



The Daily Dish

Rules for FTC Rules

DOUGLAS HOLTZ-EAKIN | SEPTEMBER 22, 2022

The Federal Trade Commission (FTC) is seemingly in the news nonstop these days. In the whirlwind of news stories it is often difficult to identify those things that are really a big deal. Among the items that may have slipped past readers are the FTC's changes to its Magnuson-Moss (MagMoss) rulemakings. Luckily, AAF's Daniel Bosch has a nice [summary](#) of the issue.

The FTC can protect competition by bringing lawsuits against those who violate the law. Simple enough. If directed by Congress, the FTC can do a standard Administrative Procedure Act (APA) rulemaking like every other agency. (Its recent rule on [auto dealers](#), for example, was dictated by the Dodd-Frank Act.) Because the FTC ran afoul of Congress in the 1970s and '80s, however, it can only issue a new rule that sets an industry standard by following the MagMoss law (as amended in 1980).

To keep the FTC on a short leash, the MagMoss process requires more screening before issuing a rule. Specifically, the FTC must publish an advanced notice of proposed rulemaking and obtain public feedback prior to publishing a proposed rule. Then, at least 30 days prior to publishing a proposed rule, the agency must submit the proposal to its oversight committees in Congress along with “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.”

After publishing a proposed rule, there must be a hearing if any interested party asks for one. The presiding office – an administrative law judge – runs the hearing, establishes the factual disputes, and submits to the FTC a recommended resolution of the dispute. Finally, MagMoss also has 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.”

While MagMoss remains in force, the FTC modified the [rules](#) for implementation to get rid of “extraneous and onerous procedures.” Just like that, the FTC’s chief administrative law judge as the chief presiding officer was pitched and replaced by the FTC chair. Similarly, presiding officers are gone and replaced by the FTC itself. As Bosch notes: “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.”

Also the requirement that the FTC staff publish a report on the rulemaking and whether to adopt or modify the rule was scrapped entirely. Finally, the ability to appeal rulings of the presiding officer was removed.

Collectively, these changes remove constraints on the FTC. As Bosch concludes: “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.”