Insight

Primer: The FTC and Magnuson-Moss Rulemaking

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EXECUTIVE SUMMARY

- The Federal Trade Commission (FTC) has the authority to issue industry-wide regulations but must go through what is known as Magnuson-Moss rulemaking, which is more exacting than traditional rulemaking under the Administrative Procedure Act.
- Congress required these extra steps following a series of rampant, unpopular rules from the FTC in the 1970s; to date, the process has worked as intended as the agency has relied on case-by-case enforcement rather than sweeping regulation.
- New leadership at the FTC, in order to expand its commissioners' influence over rulemaking, has changed its internal rules and appears poised to eschew Magnuson-Moss rulemaking in order to pursue more broad-based rulemaking—particularly regarding unfair methods of competition.

INTRODUCTION

One year ago, Federal Trade Commission (FTC) Chair Lina M. Khan formalized her vision for the agency in a memorandum to staff. Included in that vision was a renewed emphasis on utilizing rulemaking to issue regulations with broader applicability than has occurred in recent decades. True to her word, the FTC has initiated the development of trade regulations on impersonating government and businesses and data security over the past year, on top of an earnings claims rule started in March 2021.

The FTC must go through different steps than other agencies when issuing most of its rules, however, due to what was perceived by Congress as abuses of its rulemaking authority in the 1970s. As the FTC has promised to pursue a number of new rulemakings, this process, known as Magnuson-Moss rulemaking, takes on increased importance.

This analysis explains the Magnuson-Moss process, recent changes to that process by the FTC that may undermine transparency and fairness, and an ongoing debate over the procedures' application.

THE MAGNUSON-MOSS PROCESS

Congress gave the FTC authority to issue regulations that could apply industry-wide with the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975. In recognizing the broad authority it granted the FTC, the Magnuson-Moss Act imposed some additional rulemaking steps on the agency beyond those typical of the common informal rulemaking described in the Administrative Procedure Act (APA). It soon became apparent, however, that the FTC had exceeded congressional intent with its new authority. In 1980, Congress enacted additional steps for the agency to follow to prevent the issuing of excessive rules by making the process more exacting on the FTC, thus disincentivizing (or perhaps *appropriately* incentivizing) broad rulemakings in favor more targeted enforcement of specific abuses.

The process requires the FTC to publish an advanced notice of proposed rulemaking to obtain public feedback prior to publishing a proposed rule. At least 30 days prior to publishing a proposed rule, the FTC must submit the proposal to its oversight committees in Congress. The proposed rule must contain evidence that "defines with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" and that such acts or practices are prevalent.

Following the publication of a proposed rule, the FTC must hold a hearing if any interested party requests it. The hearing is run by a presiding officer that notes disputes of material facts that arise, allows for cross-examination and rebuttal testimony, and then submits a report to the FTC with a recommended resolution to the disputes based on the evidence provided. The agency can then proceed to a final rule consistent with the rulemaking record.

The process also includes an enhanced judicial review threshold whereby a court can invalidate a rule if it is not based on "substantial evidence," as opposed to the APA's more agency-friendly "arbitrary and capricious" standard.

Not all FTC rules must go through the Magnuson-Moss process. The FTC can use APA rulemaking when specifically directed by Congress, such as with its recent proposed rule regarding auto dealers that was specifically authorized by the Dodd-Frank Act.

FTC CHANGES TO THE PROCESS

While Congress has set the requirements for Magnuson-Moss rulemaking, the FTC has authority to develop procedural rules for implementing those requirements. Following enactment of the 1980 amendments, an introspective FTC followed Congress's lead and changed its rules to ensure that its rulemaking process was impartial and fair.

In the first open meeting under the agency's new leadership in July 2021, a split FTC voted along party lines to modify those rules for implementing the Magnuson-Moss process in a manner that expands the commissioners' own power to drive rulemakings. The majority's statement accompanying the changes said the modifications would remove "extraneous and onerous procedures" and provide the FTC with "greater accountability and control" over the process.

One of the major changes replaced the FTC's chief administrative law judge as the chief presiding officer over Magnuson-Moss rulemaking and gave that role to the FTC chair. The rule removed responsibility for running hearings – including important components such as who can present evidence and what can be submitted – from a designated presiding officer and shifts that power to the FTC itself. The agency can now set hearing agendas, the topics up for discussion, who can testify, and what is eligible for cross examination. The rule also stripped the presiding officer's ability to decide on disputes of material fact, giving that over to the FTC.

The rule made two other significant changes. Previously, the FTC's staff was required to publish a report summarizing and assessing the rulemaking record and providing a recommendation on whether to adopt or modify the rule in question. That requirement was scrapped. Finally, the ability to appeal rulings of the presiding officer was removed because the FTC argued that it added "procedural complexity to informal hearings that are inconsistent with the informal nature of the rulemaking process."

In their dissenting statement, the minority commissioners criticized the changes as being designed to allow the FTC "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 minority commissioners specifically decried the changes regarding the presiding officer, noting that it would revert to an era when presiding officers were "puppets" of agency management that undermined the credibility and fairness of the resulting rules. They also argued against scrapping the staff report changes and elimination of the ability to appeal, noting that it would reduce transparency.

DEBATE OVER MAGNUSON-MOSS' APPLICATION

The rule changes were the clearest indication that the current FTC intends to take the agency in an aggressive direction with broad, sweeping rules, but that is far from the only signal. The FTC is also pushing the boundaries of what types of rules the Magnuson-Moss process covers.

The 1975 Magnuson-Moss Act text specifies that the FTC needs to use the process for rules regarding unfair or deceptive acts or practices, but it is not completely clear whether that covers rules regarding unfair methods of competition (UMC). The FTC's current leadership argues that the procedures do not cover UMC rules because they are not specified in the act and that it has authority to use APA rulemaking for those rules under its broad authority to enact regulations for the purpose of carrying out its responsibilities under the Federal Trade Commission Act.

Critics of this view contend that Congress intended to cover UMC rules. They argue that the Magnuson-Moss Act was in part a response to a federal court decision that upheld the FTC's authority to use APA rulemaking in UMC rule instances. They also cite the failure of the FTC since the 1980s to issue UMC rules via the APA process as further evidence that the agency lacks the authority to do so.

While the FTC has yet to do so, many expect it will proceed with UMC rules soon. The first of those rules using APA rulemaking instead of Magnuson-Moss would undoubtedly garner a legal challenge, setting the stage for resolution regarding the FTC's rulemaking authority.

CONCLUSION

The FTC's newfound yearning for broad rules calls attention to its congressionally mandated Magnuson-Moss rulemaking process. The procedures were intended to make rulemaking more onerous to ensure fairness and impartiality. Dissatisfied that the Magnuson-Moss process imposes restrictions on the agency, the FTC's new leadership is intent on pushing the boundaries of its rulemaking authority.