

Concurring Statement of Commissioner Christine S. Wilson
Advance Notice of Proposed Rulemaking for Regulatory Review of the Amplifier Rule

December 17, 2020

I support the Commission’s decision to issue a Federal Register Notice to initiate its decennial review of the Amplifier Rule, in particular because the Notice seeks comments on several topics, including the Rule’s costs and benefits and whether the Commission should repeal or amend the Rule.

The Amplifier Rule was created in the 1970s, an era during which the FTC engaged in prolific rulemaking. During one 15-month period, the Commission issued a rule a month.¹ No area of commerce was too straightforward to escape the Commission’s notice.

- The Sleeping Bag Rule and the Tablecloth Rule specified the “cut size” of fabric to be “accompanied by a clear and conspicuous disclosure of the dimensions of the finished products and an explanation that those dimensions constituted the finished size.”²
- The Guides for Labeling, Advertising and Sale of Wigs and Other Hairpieces addressed representations and disclosures in the advertising and labeling of hairpieces for women and men, including wigs, falls, chignons and toupees. These Guides included detailed disclosure requirements related to hair composition, including instructions for determining the composition of the product (“the ratio of the weight of each type of hair fiber to the total weight of hair fiber in the product”).³
- The Trade Regulation Rule concerning the Failure to Disclose the Lethal Effects of Inhaling Quick-Freeze Aerosol Spray Products Used for Frosting Cocktail Glasses, known colloquially as the Quick-Freeze Spray Rule, required a clear and conspicuous warning on aerosol spray products used for frosted beverage glasses.⁴

In March 1978, the Commission considered a Rule regarding advertising to children that prompted the Washington Post to characterize the FTC as the “National Nanny.”⁵ In response to the FTC’s regulatory zest, Congress (with both the Senate and the House controlled by Democrats) passed the Federal Trade Commission Improvements Act of 1980 that implemented

¹ Alex Propes, Privacy & FTC Rulemaking Authority: A Historical Context, IAB (Nov. 6, 2018), <https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context/>

² <https://www.ftc.gov/news-events/press-releases/1995/05/sleeping-bag-rule-and-tablecloth-rule>;
16 C.F.R. § 404, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/trade-regulation-rule-deceptive-advertising-and-labeling-size-tablecloths-and-related-products-16/950523advertisingandlabelingasto.pdf;

16 C.F.R. § 400, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/trade-regulation-rule-concerning-advertising-and-labeling-size-sleeping-bags-16-cfr-part-400/951220advertisingandlabeling.pdf

³ 16 C.F.R. § 252.2 n.2, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-labeling-advertising-and-sale-wigs-and-other-hairpieces-16-cfr-part-252/950809wigsandother.pdf

⁴ 16 C.F.R. § 417, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/trade-regulation-rule-concerning-failure-disclose-lethal-effects-inhaling-quick-freeze-aerosol-spray/951221failuretodisclose.pdf

⁵ The FTC as National Nanny, WASH. POST (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/?noredirect=on&utm_term=.5e02c4575a42

changes to the FTC’s rulemaking authority to curtail the FTC’s over-zealous rulemaking agenda.⁶

In the early 1990s, the FTC began systematically reviewing its Rules and Guides every ten years; this process resulted in the repeal of more than 40 of the Commission’s Rules and Guides.⁷ I applaud the FTC’s efforts to rescind unnecessarily prescriptive regulations that do not benefit consumers but can cause harm to competition by increasing costs and potentially limiting innovation. I urge the Commission to continue these efforts and approach our Rule and Guide reviews with the goal of purging the last vestiges of the FTC’s 1970s practices that earned it the sobriquet of the “second most powerful legislature in Washington.”⁸

With respect to the Amplifier Rule, there have been many technological advances in the amplifier industry since this Rule was promulgated. Although the FTC has updated and no doubt can continue to update the rule, I question whether the FTC’s continued engagement in this space is constructive. Does it remain helpful for the FTC to specify the precise testing conditions manufacturers must use, and how they must communicate power output?⁹ Are there standard setting organizations¹⁰ better suited to this task? In other industries, the FTC has repealed Rules when it determined the agency’s guidance was no longer necessary. For example, the FTC repealed the Picture Tube Rule because the Commission determined it was no longer necessary to prevent deceptive claims regarding the size of television screens or to encourage uniformity and accuracy in their marketing.¹¹ Could the same be true here?

Freeing businesses from unnecessarily prescriptive requirements benefits consumers.¹² I encourage the Commission to continue to review its roster of Rules and Guides with a

⁶ See Alex Propes, Privacy & FTC Rulemaking Authority: A Historical Context, IAB (Nov. 6, 2018), <https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context/>

⁷ https://www.ftc.gov/system/files/documents/one-stops/retrospective-review-ftc-rules-guides/rescinded-rules_and_guides.pdf

⁸ See, e.g., J. Howard Beales III & Timothy J. Muris, FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?, 83 GEO. WASH. L. REV. 2157, 2159 (2015) (quoting Jean Carper, The Backlash at the FTC, WASH. POST, Feb. 6, 1977, at C1).

⁹ See, e.g., 16 C.F.R. §§ 432.2 and 432.3

¹⁰ See, e.g., Sony Comment, 2018 Rulemaking Proceeding (Oct. 9, 2018), https://www.ftc.gov/sites/default/files/documents/public_comments/trade-regulation-rule-relating-power-output-claims-amplifiers-utilized-home-entertainment-products/534789-00003.pdf

¹¹ <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21803.pdf>

¹² See Nicholas Buchholz, Spatial Equilibrium, Search Frictions and Dynamic Efficiency in the Taxi Industry 37 (February 3, 2020) (unpublished manuscript) (describing how under relaxed regulations on taxi pricing “prices will fall by around 10-20% [...] driver profits improve as utilization rates increase 6-10%” resulting in “[t]otal welfare gains up to 8.2% and consumer welfare gains up to 20.7%”), https://scholar.princeton.edu/sites/default/files/nbuchholz/files/taxi_draft_2019_sm.pdf; Derek Thompson, How Airline Ticket Prices Fell 50% in 30 Years (and Why Nobody Noticed), THE ATLANTIC, Feb. 28, 2013, <https://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/>; James M. MacDonald & Linda C. Cavalluzzo, Railroad Deregulation: Pricing Reforms, Shipper Responses, and the Effects on Labor, 50 ILR REV. 80, 90 (1996) (concluding that because of railroad deregulation, “shippers switched to low-cost methods of transport, productivity measures grew sharply, shipping rates fell, and carrier profits grew”); Steven A. Morrison & Clifford Winston, The Dynamics of Airline Pricing and Competition, 80 AM. ECON. REV. 389, 390 (1990) (“On average, deregulated fares are lower than regulated fares by 18 percent, amounting to an average annual savings to travelers of roughly \$6 billion (1988 dollars).”)

deregulatory mindset. When the Commission conducts a review of a Rule or Guide, we regularly ask if the regulation is still necessary. We ask about the costs and benefits to businesses and consumers; conflicts with state, local, federal or international laws; whether consumer perceptions have changed; and the effect, if any, that changes in relevant technological, economic or environmental conditions have had on Rules and Guides. This process facilitates the Commission's analysis of whether prior instances of regulatory overreach can be repealed for the benefit of both consumers and competition. I encourage the Commission to continue its practice of being receptive and responsive to input from stakeholders, and I look forward to reviewing the comments we receive regarding this Rule.