

**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

Regulations, even well-intentioned ones, frequently displace competition, stifle innovation, raise the costs of doing business, limit consumer choice, and increase the prices that consumers must pay. Poorly conceived regulations impose these harms and simultaneously undermine America’s global competitiveness.<sup>1</sup> For these reasons, rulemaking authority should be employed judiciously, and for the narrow purpose of addressing market failures.

During the past few years, our colleagues have advocated for regulation upon regulation, in industry after industry.<sup>2</sup> Recasting the Federal Trade Commission as a regulator of last resort is not a new idea, and history shows it is not a good one.<sup>3</sup> But our colleagues leave little doubt that regulation, not competition, is the goal. Lest there be any quibble about that, the revisions to the Rules of Practice we adopted last week strike the following sentences from the description of the FTC’s Bureau of Competition:

“The Bureau’s work aims to preserve the free market system and assure the unfettered operation of the forces of supply and demand. Its activities seek to ensure price competition, quality products and services and efficient operation of the national economy.”

The deletion of this description makes clear the majority’s intention to embark on a sweeping campaign to replace the free market system with its own enlightened views of how companies should operate, and to replace the goals of price competition, quality, and efficiency with subjective and as-yet-unstated goals that are ripe for political manipulation. The revisions thus confirm the suggestion elsewhere that the majority intends to jettison the consumer welfare

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<sup>1</sup> See, e.g., *Regulatory Review of Safeguards Rule*, Dissenting Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson (Mar. 5, 2019), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1466705/reg\\_review\\_of\\_safeguards\\_rule\\_cmr\\_phillips\\_wilson\\_dissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1466705/reg_review_of_safeguards_rule_cmr_phillips_wilson_dissent.pdf); *Notice of Proposed Rulemaking: Energy Labeling Rule*, Dissenting Statement of Christine S. Wilson (Dec. 10, 2018), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1433166/2018-12-7\\_statement\\_of\\_c\\_wilson\\_energy\\_labeling.pdf](https://www.ftc.gov/system/files/documents/public_statements/1433166/2018-12-7_statement_of_c_wilson_energy_labeling.pdf). See also Christine S. Wilson, Prepared Remarks at the Federalist Society The Future of Rulemaking at the FTC, Hey, I’ve Seen This One: Warnings for Competition Rulemaking at the FTC (June 9, 2021), available [https://www.ftc.gov/system/files/documents/public\\_statements/1591666/wilson\\_statement\\_back\\_to\\_the\\_future\\_of\\_rulemaking.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf).

<sup>2</sup> See, e.g., Rohit Chopra and Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 86 University of Chicago Law Review 357 (2020), available at [https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\\_Rulemaking\\_87UCLR357.pdf](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf); Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter at the Consumer Federation of America’s Virtual Consumer Assembly (May 4, 2021), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughter-cfa-virtual-consumer-assembly.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughter-cfa-virtual-consumer-assembly.pdf).

<sup>3</sup> As children of the 1970s, we leave for another day the discussion of why there is enthusiasm in any camp for reviving the economic policies of that decade. American consumers derived little benefit from higher prices, constrained supply, and less choice, while American companies lost ground to overseas competitors.

standard that has guided antitrust enforcement under both Democrat and Republican administrations for decades.<sup>4</sup>

*Better* regulation—which is not the same as *more* regulation—ought to be the goal. By reducing transparency and objectivity in the rulemaking process, the revisions to our Section 18 procedures move us away from that goal and toward more—and *worse*—regulation.

Although Congress empowered the FTC to issue trade regulations when it passed the Magnuson-Moss Act,<sup>5</sup> it imposed significant procedural obligations on the Commission to cabin its discretion.<sup>6</sup> Despite those congressional efforts, the agency engaged in a flurry of rulemaking activity that sought to regulate broad swaths of the economy in the wake of Magnuson-Moss.<sup>7</sup> This period of hyperactivity famously included an effort aimed at children’s advertising (the so-called “Kid-Vid” rulemaking) that sought, among other things, to ban all advertising on television programs for children under 8 years of age. The negative reaction from businesses and many in Congress was swift.<sup>8</sup> The Washington Post accused the agency of attempting to serve as the “national nanny.”<sup>9</sup> A Senate Report found that the agency’s rulemaking efforts were filled with “excessive ambiguity, confusion, and uncertainty.”<sup>10</sup> 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.<sup>11</sup> Yet again,

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<sup>4</sup> Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips on the New “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ under Section 5 of the FTC Act” (July 9, 2021).

<sup>5</sup> Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183.

<sup>6</sup> 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.”).

<sup>7</sup> Commissioner Wilson has described some of these rulemaking initiatives in recent statements. 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](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](https://www.ftc.gov/system/files/documents/public_statements/1585038/p974222amplifierrulewilsonstatement.pdf).

<sup>8</sup> Supporters of the Magnuson-Moss Act and the FTC Improvements Act of 1980 included then-Senator Joe Biden, who also voted to abolish the Interstate Commerce Commission and the Civil Aeronautics Board because of the recognition of the negative impact that those massive regulatory regimes had on consumers.

<sup>9</sup> *The FTC as National Nanny*, The WASH. POST (Mar. 1, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/>.

<sup>10</sup> S. REP. NO. 96-500, at 3 (1979).

<sup>11</sup> Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374. Our colleagues characterize the law as “instituting some lasting revisions around the edges of FTC rulemaking.” But the changes were significant. 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

Congress cabined the agency’s discretion—a rebuke to the agency’s regulatory enthusiasm that Ernest Gellhorn characterized as “The Wages of Zealotry.”<sup>12</sup>

The majority asserts that the revisions to Section 18 procedures are designed to “streamline” rulemaking and reduce “red tape.”<sup>13</sup> (To be clear, the red tape in question helps avoid the ill-advised application of red tape to American businesses.) What the changes – adopted without public input – in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record. We see no need for bulldozing procedural safeguards in our Section 18 rulemaking Rules of Practice and are concerned in particular that the reforms undercut the independence of those charged with conducting evidentiary hearings, limit valuable input from the public, and reverse decades of practice regarding agency transparency. Accordingly, we respectfully dissent.<sup>14</sup>

### **Corruption of the Fact-Finding Process**

Effective regulation should be based on solid evidence, which is why the Magnuson-Moss Act provides for a comprehensive fact-finding process in advance of promulgating rules. Section 18 trade regulation rules have considerable force, setting the table for high stakes in Section 18 rulemaking proceedings. For example, Section 18 rules substantially increase the penalties for rule violations.<sup>15</sup> An independent hearing process is essential to crafting rules that address actual market failures rather than pet projects of a majority of unelected Commissioners.

The role of a Presiding Officer is to oversee the fair conduct of the hearing process and make independent recommendations to the Commission based on relevant and material evidence. During the 1970s rulemaking spree, the Presiding Officer was viewed as a puppet of agency

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the Commission’s authority relating to 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.cato.org/sites/cato.org/files/serials/files/regulation/1982/9/v6n5-4.pdf>; 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/>.

<sup>12</sup> Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, 4 REGULATION 33 (1980).

<sup>13</sup> Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Rohit Chopra *Regarding Adoption of Revised section 18 Rulemaking Procedures* (July 1, 2021), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1591522/joint\\_rules\\_of\\_practice-statement\\_final\\_7121\\_1131am.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice-statement_final_7121_1131am.pdf).

<sup>14</sup> A statement of the Commission differs from a majority statement. A Commission Statement is binding on the Commission, remains in place until it is repealed or superseded, and can be cited as the opinion of the Commission.

<sup>15</sup> A knowing violation of a trade regulation rule can result in civil penalties of up to \$43,792 per day, and these penalties begin to accrue as soon as the violation takes place. The Commission can also seek broad equitable remedies for consumers injured as a result of trade regulation rule violations.

management, leading to the perception that outcomes were biased and predetermined.<sup>16</sup> To address this issue and build trust in the rulemaking process, Congress adopted laws to ensure the independence of the Presiding Officer, which the Commission augmented in the Rules of Practice.<sup>17</sup> The revisions cut in the opposite direction.

### Naming of the Presiding Officer

The newly-instituted rules remove selection of the Presiding Officer from an independent judge and assign that role to the Chair. The Commission, heeding Congressional concerns regarding independence, previously required the Chief Administrative Law Judge (“ALJ”) to serve as the Chief Presiding Officer and empowered the ALJ to pick the person who would oversee the rulemaking hearing process. That person, in turn, conducts the hearing, compiles the hearing record, resolves disputes, and makes recommendations to the Commission. The hearing helps determine the facts on which the Commission bases its policy calls. By relying on an independent judge to select the hearing officer, the process thrown out by the majority last Thursday gave the public some assurance that the proceedings would be unbiased and that all points of view would be heard and considered. The revisions enable the Chair to hand pick the presiding officer, opening the door for a fact-finding process gerrymandered to fit the agenda of a majority of commissioners.

### Hearing format

The revisions also strip the Presiding Officer of significant control over the hearing process. The majority characterizes these changes as “providing the Commission with greater accountability and control over Section 18 rulemaking.” Under the Commission’s new rules, the Commission, not the Presiding Officer or the public, will set the agenda for the hearing, choose which issues will be discussed, and select which parties will be permitted to testify, conduct cross-examination, and offer rebuttal evidence. Simply put, a majority of the Commission will now have a greater ability to control which facts make it into the record, laying the groundwork for skewed rulemakings designed not to benefit the consumer but instead to satisfy the Commission majority.

### Designation of disputed issues of material fact

The revisions narrow opportunities for the public to help determine which factual issues are in dispute. Section 18 rulemakings afford those affected by the proposed rules the right to a hearing, which sometimes includes the right to cross-examine witnesses and present evidence

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<sup>16</sup> See *Oversight to Examine the Enforcement and Administrative Authority of the FTC to Regulate Unfair and Deceptive Trade Practices: Hearings Before the Subcomm. for Consumers, S. Comm. on Commerce, Science, and Transportation*, 96<sup>th</sup> Cong. (1979) (capturing testimony from businesses, including but not limited to The Association of Physical Fitness Centers, The National Fire Protection Association, U.S. Chamber of Commerce, and the American Plywood Association, expressing concern about the independence of the Presiding Officer) <https://books.google.com/books?id=ISuF0giWSiEC>.

<sup>17</sup> Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374.

rebutting claims about the need for rules, their costs, and how to craft them. But the hearing is confined to “disputed issues of material fact” that are “necessary to resolve.”

Until last Thursday, the universe of disputed issues of material fact was not finalized by the Presiding Officer until there had been ample opportunity for public comment. Now, the Commission will declare the list of disputed issues of material fact earlier in the rulemaking process, and finalize it with more limited public input.

What all this means is that a majority of the Commission can more easily ignore contradictory views by omitting disputed issues from the NPRM and the initial hearing notice. Replacing independent and objective analysis of controversial issues in the agency’s rulemaking proceedings with a “majority rules” regime not only makes it less likely that the resulting regulations will benefit consumers, but also less likely that trade regulation rules will survive legal scrutiny.<sup>18</sup>

### **Procedural Limitations Diminish Public Input and Understanding**

The majority declined to seek public comment on the revisions.<sup>19</sup> Had they done so, the public might have noticed that the revisions reduce opportunities for public input and render far less transparent our proposed actions. The majority claims these changes remove “extraneous and onerous procedures that serve only to delay Commission Business.” Transparency and public input can be time consuming, but they are still good. The revisions abolish a staff report that analyzes the rulemaking record and makes recommendations as to the form of the final rule; and remove comment periods on the staff report and the Presiding Officer’s recommended decision.<sup>20</sup>

Our old Rules of Practice wove transparency into the rulemaking process by requiring staff to publish a report containing their comprehensive analysis of the rulemaking record. Both we and the public derive great value from the thoughtful assessments of record evidence by expert staff. The traditional staff report also provided a vehicle for expert recommendations regarding the proposed form of the final rule. It allowed the public to check our work. Moreover, public input on the proposed form of the final rule proved valuable, particularly with respect to unintended consequences that might otherwise escape the Commission’s consideration, given that final rules

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<sup>18</sup> Section 18 makes clear that agency action can be reversed for procedural error and specifies that FTC rulings limiting cross-examination and rebuttal may constitute reversible error when they have “precluded disclosure of disputed material facts which was necessary for a fair determination by the Commission of the rulemaking proceedings taken as a whole.” 15 U.S.C. § 57a(e)(3)(B). If a majority of the Commission precludes the analysis of material, controversial facts, the reviewing court may set aside the rule in question and require the Commission to begin anew the time-consuming and resource-intensive rulemaking process.

<sup>19</sup> FTC Press Release, *Open Commission Meeting – July 1, 2021* (July 1, 2021), <https://www.ftc.gov/news-events/events-calendar/open-commission-meeting-july-1-2021>.

<sup>20</sup> The majority is choosing to silence interested parties as key areas of dispute are funneled into conclusions from expert staff and the Presiding Officer. We fear such a change will omit critical opportunities to hear about potentially unintended consequences of rules as they begin to crystalize but before they are enacted.

sometimes differ from initially proposed rules. While the benefits of the staff report are great, the time and resources required are not unreasonable – it should take no longer to draft a staff report than it takes to draft the customary final recommendation to the Commission that precedes any Commission action.<sup>21</sup>

## **Conclusion**

The revisions to our Rules of Practice adopted by the majority last Thursday, without public input, undermine the goals of participation and transparency that Congress sought to advance when it enacted and amended Section 18. These changes will facilitate more rules, but not better ones. These changes will also provide additional opportunities for legal challenges in federal court, given that new rules will be formulated pursuant to an agenda-driven process that limits public input and facilitates a biased evidentiary record. When Section 18 was adopted, the FTC suffered from a loss of public trust and was on the brink of being shuttered.<sup>22</sup> The majority would do well to heed lessons from this history, because those who fail to learn from the past are doomed to repeat it.

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<sup>21</sup> Opportunity for staff to weigh in on important policy issues, however, is no longer guaranteed. During the July 1, 2021 Open Meeting, Chair Khan omitted staff from the dialogue.

<sup>22</sup> *Id.* See also J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MKTG. 192 (2003).