



August 20, 2018

Via Electronic Submission to: www.regulations.gov

Mr. Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Public Comment for FTC Hearings on Competition and Consumer Protection in the 21st Century [Matter Number: P181201] [Docket No. FTC-2018-0048] [Topic #1]

**Comments of the Consumer Advocacy & Protection Society (CAPS) at
University of California, Berkeley, School of Law**

Dear Mr. Clark:

The [Consumer Advocacy and Protection Society](#) (“CAPS”) is a student-run organization dedicated to the promotion of consumer law and consumer protection at the University of California, Berkeley, School of Law. The Consumer Advocacy and Protection Society is pleased to submit this letter to the Federal Trade Commission (“FTC”) in response to the Commission’s upcoming Hearings on Competition and Consumer Protection in the 21st Century. Specifically, we submit this comment in response to Topic #1, or [FTC Public Comment #755](#), regarding the state of consumer protection law enforcement and its development since the Pitofsky hearings.

In her July 18th Congressional testimony, FTC Commissioner Rebecca Slaughter noted several important reforms that would equip the FTC to meet the challenging demands of an evolving marketplace: “In addition to sufficient resources . . . sufficient authority is critical for the FTC to continue to meet the demands of the 21st century marketplace. Repeal of the common-carrier exemption, APA rulemaking authority, and related civil penalty authority would each go a long way to help the FTC better meet today’s challenges as well as tomorrows.”¹ While we agree with Commissioner Slaughter that the FTC should ask Congress to repeal the common-carrier exemption, this comment focuses instead on the FTC’s civil penalty authority and Section 5 rulemaking authority under the Magnusson-Moss Act.

First, we believe that the authority to levy civil penalties against first-time violators is an essential tool to sufficiently deter unfair and deceptive business conduct. The FTC should therefore ask Congress for discretionary civil penalty authority against first-time Section 5 violations. Second, because we believe the Commission’s current Section 5 rulemaking procedure under Magnusson-Moss is demonstrably broken, the FTC should ask Congress for Section 5 rulemaking authority under the Administrative Procedure Act (“APA”).

I. Discretionary Civil Penalty Authority Against First-Time Section 5 Violations

The FTC should formally ask Congress to grant the Commission discretionary authority to levy civil penalties against first-time Section 5 violations.² Currently, the FTC cannot obtain civil

¹ U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 43:39–43:58 (July 18, 2018), available at <https://www.c-span.org/video/?448609-1/ftc-officials-testify-house-oversight-hearing>.

² Joan Z. Bernstein & Ann Malester, *Federal Trade Commission: Consumer Protection and Competition for a 21st-Century Economy*, in *CHANGE FOR AMERICA: A PROGRESSIVE BLUEPRINT FOR THE 44TH PRESIDENT* 421 (Mark Green & Michele Jolin eds., 2009) (“The FTC’s law enforcement efforts are [] sometimes thwarted by legal hurdles that make it hard for it to obtain monetary penalties from wrongdoers or those assisting wrongdoers. The agency should therefore consider seeking legislative authority to obtain civil penalties for violations of Section 5 . . .”).

penalties unless a company violates a pre-existing consent order or FTC rule, such as the Telemarketing Sales Rule. Therefore, when the FTC prosecutes first-time Section 5 violations it generally can only obtain injunctive relief and restitution.

As important as these remedies are, injunctive relief and restitution cannot provide adequate deterrence on their own unless coupled with discretionary civil penalty authority. In the words of FTC Chairman Joe Simons, “[I]f . . . we can only get an injunction that just says ‘sin no more,’ then that is much less of a deterrent than if we could get monetary penalties that would actually cause the business to think through how it is conducting its business.”³ Moreover, as Commissioner Rohit Chopra explained during his recent Congressional testimony,⁴ simply telling a business to stop an illegal practice once caught—without levying any monetary penalty other than reimbursing the wrongful gains—essentially leaves the business in nearly the same position it would have occupied had it never violated the law in the first place.⁵ This not only creates insufficient deterrence against misconduct, but is also unfair to competitors who play by the rules.

³ U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 1:01:41–1:02:25.

⁴ U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 1:06:00–1:06:38 (July 18, 2018) (“The question you’re raising about whether on a first offense there should be penalties, I think that in order to deter misconduct, we need to consider when it’s appropriate that even on a first offense the lack of penalties may not serve as adequate deterrence.”).

⁵ See cf. James L. Thompson, *Citizen Suits and Civil Penalties under the Clean Water Act*, 85 MICH. L. REV. 1656–80, 1671 (1987) (“Permitting . . . civil penalties for past violations . . . induc[es] compliance by forcing the violator, before [violating], to consider the threat of quasi-punitive, economic sanctions.”); James C. Lydon, *The Deterrent Effect of the Uniform Trade Secrets Act*, 69 J. PAT. & TRADEMARK OFF. SOC’Y 427 (1987) (finding that an inability to assess civil penalties against violators of trade laws “unduly favors a policy of unfettered competition at the expense of the legitimate state interest in deterring unethical commercial conduct.”).

The notion that injunctive relief and restitution alone can produce sufficient deterrence is predicated on a number of unwarranted assumptions: first, it assumes that the FTC identifies 100% of cases in which businesses commit Section 5 violations; second, it assumes that the FTC prosecutes 100% of those cases; third, it assumes that courts successfully find liability in 100% of cases where liability is proper; fourth, it assumes that the FTC can obtain a perfect remedy entailing 100% of the defendant's wrongful gain after liability is found.

The problems with these assumptions are clear on their face. But even if all of these assumptions were true, taxpayers would still be essentially subsidizing corporate wrongdoing by publicly funding a consumer protection agency that can only seize precisely the amount of money earned illegally and not a penny more.⁶

The FTC should have the discretion to levy monetary penalties against certain first-time Section 5 offenders to promote deterrence. “[I]nadequate levels of sanctions are . . . a major matter for concern” in consumer protection law.⁷ “Consumers rely upon public regulation to ensure that dangerous products do not reach the market, and this can only be done if a sufficient deterrent is available.”⁸ Allowing civil penalties may be the only way to effectively deter unfair and deceptive conduct in the marketplace.⁹ Indeed, “the cost to sellers of ascertaining whether [a] particular[ly]”

⁶ See Laura Nader, *Disputing without the Force of Law*, 88 YALE L.J. 998, 1001 (1979) (“The consumer suffers from a doubly disadvantaged position: he has to bear the full cost of legal fees, while businesses can deduct litigation costs as a business expense and the public bureaucracy’s legal costs are ultimately paid by the consumer.”).

⁷ PETER CARTWRIGHT, CONSUMER PROTECTION AND THE CRIMINAL LAW: LAW, THEORY, AND POLICY IN THE UK 155 (2009).

⁸ *Id.*

⁹ See Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127 (2009) (discussing “the remedial functions of civil penalties,” including: deterrence, compensation, and remediation).

egregious practice could produce civil penalties “may deter them” from engaging in such dubious conduct in the first place.¹⁰

In fact, Chairman Simons noted in his Congressional testimony that civil penalty authority is crucial to creating deterrence against privacy and data protection violations.¹¹ However, there is no reason to restrict civil penalties solely to the privacy and data protection realm. Chairman Simons supports civil penalty authority for privacy violations because of the difficulty the FTC faces in measuring consumer harm in privacy cases. But the FTC faces this same difficulty in many other contexts. For example, it can be difficult to prove injury and materiality in deception cases where consumers may have purchased the product for reasons unrelated to the challenged claim.¹² But a deceptive claim about a product remains equally deceptive regardless of whether a consumer purchases the product for other reasons. Society has an inherent interest in deterring deceptive claims, and civil penalty authority would go a long way in fulfilling that interest.

The FTC should have broad discretionary authority to seek penalties against any Section 5 violation it deems worthy of civil penalties. This is not to suggest that the FTC should add on civil penalties to each and every Section 5 complaint. Rather, the FTC should have the *discretion* to

¹⁰ Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661–701, 688 (1977).

¹¹ U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 46:40–46:55.

¹² See Patricia Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AMER. U. L. REV. 849, 893 (1984) (“Typically, many preferences influence a consumer’s decision to purchase a product or service with no single one being determinative. In many cases, especially in those involving advertising, it would be extremely difficult to establish that a particular misrepresentation caused consumers to choose differently, and even more difficult to show that they were ‘injured’ by the different choice.”); Jeff I. Richards & Ivan L. Preston, *Proving and Disproving Materiality of Deceptive Advertising Claims*, 11(2) J. PUB. POL’Y & MARK. 45–56 (1992).

seek civil penalties in certain cases involving egregious or intentional unfair or deceptive conduct.¹³

The use of punitive measures to create deterrence is far from a novel concept.¹⁴ Indeed, state and international antitrust laws frequently include both criminal and civil penalty provisions as a means to deter future violations.¹⁵ When considered in light of the criminal remedies available in antitrust law, the availability of civil penalties in the consumer protection context should be welcomed by industry as a reasonable compromise.

II. Section 5 Rulemaking under the APA

The FTC should formally ask Congress to restore its Section 5 rulemaking authority under the Administrative Procedure Act.¹⁶ “The commission already possesses generalized rulemaking authority under the Magnusson-Moss Act,^[17] but the process is slow and cumbersome.”¹⁸ The Magnusson-Moss Federal Trade Improvements Act of 1975 “imposed a number of procedural requirements on the FTC . . . in addition to following the ‘notice and comment’ procedures required

¹³ Cf. James C. Lydon, *The Deterrent Effect of the Uniform Trade Secrets Act*, 69 J. PAT. & TRADEMARK OFF. SOC’Y 427 (1987) (“Authorizing the discretionary imposition of such punitive sanctions . . . provides a proper balance among society’s interests in deterrence of unethical business conduct [and] unfettered legitimate competition . . .”).

¹⁴ SEE GENERALLY PETER CARTWRIGHT, *CONSUMER PROTECTION AND THE CRIMINAL LAW: LAW, THEORY, AND POLICY IN THE UK* (2009) (discussing comparative approaches to using civil penalties and criminal prosecution to deter violations of trade laws).

¹⁵ Cf. Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 132–41 (2009) (discussing the widespread use of civil penalties in international and state antitrust actions).

¹⁶ Cooper J. Spinelli, *Far From Fair, Farther From Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking*, 6(1) LEGISLATION & POLICY BRIEF 129–70 (2014), available at: <http://digitalcommons.wcl.american.edu/lpb/vol6/iss1/3>.

¹⁷ See Federal Trade Commission Improvements Act of 1975, P.L. 93–637, § 202(a), 88 Stat. 2193 (1975), as amended and codified at 15 U.S.C. § 57(a) (1976).

¹⁸ Joan Z. Bernstein & Ann Malester, *Federal Trade Commission: Consumer Protection and Competition for a 21st-Century Economy*, in *CHANGE FOR AMERICA: A PROGRESSIVE BLUEPRINT FOR THE 44TH PRESIDENT* 413–22 (Mark Green & Michele Jolin eds., 2009).

by the Administrative Procedure Act (APA).”¹⁹ In the subsequent Federal Trade Commission Improvement Acts of 1980 and 1994, Congress augmented these procedural requirements by imposing further restrictions on FTC rulemaking.²⁰ These rulemaking requirements went “substantially beyond” those of the APA.²¹ Unlike the APA, “Magnusson-Moss requires as many as 18 detailed steps before the FTC may issue a final rule, and by most estimates that process can take as long as ten years.”²²

The FTC has issued only seven rules under Magnusson-Moss following the 1980 FTC Improvements Act. The amount of time it took to issue these rules averages at 2035 days or 5.57 years.²³ “There were also several other rulemakings that did not ultimately result in rules but nonetheless went on for many years. . . . Because the date of the formal termination of these rulemakings is often not clear, the average of 8.66 years for these unsuccessful rulemakings is probably an underestimate.”²⁴ In contrast, the FTC’s rules issued before the Magnusson-Moss Act averaged 1086 days, or 2.94 years.²⁵

In fact, the FTC’s Section 5 rulemaking under Magnusson-Moss is so burdensome that it is practically a non-starter. Rather than engage in years of rulemaking activity with an already

¹⁹ TIMOTHY MURIS ET AL, *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION & BUREAUCRATIC BEHAVIOR* 162 (1981).

²⁰ Cooper J. Spinelli, *Far From Fair, Farther From Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking*, 6(1) *LEGISLATION & POLICY BRIEF* 129–70, 133 (2014).

²¹ TIMOTHY MURIS ET AL, *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION & BUREAUCRATIC BEHAVIOR* 162 (1981).

²² David A. Balto, *Bring the FTC into the 21st Century*, *THE HILL* (May 4, 2010), available at <http://thehill.com/opinion/op-ed/95947-bring-the-ftc-into-the-21st-century>.

²³ Jeffrey S. Lubbers, *It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 *GEO. W. L. REV.* 1979, 1988–89 (2015).

²⁴ Jeffrey S. Lubbers, *It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 *GEO. W. L. REV.* 1979, 1988–89 (2015).

²⁵ Jeffrey S. Lubbers, *It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 *GEO. W. L. REV.* 1979, 1987 (2015).

underfunded budget, the FTC is often forced to abandon rulemaking efforts altogether to instead focus on individual enforcement actions. Thus, rulemaking under Magnusson-Moss is “strict in theory and fatal in fact.”²⁶ This was not the intent behind reforming FTC rulemaking in the 1970s. The intent was to *limit* Section 5 rulemaking, not end it altogether.²⁷ Indeed, the American Bar Association’s 1980 report on the FTC’s rulemaking procedures proclaimed: “Rulemaking by the Federal Trade Commission is a legitimate and important administrative procedure which should be preserved.”²⁸ But rather than preserve the FTC’s Section 5 rulemaking authority, the Magnusson-Moss Act has helped destroyed it. Four decades later, the good intentions underlying Magnusson-Moss “have helped entrench, if not exacerbate, the very problems Congress sought to ameliorate.”²⁹ The time has come to reverse this mistake by restoring the FTC’s Section 5 rulemaking authority under the APA.

As important as it is, *ex post* case-by-case enforcement can only go so far in deterring unwanted business conduct. If the FTC wants to see broad industry-wide changes in practices, the only effective means is through *ex ante* rulemaking:

[I]t is more difficult to issue broad, meaningful rules in cases of adjudication where the Commission is seeking justice in the individual case being prosecuted. It is also true that adjudicative rules have retroactive effect, thus working unforeseen hardships on the first groups prosecuted and resulting in an unfair stigmatization of those individuals as lawbreakers. Given the Commission’s necessarily limited resources, continued restriction to the use of less efficient cease and desist orders may, in effect, prevent it from providing adequate protection to the consumer. By

²⁶ Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²⁷ See Gerald Thain, *Suffer the Hucksters to Come Unto the Little Children - Possible Restrictions of Television Advertising to Children under Section 5 of the Federal Trade Commission Act*, 56 B.U. L. REV. 651 (1976).

²⁸ *Report of the Section Concerning FTC Trade Regulation Rulemaking Procedures Pursuant to the Magnusson-Moss Act*, 49 ANTITRUST L.J. 347, 350 (1980).

²⁹ Cooper J. Spinelli, *Far From Fair, Farther From Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking*, 6(1) LEGISLATION & POLICY BRIEF 129–70, 134 (2014).

issuing rules, an agency may be better equipped to utilize the expertise of its staff to make industry-wide rulings which would provide advance guidance as to the lawful limits of industry action.³⁰

As former Commissioner Terrell McSweeney once wrote, “[S]ome harms to innovation are hard to detect and equally hard to remedy through *ex post* enforcement. In those situations a hybrid system of clear, appropriately tailored *ex ante* rules coupled with *ex post* enforcement may be justified.”³¹

The FTC’s current enforcement-based framework often produces industry complaints that “the FTC does not provide sufficiently clear guidance on how and when it uses its generalized authority.”³² In contrast to an enforcement-heavy approach, rulemaking can better provide the guidance and certainty that industry seeks. Moreover, rulemaking is also more participatory and inclusive of industry-wide concerns than enforcement. If FTC policies are issued through the rulemaking process as opposed to embedded in individual enforcement actions, “[T]he views of interested persons excluded in a case-by-case adjudicatory process would be considered.”³³ In fact, Commissioner Chopra pointed this out in his recent congressional testimony, explaining that “The development of rules is a much more participatory process than individual enforcement actions, and it also gives clear notice to the marketplace rather than being surprised.”³⁴

Industry concerns that the FTC would abuse APA Section 5 rulemaking authority are unfounded. However unwise one may perceive the FTC’s regulatory actions to have been in the

³⁰ *Denial of FTC Rulemaking*, 1973 DUKE L.J. 345–46 (1973).

³¹ Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, 32 BERKELEY TECH. L.J. 1027, 1039 (2017). See also David Vladeck, *Charting the Course: The Federal Trade Commission’s Second Hundred Years*, 83 GEO. W. L. REV. 1979, 2109 (2015) (noting “the confines of the Commission’s Section 5 deception and unfairness authority.”).

³² Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, 32 BERKELEY TECH. L.J. 1027, 1038 (2017).

³³ *Denial of FTC Rulemaking*, 1973 DUKE L.J. 345 (1973).

³⁴ U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 52:54–53:11.

1970s, the FTC's recent regulatory actions show that the agency has reformed its approach. The notion that the FTC would abuse Section 5 APA rulemaking is belied by the agency's proper exercise of APA rulemaking authority under specific congressional mandates. "Congress has given the FTC specific legislative authority to perform regular APA rulemaking on particular topics," and the FTC has not abused that authority.³⁵ For example, "Congress has granted the FTC APA rulemaking authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act and the Children's Online Privacy Protection Act. There is simply not a scintilla of evidence of regulatory abuse by the FTC under those Acts. There is no reason to expect anything different from extending APA authority to the full range of conduct protected by the FTC."³⁶

Moreover, the regulatory landscape has vastly changed since the Magnusson-Moss Act first curtailed the FTC's rulemaking power in 1975:

These changes include enactment of the Regulatory Flexibility Act, Paperwork Reduction Act, and the Small Business Regulatory Enforcement Fairness Act (which includes the Congressional Review Act), and changes at the FTC itself including refinements in the deception and unfairness standards (including the Commission's policy statement defining "deceptive" acts and practices, and a statutory definition of "unfair" practices added by the FTC Act Amendments of 1994) and the practice of conducting preliminary and final regulatory analyses for FTC Act rules.³⁷

These changes should further allay industry concerns warning against APA Section 5 rulemaking.

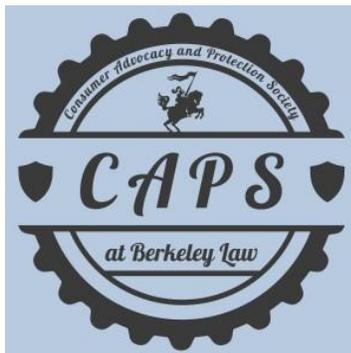
Equipping the FTC with APA Section 5 rulemaking would enable the FTC to more promptly and efficiently respond to pressing regulatory needs. Instead of having to depend on

³⁵ Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. W. L. REV. 1979, 1990 (2015), available at <https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1979.pdf>.

³⁶ David A. Balto, *Bring the FTC into the 21st Century*, THE HILL (May 4, 2010), available at <http://thehill.com/opinion/op-ed/95947-bring-the-ftc-into-the-21st-century>.

³⁷ Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. W. L. REV. 1979, 1997 (2015).

lobbying Congress each time the FTC needs a new rule, it could initiate needed rules on its own. Indeed, Chairman Simons stated during his congressional testimony that if the FTC had APA rulemaking authority, he would direct FTC staff to begin a rulemaking proceeding for privacy and data protection.³⁸ He went on to explain that although the FTC could technically start a rulemaking proceeding immediately under Magnusson-Moss, the process would be “time consuming” and “resource-intensive.”³⁹ Is there any better evidence that rulemaking under Magnusson-Moss is broken than this? There is broad bipartisan agreement that privacy and data security are issues in desperate need of regulation, and Chairman Simons clearly wants to regulate them. Yet despite his desire to initiate rulemaking over the industry, the FTC is hamstrung from doing so because of the Magnusson-Moss Act. Instead, the FTC is entirely dependent on Congress to grant it specific APA rulemaking authority over the industry. This process is inefficient and unnecessary. For the FTC to meet the demands of a rapidly evolving marketplace, Congress must grant the agency general APA rulemaking over Section 5 as a whole.



Sincerely,

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³⁸ U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 53:44–53:50.

³⁹ U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 54:15–54:23.