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Office of Policy and Planning

Remarks of Director Elizabeth Wilkins
As Prepared for Delivery
BYU Law: Past, Present and Future of FTC Rulemaking

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Thank you so much for having me here today to speak about the FTC's role in rulemaking.

Thank you in particular to Aaron Nielson, who I consider a colleague and a friend, and who I was delighted to find had thought hard about these questions when I came to the FTC. Thanks also to our speakers earlier in the day.

Before jumping into a rulemaking discussion, I want to step back a moment to define the right starting point for this discussion, which should not be whether rulemaking is a good or a bad idea, but rather, it should be: What is the FTC's congressionally mandated mission, and how can it most effectively carry out that mission?

This question is not theoretical; it's fundamentally about *people* and how they interact in various marketplaces, and what the law says about the FTC's role in ensuring that people are treated fairly.

Congress charged the FTC with protecting competition and consumers across essentially the entire economy.[1] To say that this is a huge mandate for a small agency is a phenomenal understatement. The FTC is tasked with overseeing economic unfairness in both the consumer protection and competition realms, something that is core to the American experiment.

When creating the FTC, Congress was concerned about *oppressive* methods of competition that would drive out rivals to the detriment of consumers, the economy and the public. Key members cited to the dangers of coercive and other underhanded methods and charging the agency with policing such practices.[2] On the consumer protection side, we have jurisdiction over practices that are unfair – those that cause *substantial injury* to consumers – and those that are deceptive.[3] The FTC protects consumers from financially ruinous and otherwise seriously harmful business practices.

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[1] Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1)).

[2] *See* Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, at 3-7 (Nov. 10, 2022) (hereinafter "Section 5 Policy Statement"), https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission.

[3] 15 U.S.C. § 45(n).

The agency also protects people who cannot protect themselves – from powerful corporate interests looking to squeeze-out, trick, erode the wealth of, or otherwise undermine the economic autonomy of consumers. We ensure well-functioning markets that protect people's economic freedom, choice, and liberty. Our agency's vision is of "a vibrant economy fueled by fair competition and an empowered, informed public."[4] That's a grand vision, and one that I know I want to be a part of.

Given the enormity of the FTC's mandate, we will never have sufficient resources. Add to that enormity the *urgency* of this mandate, it is essential that the agency uses all the tools at its disposal. This exercise of considering the propriety of rulemaking, for the FTC, is not a theoretical weighing of pros and cons. It's an obligation to lean into the most effective tools for tipping markets in favor of fair competition and fair commercial dealings with the public.[5]

Now, on to rulemaking. There are many reasons why rulemaking on both the consumer protection and competition sides can make sense. I'll just note here there's a huge collection of administrative literature on the relative benefits of rulemaking and I won't attempt to canvass it all,[6] but here are some features that are highly salient for us.

First, rulemaking is an opportunity to give the market clear guidance about what is permissible and what is required. Of course, all parties are required to know and abide by the law, but rules – which can provide a clear and simple statement of the law outside of any particular case – can be an especially good source of guidance for industry.

Clarity allows regulated parties to order their affairs more easily, and it may also provide greater protection for individuals. The FTC's promulgated rules are often meant to protect a less sophisticated party, and when a rule is simple and clear, those less sophisticated parties are also more likely to know their rights. For example, our Credit Practices Rule prohibits certain remedies in consumer credit contracts.[7] The prohibitions are simple, such that consumers may be better equipped to know when they are being subject to an impermissible contract term.

As another example, our proposed prohibition on non-compete clauses in worker contracts discusses the startling prevalence of non-compete clauses in states where they are unenforceable, which can have a chilling effect on competitive conditions – just as enforceable clauses do.[8] Clear rules that are easily understood help to clear up these misconceptions and achieve the desired results – in this case, more optimal job switching and matching.

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[4] Fed. Trade Comm'n, *Strategic Plan for Fiscal Years 2022-2026*, at 13 (released Aug. 26, 2022), https://www.ftc.gov/reports/fy-2022-2026-strategic-plan.

[5] Jodie Z. Bernstein & David A. Zetoony, *A Retrospective of Consumer Protection Initiatives*, 72 Antitrust L. J. 969, 971 (2005) (noting that the FTC has applied "innovative solutions to large problems through rulemaking.").

[6] *See e.g*., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383 (2004); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 Duke L J 103; Richard K. Berg*, Re-examining Policy Procedures: The Choice Between Rulemaking & Adjudication*, 38 Admin L. Rev. 149 (1986).

[7] Credit Practices, 49 Fed. Reg. 7789 (Mar. 1, 1984) (codified at 16 C.F.R. pt. 444).

[8] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3845 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

Second, rulemaking has the potential to deploy the FTC's limited resources more efficiently. In part, that's because with added clarity comes added market-wide deterrence. While a court decision can and certainly does have significant repercussions, rulemakings, with their long and participatory process, can raise the salience for regulated parties and educate the public at large.

Rulemaking can also enhance redress in our consumer protection matters, further increasing deterrence. Take "restatement" rules – rules that add no new obligations but simply restate well-established law. Such rules do not add costs to businesses not engaging in, for instance, fraudulent behavior, but provide greater redress and heightened salience, and can thus lead to added deterrence for bad actors.[9] This is also important in instances where redress is hard to show for various legal reasons, but where civil penalties can help to deter harmful market conduct appropriately. Finally, in a post-*AMG*[10] world, civil penalties can play an important role more broadly in ensuring that we can achieve optimal deterrence.

Lastly, public participation is a hugely beneficial feature of rulemaking. The agency can only achieve the above-benefits if it goes through the process of studying the issue from all angles, hearing from a wide array of affected parties.

Now, there has been some anxiety expressed about greater FTC rulemaking that I'd like to address. First, we should remember that any challenges of rulemaking are not unique to the FTC. Every agency with rulemaking authority must decide whether and when it is appropriate to propose a rule. Further, many of those agencies have enforcement powers and make choices about rulemaking *vis-à-vis* one-off litigation. This is a highly routine, unremarkable feature of the administrative state, and the FTC is no less capable of making appropriate judgments than agencies with similar authorities.

If anything, there are ways in which the FTC is especially well-suited to make rules. Administrative Procedure Act (APA) rulemaking creates significant opportunity for public participation to ensure that an agency is making well considered policy decisions.[11] Magnuson-Moss rulemaking creates *additional* procedures to ensure participation.[12] Moreover, the FTC was created to be an expert body with both law enforcers and economists who bring their expertise to bear on the questions at hand.[13] The agency also has unique study tools, like our 6(b)

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[9] For example, the FTC proposed a rule to fight government and business impersonation scams, which would codify the well-understood principle that impersonation scams violate the FTC Act, as do those who provide impersonators with the means to harm consumers. The proposed rule would allow the Commission to recover money from, or seek civil penalties against, scammers who harm consumers in violation of the rule. *See* Press Release, FTC Proposes New Rule to Combat Government and Business Impersonation Scams (Sept. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-proposes-new-rule-combat-government-business-impersonation-scams; *see also* Trade Regulation Rule on Impersonation of Government and Businesses, 87 Fed. Reg. 62741 (proposed Oct. 17, 2022) (to be codified at 16 C.F.R. pt. 461).

[10] *AMG Capital Mgmt., LLC v. Federal Trade Commission*, 207 L. Ed. 2d 1118 (S. Ct. July 9, 2020).

[11] *Public Participation in the Rulemaking Process*, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/rulemaking (last visited Feb. 28, 2023).

[12] *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Fed. Trade Comm'n (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

[13] *See* Section 5 Policy Statement, at 6-8.

market study tool,[14] as well as traditions like our workshops and open comment dockets, to intake a wide breadth of information about a topic on which we are considering making policy.[15]

Second, I want to address the idea that rulemaking requires significant resources to accomplish. It is true that a rule demands a large time investment upfront – though that is not always the case, depending on the scope of the issues and the degree to which the project is focused and planned.[16]

But even if it is a significant upfront investment, a rule can be well worth it. As I discussed earlier, rules can create efficiencies *vis-à-vis* enforcement that can justify the rulemaking process. In particular, even costly rulemakings can be worth the time when they have significant salutary effects for the market and market participants over decades. I think of two early rules that were controversial when proposed but that have stood the test of time, protecting consumers over generations with significantly less resources from the FTC, to enforce consumer rights:

- In 1975, the FTC promulgated the Holder in Due Course Rule to allow consumers to assert defenses against third-party creditors that they could have asserted against the seller. This rule was designed to prevent fraudulent businesses from selling credit notes for bogus goods to be collected against an unsuspecting consumer.[17] It has been called the "FTC's most effective tool against fraud."[18] Having stood for nearly 50 years as a clear prohibition against significant abuse, it has paid for itself in spades.[19]
- In 1984, the FTC finalized the Credit Practices Rule, which prohibits certain remedies in consumer contracts.[20] This rule has successfully prevented some of the worst abuses of consumer credit contracts, so much so that people have called for it to be expanded to other credit markets.[21]

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[14] *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Fed. Trade Comm'n (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.
[15] *Id*.
[16] J. Howard Beales III & Timothy J. Muris, *Back to the Future: How Not to Write a Regulation*, Am. Enterprise Inst., at 3 (June 2022) (noting that "[r]ules, which establish brighter lines for what constitutes a violation, can reduce these costs and the risk of future harm to consumers. For the regulated community, specific rules provide clarity about compliance obligations that can reduce the costs of overdeterrence. For the agency, enforcement actions need only establish violation of a specific requirement of the rule, without the need to consider a fuller range of circumstances.").
[17] Holder in Due Course Rule, 40 Fed. Reg. 53506 (Nov. 18, 1975) (codified at 16 C.F.R. pt. 433).
[18] Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. 18711 (May 2, 2019) (codified at 16 C.F.R. pt. 433).
[19] *See* Michael F. Sturley, *The Legal Impact of the Federal Trade Commission's Holder in Due Course Notice on a Negotiable Instrument: How Clever Are the Rascals at the FTC*, 68 N. C. L. Rev. 953, 954 (1990); *see also* Jon Sheldon et al., *Protecting and Improving the Best Thing The FTC Has Ever Done: The Holder Rule*, Nat'l Consumer L. Center (Oct. 29, 2009), https://www.nclc.org/protecting-and-improving-the-best-thing-the-ftc-has-ever-done-the-holder-rule/.
[20] Credit Practices, 49 Fed. Reg. 7789.
[21] Lenore Palladino, *Small Business Fintech Lending: The Need For Comprehensive Regulation*, 24 Fordham J. Corp. & Fin. L. 77, 91 (2018).

Third, I want to address the ideas of legal and institutional risk. It has been suggested that taking on legal risk is somehow inappropriate. Certainly, as stewards of the agency, leadership has an obligation to be protective of the institution and its mission. But I would suggest that having a zero tolerance for risk would not be fulfilling the agency's obligations to apply the creativity, nimbleness and innovation necessary for this small agency to meet its significant task. More than that, some of the agency's greatest successes would have never been realized if the agency took a zero-risk approach.

- The Telemarketing Sales Rule and its progeny, known colloquially as the "Do Not Call List," protects Americans from abusive telemarketing calls.[22] This rule has been called possibly "one of the most popular federal regulations in history,"[23] and it would not be law if the agency had not been willing to risk the inevitable First Amendment challenge. Indeed, the FTC *lost* in District Court on those grounds, but fought on.[24] The risk was worth the protection that the FTC could provide against abusive tactics.
- The Eyeglass Rule requires that optometrists and ophthalmologists provide patients a copy of their prescription after the completion of an eye examination without extra cost.[25] Here, significant parts of the rule were struck down, but the popular provision survived arbitrary and capricious review and has spurred competition and innovation as a result. (As an aside, the Eyeglass Rule is an example of a rule where little enforcement has been required, suggesting that market-wide deterrence can really make a huge difference and can be extremely efficient.[26])

In a "win some, lose some" game, you do lose some of the time. But that's okay, that's the inevitable back-and-forth between agencies and the courts that our system created. The risk should not chill us from doing our best. If it did, we'd be acceding to the equivalent of "lose all, lose all."

Lastly, I want to address the idea of democratic legitimacy and whether the FTC should be making rules that could have a broad economic impact. I would answer an emphatic yes. Where we make rules within our statutory ambit as we are, the FTC is the right institution to be making both competition and consumer protection rules.

Far from being lawless, using the statutory tools that Congress gave us to make rules concerning the conduct Congress was concerned about is a fundamentally law-bound exercise.

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[22] Telemarketing Sales Rule, 80 Fed. Reg. 77520 (Aug. 24, 1995) (codified at 16 C.F.R. pt. 310).
[23] Dee Pridgen et. al., *Consumer Protection and the Law* § 13:6 (2022).
[24] Rodney A. Smolla, *The "Do-Not-Call List" Controversy: A Parable of Privacy and Speech*, 38 Creighton L. Rev. 743, 747-759 (2005).
[25] Advertising of Ophthalmic Goods and Services, Fed. Reg. 23992, 23998 (June 2, 1978) (codified at 16 C.F.R. pt. 456).
[26] Tim Wu, *Antitrust Via Rulemaking: Competition Catalysts*, 16 Colo. Tech. L. J. 33, 46 (2017) (noting that the Eyeglass Rule "was such a success that it has been more or less taken for granted, and seems to have required only limited amounts of ongoing enforcement, which perhaps is the best evidence of a successful rule.").

We are public servants tasked with serving the public in the way Congress intended, using our best judgment and ingenuity to do it effectively. We have an obligation to use our tools to make the maximum impact we can in peoples' lives, and that's just what we're doing.

Indeed, when thinking about legitimacy, I immediately think of a moment that stood out starkly to me in the first months of my time at the FTC. In 2022, the Office of Policy and Planning conducted a series of listening forums, hearing from market participants about their experiences with mergers in their respective industries. We heard from small businesses, workers, entrepreneurs, investors, and others. One participant thanked us for our act of listening to their experiences and urged us to *renew their faith in government* by using our enforcement power to do something about the real, material problems in their life.[27] Many have highlighted concerns about overreach. An underexamined problem may be the significant costs to inaction or neglect. When we ignore the mandate that we have been given and the tools we have to fulfill it, we *undermine* our reason for being in the eyes of the public.

We are bound by law, and the wellspring of our authority is Congress. The creativity and ingenuity to do our jobs with excellence comes from our staff. When we do it right, we fulfill our contract with the American people that the government they support will work for them. *That* is democratic legitimacy.

Now, one might agree that in general rules can generate the benefits I've described—deterrence, clarity, durable efficiencies, and the like—but wonder how it might apply to competition rules. These reasons apply equally to any subject matter, in my opinion, but additional reasons may apply here. The FTC's Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 provides important context for why and where competition rules may be appropriate.

As the policy statement makes clear, Congress passed the FTC Act against the backdrop of significant skepticism of the judge-made rule of reason approach. Congress was concerned about a potentially inconsistent and unpredictable approach to antitrust law.[28] Indeed, antitrust has been especially singled out for the complexity, length, and expense of litigation. It is an area of law that, then as now, cries out for added clarity that can be achieved through rulemaking.[29]

As an alternative to the judicially-created rule of reason standard, Congress expected the FTC, as an expert body, to develop an understanding of various types of unfair methods of competition and to develop a different and informed approach to protecting against them.[30] As I said before, the FTC was created with tools to study markets, in part to be able to develop considered views as to what constitutes an unfair method of competition.

[27] Fed. Trade Comm'n, Tr., FTC - DOJ Merger Guidelines Listening Forum on Agriculture, at 18 (Mar. 28, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ%20Merger%20Guidelines%20Listening%20Forum_FTC_March%2028%202022.pdf.

[28] Section 5 Policy Statement, at 2-6.

[29] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357, 360 (2020).

[30] Section 5 Policy Statement, at 2-6.

With these origins in mind, and relying on a close reading of the statutory text, legislative intent, and case law, our policy statement describes a framework for determining whether a practice constitutes an unfair method of competition.[31] The framework also posits some conduct for which no justification can be found, as well as conduct for which there might be narrow justifications.[32]

Where appropriate, rulemaking based on significant evidence, experience, and the like can help to determine what conduct constitutes an unfair method of competition. Further, rules—which can include prohibitions, presumptions, guidelines, and more—can provide an appropriately flexible avenue for dealing with complex market structures and effects in a clear and simple way.

Now, what do I mean by "appropriate" in competition rulemaking? Well, with respect to the FTC's proposed rule on non-competes, there are a number of features that strongly suggest that a nationwide rule is appropriate and well-suited to meet this challenge. As we review in the proposal, there is a large body of evidence across industries and income levels.[33] That evidentiary record demonstrates significant harms to competitive conditions and to market participants. Indeed, our preliminary estimates calculate a loss of $250-300 billion per year in wages to American workers,[34] as well as impacts on innovation, business formation, and consumer prices.

Importantly, the evidentiary record describes effects *in the aggregate*, a feature of unfair methods of competition law that makes it especially applicable in the context of rulemaking.[35] The centuries of law about non-competes have considered their impacts on the individuals involved, not on workers in the same industry or the economy at large.

The literature also strongly suggests that non-compete clauses are coercive and exploitative as to a large swath of workers, within the understanding expressed in Supreme Court case law.[36] Not only is this legally relevant, it also counsels in favor of action, as affected participants are unlikely to have or find avenues to enforce against non-competes through private means, making government intervention important for market discipline.

Finally, a clear nationwide rule is appropriate given the important spillover effects at play. The evidence indicates that non-compete clauses suppress wages even for workers who are not subject to non-competes, by preventing jobs that would be a better fit for those workers from opening up.[37] Many labor markets cross state lines, with four of the eight largest US

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[31] *Id*. at 8-10.
[32] *Id*. at 10-12.
[33] Non-Compete Clause Rule, 88 Fed. Reg. at 3484-88.
[34] *Id*. at 3501.
[35] *Id*. at 3517.
[36] *Id*. at 3502-04.
[37] *Id*. at 3521.

metropolitan areas including more than one state.[38] Finally, employers may seek to circumvent those laws through the use of choice-of-law provisions and forum selection clauses.[39]

The FTC has an enormous mandate by Congress that goes right to the heart of protecting the economic liberty and autonomy that is central to the American project. We are small, but we have the passion, fidelity to mission, and creativity to live up to that mandate. In order to carry out our mission, we have to use all the tools in our toolbox – the toolbox Congress gave us. Rulemaking on both consumer protection and competition issues is an important tool that we cannot be afraid to use where it's the most effective one for achieving the mission. Thank you.

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[38] *Largest Urbanized Areas With Selected Cities and Metro Areas*, United States Census Bureau (Nov. 15, 2021), https://www.census.gov/dataviz/visualizations/026/508.php.
[39] *See* Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 Comp. Lab. & Pol'y J. 389, 396-402 (2010).