



STATEMENT OF THE COMMISSION

Regarding the Adoption of Revised Section 18 Rulemaking Procedures

July 9, 2021

The FTC’s revisions to Parts 0-1 of the Commission’s Rules of Practice will bring the Commission’s procedures for promulgating Trade Regulation Rules under Section 18 of the FTC Act in line with the statute’s requirements. These changes reflect the Commission’s serious appreciation of its statutory obligation to “avoid unnecessary costs or delay”¹ in those proceedings and our commitment to using all of our available tools robustly to protect consumers from the unfair and deceptive tricks and traps they face in our modern economy.

I. Background.

The mandate of the Federal Trade Commission is to address “unfair or deceptive acts or practices” and “unfair methods of competition” in or affecting commerce. In 1975, Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act² laying out specific procedures for the promulgation of “Trade Regulation Rules” to protect consumers in a dynamic and changing economic landscape. Indeed, the Commission rightfully responded to this grant of authority by initiating more than a dozen rulemakings in the few months and years after its passage.³ Yet, in the intervening decades, we have nearly abandoned using Section 18 rulemaking as it was intended: to provide a participatory, dynamic process for setting out clear conduct rules for industry.

The change in approach began in the early 1980s amid a broad deregulatory wave, including at the Commission. The Federal Trade Commission Improvements Act of 1980 instituted some lasting revisions around the edges of FTC rulemaking, including adding a requirement to issue an Advance Notice of Proposed Rulemaking (ANPRM) before initiating rulemaking.⁴ However, the true and lasting changes to the FTC were self-imposed limitations through bureaucratic organization.

The FTC of the 1980s sought to radically reduce the agency’s rulemaking capacity. A fundamental part of that posture are the agency-promulgated Rules of Practice. Parts 0 and 1 of these Rules shape Commission behavior and process for Section 18 rulemaking. The imposition of requirements beyond what Congress provided in statute has led to the widespread belief

¹ 15 U.S.C. § 57a(c)(2).

² Pub. L. No. 93-637, 88 Stat. 2183 (1975).

³ Though few of the Trade Regulation Rules from that initial burst of Section 18 activity have survived the ensuing deregulatory backlash, many other TRRs under various FTC authorities have continued to provide important regulatory guidance on issues of public concern. Among those are the Negative Option Rule (16 C.F.R. 425.1); the Franchise Rule (16 C.F.R. pt. 436); the Business Opportunity Rule (16 C.F.R. pt. 437); the Credit Practices Rule (16 C.F.R. pt. 444); the Funeral Rule (16 C.F.R. pt. 453); and the Eyeglass Rule (16 C.F.R. pt. 456).

⁴ Pub. L. No. 96-252, § 8(a)(3).

among some commentators and policymakers that Section 18 rulemaking is too difficult to address many of the unfair and deceptive practices prevalent in the economy today.

II. Changes to the Rules of Practice.

These changes to the Rules of Practice realign Commission practice with our statutory requirements and remove those extraneous and onerous procedures that serve only to delay Commission business. These streamlined Section 18 rules still provide far greater transparency, process, and opportunity for the public and businesses alike to be heard than APA notice-and-comment rulemaking procedures.

These changes include providing the Commission with greater accountability and control over Section 18 rulemaking including deciding the final list of disputed material facts to be resolved, deciding who will make oral presentations to the Commission and who will cross examine or present rebuttals submissions. The chair will now either serve as or designate the Chief Presiding Officer and the Commission will ensure orderly conduct for those rulemakings. Previously, the Chief Administrative Law Judge was designated as Chief Presiding Officer in Part 0, which reinforced the myth that Section 18 rulemakings required elaborate, interminable judicial processes instead of straightforward public participation. Additionally, these streamlined provisions allow Commission to designate disputed issues of material fact earlier in the rulemaking proceeding with the issuance of the Notice of Proposed Rulemaking (NPRM) and avoid delaying proceedings with unrelated matters late in the process.

These procedures also enhance Commission transparency by requiring that records of both written and oral communications to a Commissioner or their advisors during a rulemaking proceeding will be placed in the rulemaking record and be available to the public.

The revised rules respect the underlying statutory requirements of Section 18 that provide ample transparency and opportunity for public participation in the promulgation of Trade Regulation Rules. These requirements include: the publication of an ANPRM for comment; the advance submission of the ANPRM to our congressional oversight committees; the publication of an NPRM; the advance submission of the NPRM to the congressional committees; an informal hearing to resolve any disputed issue of material fact; and publication of a Final Rule accompanied by a statement of basis and purpose.⁵ These statutory guidelines provide for substantially greater public engagement and congressional oversight than the Administrative Procedure Act, under which most federal rulemaking is conducted. The Commission's rules of practice should—and now do—adhere closely to this statutory framework.

III. Conclusion.

Revitalizing the Commission's ability to issue timely Trade Regulation Rules under Section 18 will provide much needed clarity about how our century-old statute applies to contemporary economic realities and will allow the FTC to define with specificity what acts or practices are unfair or deceptive under Section 5 of the FTC Act.

⁵ 15 U.S.C. § 57a.

Prospective trade rules will give businesses and consumers concrete guidance about their responsibilities and rights. Importantly the Commission will be able to exercise its prosecutorial discretion to seek a wide variety of relief, including redress, civil monetary penalties, reformation of contracts, and other relief, against first-time violators of Trade Regulation Rules under Section 19 of the FTC act. While rulemaking is no substitute for a permanent fix to our Section 13(b) authority to obtain monetary relief, trade rules can help ensure that businesses will no longer be able to take advantage of consumers and cement their market position by engaging in practices that do people real harm until we catch them and take them to court the first time.

Self-imposed red tape has only created uncertainty and delay for the important business of this Commission. The imposition of those requirements decades ago was the FTC's signal to the business world that the brief era of Section 18 rulemaking had come to an end. With the adoption of these streamlined procedures we wish to signal a change in Commission practice and ambition: that we intend to fulfil our mission to protect against unfair and deceptive practices in commerce and provide consumers and businesses with due process, clarity, and transparency while crafting the rules to do so.