Responses to Questions for the Record

J. Howard Beales III

The Honorable Gus Bilirakis

1. The FTC's proposed "Junk Fee" Rule is an example of what we discussed at hearing on the current FTC's shift into economy wide proposals. I'm concerned how broadly drafted this is, and that it goes beyond the expertise and authority of the FTC. For example, the rule apparently reaches into the towing and recovery industry, and regulation of nonconsensual towing has been handled at the state level. This is just but one example. Do you agree that in instances like these and others that the FTC has exceeded its area of expertise and authority? How do you see these broad rules like the one on "junk fees" aligning with major questions doctrine?

Answer: Concerns about the breadth of the FTC's authority and the extent of its discretion to declare a practice "unfair or deceptive" were precisely why Congress imposed special procedural requirements on FTC rulemaking in Section 18 of the FTC Act. Those provisions were intended to ensure that the key factual predicates of a proposed rule would be subject to public scrutiny and that potentially affected entities would have ample opportunity to explore, and if necessary, challenge the salience of those facts to their own circumstances.

Whether a practice is "unfair" or "deceptive" often depends crucially on the facts. Whether a message is deceptive depends on how consumers interpret it, and that may be significantly different in different contexts, depending on consumers' knowledge and expectations about the transaction. Costs and benefits of a practice likely depend on the circumstances in which the practice is employed, making conclusions that a practice is unfair also dependent on context.

Section 18 requires hearings and rebuttal comments, with the possibility of cross examination, to address "disputed issues of material fact it is necessary to resolve."[1] The current Commission has used various devices to evade this crucial part of Section 18 rulemaking, including the alleged distinction between "legislative" and "specific" facts. Fifty years ago, shortly after the statute was enacted, the Commission's initial proposal limited designated issues to "specific" facts, but after public comments the rules allowed *any* fact necessary to resolve as a designated issue. Under the final rule, the distinction between legislative and specific facts was relevant to whether cross examination was allowed, but not to whether there was a disputed issue. As the Court noted in *Loper Bright*, executive opinions are more persuasive when they are contemporaneous with the enactment of the relevant statute. The Commission's 2021 reversal of this decision with no explanation and no opportunity for public comment is yet another example of the cavalier attitude of the Khan Commission toward Section 18 procedures.

Similarly, the Commission's frequent claim that disputes about whether a practice is unfair or deceptive are legal conclusions ignores the reality that the legal conclusion depends on the facts. The factual premises behind a claim that a practice is unfair or deceptive are in fact often disputed issues – claims that the Commission must prove with evidence, just as it must prove a violation to a court in an individual enforcement action.

Unfortunately, many of the Commission's rulemaking proposals rely on "facts" that were found in enforcement actions, which typically challenge a very narrow range of essentially fraudulent practices in

[1] 15 USC § 57a(c)(2)(B).

only a few industries. Consumers likely need protection from excessive fees in the context of nonconsensual towing, but it is not an industry in which the Commission has any significant enforcement experience to draw upon.

Undoubtedly, economy wide rules have potentially major impact. Because the Commission has clear authority to address unfair or deceptive fee practices on a case by case basis, and clear authority to write rules defining those practices with specificity, however, it is unclear that the rule would raise issues under the major questions doctrine alone. Economy wide rules, nevertheless, place special burdens on the Commission that I believe it has not met, as these answers detail.

The Honorable Kelly Armstrong

1. We have heard concerns from businesses about the FTC skipping important steps in the Magnuson-Moss rulemaking process, sometimes ignoring Administrative Law Judge recommendations in a decision. Are you aware of the FTC taking shortcuts in its current rulemaking process?

Answer: Under the procedures used in the initial wave of rulemakings after Section 18 was enacted in the 1970s, informal hearings, often lasting for weeks, were a routine part of the process. The rulemaking staff presented witnesses and evidence to make the case for the Commission's proposal. A presiding officer oversaw the hearings, hearing proposals from the staff and affected parties, and determining the designated issues on which cross examination would be permitted. At the end of the hearings, both the staff and the presiding officer made recommendations for a final rule, and both recommendations were subject to another round of public comment.[2]

The revised rulemaking procedures that the Commission adopted on a party line vote in July, 2021 either ignored or circumvented important parts of the Magnuson-Moss rulemaking process, sometimes in violation of clear statutory requirements. In an earlier paper, Professor Muris and I concluded that the changes would increase political control of rulemaking and decrease the opportunities for public participation.[3] Two sets of changes, concerning the role of Presiding Officers and the process for designating issues, are particularly problematic.

Regarding presiding officers, by 1980 there was a consensus at the Commission that it should rely more on presiding officers to evaluate the rulemaking records.[4] Congress likely thought it was codifying that consensus when, in the 1980 FTC Improvements Act, it required that presiding officers report only to a chief presiding officer, and that the presiding officer "make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence."[5] The July 2021 changes in rulemaking procedures gutted the independence of presiding officers, and limited their recommended decisions to the designated issues.[6]

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[2] J. Howard Beales III and Timothy J. Muris, Back to the Future: How Not to Write a Regulation, American Enterprise Institute, June 2022, at 8-11 ("Back to the Future").

[3] Back to the Future at 1.

[4] Back to the Future at 21.

[5] 15 USC § 57a(c)(1)(B).

[6] Back to the Future at 20.

Designated issues are a key feature of Magnuson-Moss rulemaking. They are "disputed issues of material fact it is necessary to resolve," in the words of the statute.[7] This is an essential component of the statute's emphasis on reasoned decisionmaking in rulemaking, with procedures addressing directly the evidence bearing on whether to adopt a rule and requiring an explanation of the steps from data to the conclusion.[8] Historically, it was generally the presiding officer who determined the designated issues, but under the revised procedures, the Commission reserved this role to itself.

Shockingly, in two controversial rulemakings, involving negative option plans and allegedly unfair or deceptive fees, the Commission declared that there were *no* disputed issues, despite numerous suggested issues from commenters. It relied on a never before disclosed "summary judgment" standard, with the Commission, rather than an independent party, making a determination of whether there was a real dispute about the Commission's view of the facts. Moreover, it makes this decision at a point in the proceeding when *only the Commission itself* has full access to the rulemaking record. It relied on multiple evasions of the statutory goal of exploring the facts in detail, including a distinction between "legislative" and "specific" facts that the Commission largely rejected in the rules adopted when the statute was first enacted. It also relied on claims that disputed facts were really legal conclusions, even though the legal conclusion depends on the facts, and it inappropriately generalized its own findings in enforcement proceedings to different industries and different contexts.

Summary judgment, of course, is an important and common part of American litigation. Were the Commission true to the summary judgment analogy, it would follow the procedures of the 1970s, and the clear intent of the statute in allowing robust fact finding. In litigation, detailed fact finding, including forms of cross examination of witnesses, such as depositions, occur before deciding whether summary judgment is appropriate because facts are no longer (or never were) in dispute. Indeed, summary judgment can occur only after the opposing party (here regulated industry) has the opportunity to take full discovery of the other party (here the agency), including document requests, interrogatories, and depositions. Instead, the agency puts the proverbial cart of concluding disputes do not exist before the oft used horse in litigation of publicly examining the facts. In essence, the Commission seeks to eliminate the horse entirely.

Moreover, the Commission's decisions regarding disputed issues lack the fundamental objectivity that makes the summary judgment standard successful in litigation. In court, an objective judge decides whether there is a factual dispute between contending litigants. Instead, the FTC issues an NPRM, which contains assertions of fact supporting a proposed rule, assertions with varying levels of support and assertions whose validity is sometimes not obvious. Rather than evaluating the position of two sides with equal opportunities to compile the record, examine witnesses, and make arguments to the court, the Commission, perhaps unsurprisingly, assumes its own factual assertions in its NPRM are correct in the absence of specific contrary evidence. Thus, the Commission's assertion that a practice found deceptive in one context is also deceptive in a different context is treated as a fact, but an industry argument that the finding does not apply in a different context is treated as an unsupported assertion. The one sided nature of such a proceedings is obvious to any objective observer.

In the negative option rulemaking, the presiding officer designated as a disputed issue whether the rule would have an annual impact of more than $100 million, and concluded that it would – a conclusion that

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[7] 15 USC § 57a(c)(2)(B).

[8] Back to the Future at 9.

triggered the need for a final regulatory analysis. Although the Commission's final rule included that analysis, it concluded that the annual cost of the rule was, at most, $92 million. It did not analyze the presiding officer's contrary conclusion, noting only that none of the commenters "offered any empirical analysis of the issue."[9]

2. Not only has the FTC engaged in more rulemaking activity recently than it has in the last few decades, but many of its proposed rules are more expansive than anything the FTC has advanced in the past and would apply across all industries to impact the entire U.S. economy. Do you believe the issuance of such broad regulations would exceed the FTC's authority, and should the FTC consider less disruptive alternatives?

Answer: Even when it has the authority, the Commission should confine its rules to industries where it has clear evidence that unfair or deceptive practices are widespread and where the benefits of regulation exceed its costs. Because much of the Commission's activity involves law enforcement, often against clear frauds, the agency may see primarily instances in which a practice harms consumers, and is much less likely to have experience with the impact of proposed remedies on legitimate businesses using similar business practices.[10] Although rules by their nature involve some generalization, the agency must have evidence about the specific contexts in which the rule would apply. Industries with a complicated product in which the FTC or other regulators have not previously found the problems the rule addresses require a separate evidentiary base to justify applying a rule to such industries.

Today, the agency seeks to regulate practices based on generalizing its experience, largely with fraud in a few industries, to the entire economy. In the negative options rulemaking, the Commission attempts to generalize far beyond its experience. Its enforcement activity has been largely limited to certain industries using undisclosed subscription arrangements, but it seeks to generalize to contexts in which the fact of a subscription is obvious (newspapers, video entertainment) and reasonable consumer expectations are surely different. It also spans industries where the potential costs of mistaken termination are far different from the Commission's experience. Home security companies, for example, pointed to the need for robust verification before terminating security monitoring.[11]

The Commission dismisses concerns that its general remedy may be inappropriate in some cases based in part on its inclusion of a company-specific exemption proceeding in the final rule.[12] Obviously, however, company specific exemption is no answer for the home security industry, with 79,930 businesses in 2023.[13] If such exemption requests occur, the Commission will have little choice but to develop general criteria – rules – regarding which requests it will approve and which it will reject. Those criteria should be part of the rule to begin with.

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[9] Negative Option Rule, Final Rule, at 209, https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_negative_option_rule.pdf.

[10] See Back to the Future at 17-18.

[11] See Comment of Sonsini Alarm Clients, FTC-2023-0033-0860.

[12] Negative Option Rule, 16 CFR 425.8.

[13] https://www.ibisworld.com/industry-statistics/number-of-businesses/security-alarm-services-united-states/

Similarly, in the unfair and deceptive fees rulemaking, the FTC relies heavily on a study of hotel resort fees,[14] which is cited eight separate places in the NPRM.[15] Its benefit-cost analysis tries to generalize from this and a separate study of live event ticketing, to the entire economy, which even the author of the resort fees study contends is inappropriate.[16]

3. Earlier this year, the FTC held an informal hearing for the proposed negative option rule, but despite repeated requests from commenters, the Commission did not put forward any witnesses in support of its conclusions or provide any evidence to support its calculations. In addition, numerous stakeholders raised concerns that the Commission would not allow any cross-examination at this hearing. And ultimately, the Commission claimed that there were no disputed material facts despite commenters identifying at least 20.

a. Are you concerned about the approach the FTC has taken with this rulemaking process and its failure to follow the proper legal process?

Answer: Historically, in past FTC rulemakings, the rulemaking staff used the hearing process to present the case for the proposed rule. Today, the agency is seeking to turn Section 18 into an abbreviated version of notice and comment rulemaking. It seeks to rely almost entirely on its own NPRM, without presenting any evidence directly and certainly without providing opportunities for affected parties to question the basis for the Commission's conclusions. This is not the reasoned, fact-based decisionmaking process that Congress envisioned. Rather than an open, transparent process with extensive public participation and debate about evidence that is available to all parties, the Commission is using a process where it is the only party with access to all the facts, and where the opportunities for public participation are limited at every turn.

Both the procedural requirements and the statutory basis for judicial remedies for violations are more explicit in Section 18 than in typical APA rulemaking, and my concerns about the Commission's circumvention of statutory requirements are elaborated in my response to question 2 above. Using unfair or deceptive fees as an example, the Commission's procedures are woefully inadequate. The clear violation of the statutory requirement that the presiding officer make a recommended decision based on the entire record should also be corrected, among other procedural problems. More generally, Section 18 specifically provides that the court "shall" set aside a rule if it finds that commission determinations have "precluded disclosure of disputed issues of material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole."[17] These procedural failures should be corrected, and the Commission should follow Section 18's mandate and order real hearings on the obviously disputed issues.

b. Does it seem to you that they are cutting corners to avoid information or evidence that contradicts the Chair's and the majority's goals? Also, what effect will this FTC's failure to follow the legal process have on businesses under its jurisdiction and ultimately on consumers?

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[14] Mary Sullivan, Fed. Trade Comm'n, Economic Analysis of Hotel Resort Fees 4 (2017) https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf.

[15] Trade Regulation Rule on Unfair or Deceptive Fees, 88 Federal Register 77420 (November 9, 2023).

[16] See Comment of Mary Sullivan, https://www.regulations.gov/comment/FTC-2023-0064-2891.

[17] 15 USC 57a(e)(3)(B).

Answer: As detailed above, the current Commission has used various devices to evade crucial parts of Section 18 rulemaking, including its claim that there are no material facts in dispute and its efforts to avoid any independent review by the presiding officer. It has relied on inappropriate generalizations of its enforcement experience, and rejected any attempt to question the applicability of those generalizations to the sometimes radically different contexts in which its rules would apply.

In my view, the Commission is not just cutting corners, it is shredding the procedures that Congress intended to ensure reasoned, fact-based rulemaking decisions with ample opportunities for public participation. Even if the Commission's view of the law is correct, contrary to the views of past Commissions, regulated businesses and consumers are best served when the agency offers reasoned answers to questions about the factual basis for its decisions, rather than evading such questions.

c. How does it affect the public's trust in what should be the world's leading consumer protection agency?

Answer: Refusing to confront the facts and limiting the opportunities for public input can only undermine confidence in the Commission conclusions, and its credibility as a consumer protection agency.

4. Former Commissioner Christine Wilson noted in her dissent to the proposed negative option rule that the proposed rule swept in far more conduct than was the subject of the Anticipated Notice of Proposed Rulemaking (ANPRM), and therefore that the record did not, and could not, support some parts of the rule. In particular, the proposed rule addresses claims on the underlying products, not just the features of the negative option. And because the rule would allow for civil penalties, marketers could be subject to civil penalties for claims about the product, "even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple." This seems to be yet another instance of the Chair's overreach - in this case, by using the rulemaking process for one topic to sneak in new regulations on another without proper process.

a. What effect will this FTC's failure to follow the legal process have on businesses under its jurisdiction and ultimately on consumers?

Answer: In my view, the problems with the provision prohibiting any misrepresentation, even those entirely unrelated to the negative option feature, are broader than the failure to include that possibility in the ANPRM. In particular, Section 18 requires that Commission rules define unfair or deceptive acts or practices "with specificity."[18]

As the Congress of 50 years ago that passed Section 18 understood, the original Brandeisian FTC was a generalist agency. Because the statutory prohibition of "unfair" conduct in the original FTC Act was deliberately vague, the only remedy initially available was a cease and desist order, with monetary relief eventually made available only for violations of that order. Instead, the FTC was envisioned as providing case by case guidance without monetary penalties and with an opportunity to argue that the premise of past guidance was inappropriate to the particular circumstances challenged. For many practices, this approach was wise, because the line between permissible and impermissible conduct was unclear until

[18] 15 USC § 57a(a)(1)(B).

the Commission had addressed a particular practice. The possibility of imposing monetary relief for the initial conduct could chill otherwise lawful conduct that actually benefits consumers or competition.[19]

When Congress enacted Section 18 to give the Commission rulemaking authority, it also enacted Section 19, which authorizes the Commission to obtain monetary relief, but only when a reasonable person would have known under the circumstances the practices were "dishonest or fraudulent."[20] The legislative history of Section 19, which Professor Muris and I have reviewed in detail,[21] is replete with concerns that monetary relief was not appropriate when the Commission uses its broad discretion to declare unlawful practices that not previously been deemed unlawful. Those same concerns about limiting the availability of civil penalties to instances in which regulated entities had clear notice of the Commission's concerns surely influenced adoption of the requirement that rules define prohibited practices "with specificity."

In my view, the broad prohibition on any misrepresentation of any material fact anywhere, triggered only by the availability of a negative option feature as a means of payment, does not satisfy this specificity requirement. It is instead the Commission's attempt to claim for itself general authority to impose civil penalties for first time violations, untethered to any specific practices that have been found to cause problems. In its essence, it is a new version of the Commission's earlier claim that it already had the authority to seek monetary relief in all cases, a claim the Supreme Court unanimously rejected. Indeed, recent Congresses have repeatedly declined the Commission's request for precisely that authority.

b. How does it affect the public's trust in what should be the world's leading consumer protection agency?

Answer: The overreach in the broad misrepresentation provision can only undermine public confidence in the agency. Moreover, overreach may lead to substantive limits on the Commission's authority, as is did when the Commission overreached in claiming the authority for monetary relief in any case, only to be reversed by a unanimous Supreme Court.[22]

The Honorable Russ Fulcher

1. Under the Federal Trade Commission's Vehicle Shopping Rule (VSR or "CARS" Rule) auto dealers must capture exceptionally detailed information around the car buying process. They must also document every step of the process, and then store this data for up to two years. If they fail to capture every customer question about a particular feature of a vehicle that could then become part of the pricing of the vehicle, the dealer could be fined up to $51,744 per violation. A study by the Center for Automotive Research puts the actual cost of the rule at $24.1 [billion.] What are the limits of the FTC when it comes to how intrusive it should be in a retail buying process – beyond things like price transparency, fair and honest advertising, and associated rules?

Answer: The Commission is at its best when it enforces the basic rules against fraud or deception in retail transactions, rather than trying to develop an "ideal" car purchasing process. Different consumers

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[19] See J. Howard Beales, III, Benjamin M. Mundel, and Timothy J. Muris, Section 13(b) of the FTC Act at the Supreme Court: The Middle Ground, theantitrustsource, www.antitrustsource.com, December, 2020.

[20] 15 U.S.C. § 57(b).

[21] *See* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1 (2013).

[22] AMG Capital Mgmt., LLC v. FTC, No. 19-508 (593 U.S. ___ (2021)

have substantially different priorities in seeking to purchase a car.[23] They are likely to focus first on the attributes that are most important to them, and only later consider other aspects of what is, after all, a complex transaction. Consumers are likely to first seek information about the characteristics that matter most to them, and will likely pay little attention to information addressing other issues, even if the Commission thinks those issues should be more prominent in the decision. Dealers have strong incentives to compete for consumers by developing a process that works best for their customers, and that process will likely differ depending on their clientele's priorities. This is not likely a market in which a single purchasing process is best for everyone.

The Commission's focus on the "offering price" seems particularly misguided. This is an environment where the price is normally subject to negotiation, and in which the price depends on myriad consumer choices about options and add ons that unfold during the purchase process. Similarly, the Commission's emphasis on the total of payments is likely completely irrelevant to a consumer who must figure out whether the monthly payments fit within their budget. There is a regulatory logic to the Commission's choices, but it is a logic that seems to ignore the way consumers actually make decisions.

The Honorable Robin Kelly

1. Public reports indicate the FTC is investigating the alcohol distribution market for potential Robinson-Patman Act enforcement related to volume discounts. Alcohol is regulated by the states pursuant to the 21st Amendment, including some states that ban volume discounts altogether. Is there a risk that Robinson-Patman Act enforcement could conflict with state regulations that set guardrails on pricing and marketing practices?

Answer: Companies involved in alcohol distribution must comply with state laws, which are specifically sanctioned by the 21st Amendment. Industry participants are constrained by these Constitutional provisions, as is the FTC.

2. Inflation is at a three-year low, but many Americans are still struggling. While there are economists and antitrust experts who agree that Robinson Patman Act enforcement is likely to increase consumer prices, there is some debate about empirical evidence to support that expectation. What is the best empirical evidence we have today? If empirical evidence is lacking, should the FTC study this issue to understand the potential impact on consumer prices before taking enforcement actions?

Answer: In a recent review of the Robinson Patman Act, Professor Timothy Muris found that enforcement encouraged violations of the Sherman Act, facilitated higher prices, and created indirect costs and inefficiencies.[24] The Act targeted retailers who were bringing lower costs, and lower prices, to consumers, and empirical studies found that those retailers were in fact harmed.[25] Professor Herbert Hovenkamp notes that although it is not possible to conduct a technical study of the cost of a particular statute, the Justice Department's estimate that the act "cost the economy $3 to $6 billion annually was almost certainly too low," because it considered only the direct effects on prices and ignored compliance

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[23] For a detailed description of the consumer information problem in a complex transaction see CFPB, Taskforce on Federal Consumer Financial Law Report, Volume 1, Chapter 7 (2021). I was a member of the Taskforce.

[24] Timothy J. Muris, Neo-Brandeisian Antitrust: Repeating History's Mistakes, American Enterprise Institute, June 2023, at 22-27.

[25] See Thomas W. Ross, "Winners and Losers Under the Robinson-Patman Act," *Journal of Law & Economics* 27, no. 2 (October 1984): 243, https://www.jstor.org/stable/725576.

costs and job losses.[26] Given this evidence, if the FTC believes for some reason that it is no longer correct, it should certainly conduct new empirical analyses to establish that renewed enforcement would in fact benefit consumers.

[26] Herbert Hovenkamp, "Can the Robinson-Patman Act Be Salvaged?," Promarket, October 13, 2022, https://www.promarket.org/2022/10/13/can-the-robinson-patman-act-be-salvaged.