause Rule. As it turns out, non-compete clauses are one of those areas where the new Section 5 Policy Statement leads to conclusions that are inconsistent with precedent. The NPRM states that there are 3 *independent* bases for classifying non-compete clauses as an "unfair" method of competition.[33] Two of the three explanations rely only on invocation of the adjectives "exploitive and coercive." The NPRM explains that, except for senior executives, first, "non-compete clauses are exploitive and coercive at the time of contracting" because they take

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[27] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[28] *Id.* at 9.

[29] *Id.*

[30] *See* discussion *infra* p. 7.

[31] Christine S. Wilson, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

[32] Unfair Methods of Competition Policy Statement, *supra* note 27 at 13.

[33] Notice of Proposed Rulemaking concerning the Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3500 (Jan. 19, 2023) (emphasis added).

advantage of unequal bargaining power[34] and, second, "non-compete clauses are exploitive and coercive at the time of the worker's potential departure from the employer[.]"[35]

The third basis for classifying non-compete clauses as unfair depends on the NPRM's conclusion that non-compete clauses negatively affect competitive conditions.[36] The NPRM primarily relies on empirical economic literature to support this assertion. But the cited literature provides mixed results.[37]

The NPRM also cites three consents announced one day before the NPRM was issued.[38] But the allegations in the complaints do not provide evidence of market-wide effects — for either the products or services of the companies or the wages of employees. For example, a case involving a security guard company alleged that individual former employees were limited in their ability to work for other firms in the security guard industry, but the complaint contains no allegations that the firm's non-compete provisions had market effects on wages or effects in a market for security guard services.[39] In fact, the cases do not even identify relevant markets. And two of the cases have complaints that total only three pages each, including boilerplate.[40] Thin gruel, indeed.

In addition to the far-reaching ban on non-competes, the NPRM provides alternatives, including (1) whether a rebuttable presumption should replace the categorical ban on non-compete clauses and (2) whether there should be exemptions or different standards for different categories of employees.[41]

Because this is an APA rulemaking, this solicitation for public comment is likely the only opportunity stakeholders will have to provide public input on both the sweeping ban and proposed alternatives. The comment period is currently scheduled to close on March 20, 2023. I encourage all interested parties to respond fully to all parts of the NPRM's solicitation of public comments.

Substantively, I oppose the proposed rule.[42] I understand that non-competes may be overused, and even abused. But a sweeping ban on essentially all non-competes is bad policy. Based on the

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[34] *Id.* at 3502.

[35] *Id.* at 3504.

[36] *Id.* at 3500-02.

[37] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule 7-8 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

[38] *See* O-I Glass, Inc., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf (Jan. 4, 2023); Ardagh Glass Group S.A., File No. 211-0182, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf (Jan. 4, 2023); Prudential Security, Inc., File No. 221-0026, https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecuritycomplaint.pdf (Dec. 28, 2022) (consent agreement accepted for public comment).

[39] *See* Prudential Security, Inc., *supra* note 38, (complaint at ¶¶ 23, 25).

[40] *See* O-I Glass, Inc., *supra* note 38; Ardagh Glass Group S.A., *supra* note 38.

[41] Notice of Proposed Rulemaking concerning the Non-Compete Clause Rule, *supra* note 33, at 3516-20.

[42] *See* Wilson, Dissenting Statement Regarding Non-Compete Clause Rule, *supra* note 37.

current record, I believe that non-compete clauses constitute an inappropriate subject for rulemaking; fact-specific inquiries are necessary. The competitive effects of a non-compete agreement depend heavily on the context of the agreement, including the business justification that prompted its adoption. In fact, that is the how courts determine whether a non-compete provision is unreasonable and unenforceable. The NPRM itself acknowledges, at least implicitly, the relevance of the circumstances surrounding adoption of non-compete clauses — when it excludes clauses associated with the sale of a business and when it contemplates excluding employment agreements for senior executives.

I also question the Commission's legal authority to undertake competition rulemaking. The Commission proposes the NPRM pursuant to Sections 5 and 6(g) of the FTC Act.[43] Section 6(g) authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of the subchapter" where the rest of Section 6(g) provides that the Commission may "from time to time classify corporations."[44] This provision was long viewed as providing authority for the Commission to adopt only procedural rules. For decades, FTC leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.[45]

Ignoring this history, the Commission embarked on a substantive rulemaking binge in the 1960s and 1970s. One substantive rule was grounded in both competition and consumer protection principles, and prompted a federal court challenge. The D.C. Circuit in 1973 held in National Petroleum Refiners[46] — in an opinion that never would be written today — that the FTC did have the power to promulgate substantive rules.

Two years later, Congress enacted the Magnuson-Moss Act,[47] which required substantive consumer protection rules to be promulgated with heightened procedural safeguards under a new Section 18 of the FTC Act. Notably, the Magnuson-Moss Act expressly excluded rulemaking for

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[43] Notice of Proposed Rulemaking concerning the Non-Compete Clause Rule NPRM, *supra* note 33, at 3482.

[44] 15 U.S.C. § 46(g.). Section 6 of the FTC Act provides

> **§46. Additional powers of Commission**
>
> The Commission shall also have power . . .
>
> **(g) Classification of corporations; regulations**
>
> From time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter.

[45] *See* Nat'l Petroleum Ref'rs Ass'n v. FTC, 482 F.2d 672, 696 nn. 38, 39 (D.C. Cir. 1973). *See also* Noah Joshua Phillips, *Against Antitrust Regulation*, American Enterprise Institute Report 3, https://www.aei.org/research-products/report/against-antitrust-regulation/ (Oct. 13, 2022) ("[T]he Conference Committee [considering legislation that created the Federal Trade Commission] was between two bills, neither of which contemplated substantive rulemaking. . . . The legislative history does not demonstrate congressional intent to give the FTC substantive rulemaking power: The House considered and rejected it, the Senate never proposed it, and neither the Conference Committee's report nor the final debates mentioned it.").

[46] Nat'l Petroleum Ref'rs Ass'n v. FTC, *supra* note 45.

[47] Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 stat. 2183 (1975).

unfair methods of competition from Section 18.[48] It was not clear whether Congress in Magnuson-Moss sought to clarify existing rulemaking authority or to grant substantive rulemaking authority to the FTC for the first time.[49]

Given this ambiguity, the Non-Compete Clause Rule likely will be challenged under the major questions doctrine, which the Supreme Court recently applied in *West Virginia v. EPA*.[50] This doctrine provides that an agency may not create a rule that will impose major social, political, and/or economic consequences unless Congress clearly grants the agency the authority to do so. Using the analysis in Justice Gorsuch's concurrence,[51] a judge will almost certainly conclude that the Non-Compete Clause Rule is a major question. For starters, it will impact roughly one-fifth of U.S. employees[52] and overturn the laws of 47 states. In addition, Congress has considered and rejected bills limiting or banning non-compete clauses,[53] an indication that the Commission is trying to work around the legislative process to resolve a question of political significance.

If a court determines that the NPRM addresses a major question, the FTC would be required to identify clear Congressional authorization to impose the regulation. But that clear authorization is unavailable. As I have discussed, the language in Section 6(g) is far from clear. The decision by Congress to omit unfair methods of competition rulemaking in the Magnuson-Moss Act, which immediately followed the decision in *National Petroleum Refiners*, adds further weight to this conclusion. And Congress did not remove the known ambiguity when it enacted the FTC Improvements Act of 1980.[54]

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[48] *See* 15 U.S.C. § 57(a)(2).

[49] *See* Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective* 48 ANTITRUST L.J. 1561, 1561 (1979) ("One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC's rulemaking powers.").

[50] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[51] *Id*. at 2600-01 (Gorsuch, J. concurring).

[52] Notice of Proposed Rulemaking concerning the Non-Compete Clause Rule, *supra* note 33, at 3485 (the "Commission estimates that approximately one in five American workers – or approximately 30 million workers – is bound by a non-compete clause).

[53] Russel Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION LAW (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/.

[54] *See* H.R. Rep. No. 96-917, 96th Cong., 2d sess. 29-30 (1980), reprinted in THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 5862 (Earl W. Kintner ed., 1982) (conference report on FTC Improvements Act of 1980 explaining that when adopting a restriction on standards and certification rulemaking brought as an unfair or deceptive act or practice, conferees were not taking a position on the Commission's authority to issue a trade regulation rule defining 'unfair methods of competition' pursuant to section 6(g). "The substitute leaves unaffected whatever authority the Commission might have under any other provision of the FTC Act to issue rules with respect to 'unfair methods of competition.'").

The Rule may also be challenged under the non-delegation doctrine, which holds that Congress cannot delegate its legislative power to another branch of government.[55] In *Schechter Poultry*,[56] the Supreme Court approved Congressional authorization for the FTC to prohibit unfair methods of competition because it enforced this law in quasi-judicial fashion.[57] But if the Commission pursues rulemaking rather than case-by-case enforcement of "unfair methods of competition," it abandons the basis for the Supreme Court's decision in that case.

I believe that challenges to a sweeping ban on non-competes will ultimately succeed.

Trade Regulation Rules and the FTC's Rules of Practice

Let's turn now to rules grounded in the FTC's UDAP authority. When Congress passed the Magnuson-Moss Act in 1974, it explicitly empowered the FTC to issue trade regulations for unfair or deceptive acts and practices.[58] But to cabin the agency's discretion, Congress imposed significant procedural obligations on the Commission.[59] Despite those congressional efforts, the agency engaged in a flurry of rulemaking activity that sought to regulate broad swaths of the economy.[60] As we've discussed, the negative reaction from stakeholders was swift. Backlash from the agency's sweeping regulatory efforts culminated in the Federal Trade Commission Improvements Act of 1980, which imposed additional procedural obligations on Section 18 rulemaking efforts.[61]

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[55] *See* Phillips, *Against Antitrust Regulation*, *supra* note 45. Five Supreme Court justices have expressed interest in reconsidering the Court's prior thinking on the doctrine, which increases the risk that a challenge may be successful. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J. concurring) (stating with respect to the nondelegation doctrine that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort"); *id.* at 2131 (Gorsuch, J., dissenting, joined by Chief Justice Roberts and Justice Thomas) (expressing desire to "revisit" the Court's approach to the nondelegation doctrine); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J, respecting the denial of certiorari); Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

[56] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[57] *Id.* at 533.

[58] Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183.

[59] Barry B. Boyer, Executive Summary of Barry B. Boyer Report. Trade Regulation Rulemaking Procedures of the Federal Trade Commission, Report in Support of ACUS Recommendation 79-1, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 41, 43 (1979) ("[T]he statutory standard governing the FTC's consumer protection activity provided few real limits…As a result, the feeling was apparently widespread among the members of the congressional committees considering the Magnuson-Moss Act that some means had to be found to control this broad discretion. The limits which Congress considered and ultimately enacted were predominantly procedural rather than substantive; the broad rulemaking delegation was retained, but the procedures for promulgating the rules were elaborated and formalized.").

[60] *See, e.g.*, Notice of Proposed Rulemaking for the Energy Labeling Rule, Dissenting Statement of Commissioner Christine S. Wilson (Dec. 22, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_ energy_labeling_rule_final12-22-2020revd2.pdf; Advance Notice of Proposed Rulemaking for Regulatory Review of the Amplifier Rule, Concurring Statement of Commissioner Christine S. Wilson (Dec. 17, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1585038/p974222amplifierrulewilsonstatement.pdf.

[61] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374. Congress required the FTC to issue an Advance Notice of Proposed Rulemaking (ANPRM) and to prepare regulatory analyses of proposed and final rules (justifying the cost and the regulatory framework); restrained the Commission's authority relating to

As Howard Beales and Tim Muris discussed in a recent paper, the agency's foray into rulemaking in the 1970s was doomed for many reasons.[62] The proposed rules lacked clear theories of consumer harm, failed to articulate a clear explanation for why practices occurred, lacked evidence about the systemic nature of challenged unfair or deceptive practices, and failed to produce a rulemaking record that could demonstrate the effectiveness of proposed remedies.[63] This torrent of rule proposals "signaled to many in the business community, Congress, and the media that the commission was embarking on a rulemaking campaign based on its own perceptions of what public policy should be rather than on actual consumer harm."[64]

Ironically, this characterization of events four decades ago also describes quite accurately the rulemaking efforts of the FTC under Chair Khan. Take, for example, the Commercial Surveillance and Data Security ANPRM.[65] It is sweeping in scope – it covers essentially all data collection practices. It poses nearly 100 questions, many of which imply that the agency will consider issues that extend beyond our legal authority.[66] And there is another problem — Section 18 rules must be based on "prevalent" deceptive or unfair practices.[67] Practices discussed in the ANPRM are presented as clearly deceptive or unfair — even though they extend far beyond practices within the FTC's extensive enforcement expertise.[68] And perhaps most troubling to me, this ANPRM threatens to derail federal legislation on the same topic.[69]

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voluntary standards and certification activities, children's advertising, and funeral industry practices; and required regular oversight hearings on Commission activities. Driven by concerns that the FTC was overregulating, the Act also allowed Congress to veto future FTC rules, although courts subsequently overturned this provision as unconstitutional. Timothy J. Muris, *Rules Without Reason*, AEI J. ON GOV'T AND SOC'Y (Sept/Oct. 1982) (describing failed FTC rulemaking proceedings), available at https://www.aei.org/articles/rules-without-reason-the-case-of-the-ftc/; Teresa Schwartz, *Regulating Unfair Practices Under The FTC Act: The Need For a Legal Standard of Unfairness*, 11 AKRON L. REV. 1 (1978) (explaining that the judicial reversals of FTC regulations resulted from a failure to establish an adequate legal basis for the regulations), available at https://ideaexchange.uakron.edu/akronlawreview/vol11/iss1/1/.

[62] TIMOTHY J. MURIS AND HOWARD BEALES, BACK TO THE FUTURE: HOW NOT TO WRITE A REGULATION (June 2022), https://www.aei.org/wp-content/uploads/2022/05/Back-to-the-Future-How-Not-to-Write-a-Regulation.pdf?x91208.

[63] *Id*. at 8-11.

[64] *Id*. at 8.

[65] Advanced Notice of Proposed Rulemaking concerning Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug 22, 2022).

[66] *See* Dissenting Statement of Commissioner Noah Joshua Phillips, Commercial Surveillance and Data Security Advanced Notice of Proposed Rulemaking 7-9 (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

[67] 15 U.S.C. § 57a(b)(3).

[68] *See* Dissenting Statement of Commissioner Noah Joshua Phillips, Commercial Surveillance and Data Security Advanced Notice of Proposed Rulemaking 4-6 (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

[69] *See* Dissenting Statement of Commissioner Christine S. Wilson, Trade Regulation Rule on Commercial Surveillance and Data Security (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Wilson%20Dissent%20ANPRM%20FINAL%2008112022.pdf.

Another recent ANPRM is also breathtaking in scope. The Junk Fees ANPRM could launch rules that regulate the way prices are conveyed to consumers across nearly every sector of the economy.[70] To be clear, I agree with ensuring that consumers have access to sufficient information to make informed decisions and I agree that consumers should not be charged for products or services they did not agree to purchase.[71] But this ANPRM extends beyond these modest goals. The Wall Street Journal Editorial Board expressed concern that the ANPRM could result in a blanket ban on fees and unbundled prices that could make markets less competitive.[72] And the ANPRM also extends beyond the enforcement experience of the agency. As noted above, Section 18 rules must be based on "prevalent" deceptive or unfair practices. Drip pricing, a significant focus of the Junk Fees ANPRM, has not been alleged, let alone litigated, in an enforcement matter.[73]

In the interest of full transparency, I should note that I have supported a couple of proposed rules in the past year. The Supreme Court's decision in *AMG* ended the Commission's use of Section 13(b) to obtain equitable monetary relief.[74] Section 13(b) was the foundation for the FTC's fraud program, which enjoyed broad bipartisan support. To enable the FTC to get monetary redress for consumers victimized by fraud, I have voted for rules that are narrow in scope, based on an extensive FTC enforcement record, and targeted at typically fraudulent activities like government impersonation.[75]

Setting aside rules aimed at fraud, the recent barrage of rules raises many questions. Can sensational news stories form the foundation of a rulemaking record to outlaw legal practices never challenged in FTC enforcement matters? Can the FTC consider practices and harms outside our jurisdiction to justify rule proposals? Do our rulemaking efforts reflect sound policies or, rather, sound politics?

While you ponder those questions, I will describe the July 2021 revisions to the FTC's Section 18 rulemaking procedures. The majority says these changes to our rules of practice eliminate "extra bureaucratic steps and unnecessary formalities."[76] In fact, those changes fast-track

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[70] Unfair or Deceptive Fees Trade Regulation Rule, Advance Notice of Proposed Rulemaking, 87 Fed. Reg. 67413 (Nov. 8, 2022).

[71] Dissenting Statement of Commissioner Christine S. Wilson, Advance Notice of Proposed Rulemaking – Junk Fees (Oct. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-feesanpr.pdf.

[72] Editorial Board, *The Junk Economics of 'Junk-Fee' Politics*, WALL ST. J., Feb. 13, 2023.

[73] Dissenting Statement of Commissioner Christine S. Wilson, Advance Notice of Proposed Rulemaking – Junk Fees (Oct. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-feesanpr.pdf.

[74] AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

[75] *See* Trade Regulation Rule on Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13951 (Mar. 11, 2022); Trade Regulation Rule on Impersonation of Government and Businesses, 87 Fed. Reg. 62741 (Oct. 17, 2022).

[76] *See* Fed. Trade Comm'n, Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf.

regulation at the expense of public input, objectivity, and a full evidentiary record.[77] Let me highlight some of those changes, and their implications.[78]

The revisions to the Rules of Practice facilitate manipulation of the fact-finding process. An independent hearing process is essential to crafting rules that address actual market failures rather than pet projects of unelected Commissioners. But power over the rulemaking process is now consolidated in the Office of the Chair. The revised rules remove selection of the Presiding Officer from an independent judge and assign that role to the Chair.

The independence of the Presiding Officer matters because that person oversees the rulemaking hearing process, which helps determine the facts on which the Commission bases its policy calls. The old process gave the public some assurance that the proceedings would be unbiased and that all points of view would be heard and considered. The new process allows the Chair to hand pick the Presiding Officer, opening the door for a fact-finding process gerrymandered to fit the Chair's agenda.[79]

The revisions also strip the Presiding Officer of significant control over the hearing process. Now, the Commission sets the agenda for the hearing, chooses which issues will be discussed, and selects which parties will be permitted to testify, conduct cross-examination, and offer rebuttal evidence. With these changes, the Commission can control which facts make it into the record — laying the groundwork for rulemakings based on cherry-picked facts that support a predetermined outcome.

Additional changes diminish opportunities for public input and hide our expert staff's assessment from review and comment. Specifically, the revisions abolish a staff report that analyzes the rulemaking record and makes recommendations as to the form of the final rule. The revisions also remove comment periods on the staff report and on the Presiding Officer's recommendations.

These changes ultimately will harm the agency. To build an adequate rulemaking record, the FTC needs to demonstrate to the courts that it has a sound basis for proposed rules. But these changes remove opportunities for the FTC to show its work. And public input on the proposed form of the final rule is valuable, particularly with respect to unintended consequences that might otherwise escape the Commission's consideration. Foregoing this input likely will reduce both the quality of final rules and the credibility of the agency.

The bottom line? The majority's changes to the rules of practice will facilitate more rules, but not better ones. These changes also will leave rules vulnerable to challenges in federal court,

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[77] 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.

[78] For a detailed discussion of the changes to the rules of practice, *see* 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.

[79] These concerns are further heightened by the hiring of Sarah Miller, formerly of American Economic Liberties Project, as a Special Advisor to the Chair.

because the new rules will be formulated pursuant to an agenda-driven process that limits public input and generates a biased evidentiary record.

Conclusion

I'd like to close with some takeaways from this discussion:

1. Turn to rules sparingly. We know their harms can be significant and may outweigh their benefits. Ideally, we would limit their use to market failures.
2. Scrutinize the proponents of a rule. Check for hidden agendas that may benefit rivals, not consumers.[80]
3. Acknowledge the immense resources that rulemakings consume, especially under Magnuson-Moss. As the Rule-A-Palooza has rolled on, the FTC's consumer protection enforcement levels have fallen even as fraud has increased.
4. Operate within the scope of authority granted by Congress. If there are policy changes we want but can't achieve without overreach – like guardrails for consumer privacy or limits on the use of non-competes – ask Congress to legislate. Does Congress sometimes disappoint us? Yes. Does that mean we can take matters into our own hands? No.
5. Play by the rules Congress has established. Cutting corners in a rulemaking process jeopardizes the quality of the final rule, as well as its legal viability.
6. Act like an independent agency. When the White House talks about junk fees, don't issue a rule of breathtaking scope, quickly cobbled together and largely untethered from FTC enforcement expertise, just to demonstrate the FTC is on the bandwagon.[81]
7. Stay within the agency's lane. The Commission is supposed to be an expert body. If we're going to make rules, they should be tethered not just to our authority, but to the areas in which we truly have expertise.

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[80] Christine S. Wilson, Remarks at the Open Commission Meeting on September 15, 2021 at 5 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596380/cw_remarks_open_commission_meeting_9_16_2021.pdf at 7 ("Without funding disclosures, the FTC and the public will be left in the dark about who is seeking to influence our rulemaking efforts, compromising the FTC's independence. The FDA has a disclosure-of-funding rule, and so should we.").

[81] Recall the outrage when President Trump proposed to direct the FTC to study the topic of content curation on social media platforms. *See* Leah Nylen, John Hendel, and Betsy Woodruff Swan, *Trump pressures head of consumer agency to bend on social media crackdown*, POLITICO, Aug. 21, 2020, https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.