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Office of Acting Chairwoman
Rebecca Kelly Slaughter

Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter at the Consumer Federation of America's Virtual Consumer Assembly

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Hello, Virtual Consumer Assembly! Thank you for that warm introduction, Jack, and for everything that you and the Consumer Federation of America do for American consumers year-in-and-year-out.

I am so glad to be "here" with you today to discuss the Federal Trade Commission, where I serve as the Acting Chairwoman, and my vision for how we can best meet the significant challenges facing consumers in the modern economy. I hope that you will come away excited about this vision, because *you* have an important role to play in making it happen. And, as you'll hear FTC commissioners and staff say often, I'm not speaking for the whole Commission today or any other commissioner.[1]

The FTC has a number of tools that we try to use wisely to improve Americans' everyday experiences as consumers, from powerful research into opaque markets to enforcement actions that seek to stop bad actors or break up monopolists. When the FTC makes the news, you are probably reading that we filed a lawsuit over unfair, deceptive, or anticompetitive practices or that we released a new study with groundbreaking findings.

But one powerful tool to protect consumers has in recent decades been underappreciated: rulemaking. In March, I announced that I was standing up a rulemaking group within our Office of the General Counsel to take a strategic and harmonized approach to rulemaking across our mission areas.[2]

I have fielded some recent questions from industry, Congress, advocates, and staff about my plans for the rulemaking group since that announcement, so, in my time with you today, I want to expound on my vision for its work. In short, I want to explore both updating current rules and developing new rules in areas where consumers are most at risk and where existing protections are inadequate or nonexistent. In other words, I want to focus our attention on areas where our

[1] In other words, these remarks represent my views and not necessarily those of the whole Commission or of any other commissioner.
[2] *See* Press Release, Fed. Trade Comm'n, *Acting Chairwoman Slaughter Announces New Rulemaking Group* (Mar. 25, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.

rules of the road simply did not keep up with rapid changes in technology or markets, leaving Americans' privacy exposed or their market choices limited while deceptive and unfair practices got algorithmically supercharged. I believe that the FTC will benefit from having a centralized group because it is useful to have a coordinated, strategic plan for the rule-review process and because our rulemaking authorities are technically varied and legally complicated, as you are about to hear in *much* greater detail.

Rulemaking is an important tool to clarify the scope of the law in a transparent and participatory way, protecting honest businesses and consumers alike. Of course, while rules have the force of law, they do not and cannot *create* new law. Rulemaking is not legislating: All FTC rulemaking must be grounded in specific, existing statutory authority.

So why do rules matter? Rules carry the force of law, which means that, in practice, the vast majority of companies will abide, or at least attempt to abide, by written rules. One might hope the same could be said of the underlying general laws themselves; we expect companies to attempt to abide by them. But the difference between case-by-case enforcement of general prohibitions in law and rule-based enforcement over specific prohibitions in the Code of Federal Regulations is the greater consequence that firms may face for violations.

When the FTC proves that defendants have committed an unfair or deceptive act or practice in violation of section 5 of the FTC Act,[3] but when no rule has been violated, all we can do is order them to stop. Indeed, after the Supreme Court's decision in *AMG* two weeks ago,[4] we cannot even go straight to federal court to disgorge ill-gotten gains or to provide redress to consumers. (And, as an aside, I know that you understand how important it is that Congress restore the now-defunct section 13(b) authority that the FTC had utilized on a bipartisan basis, with the blessing of eight circuit courts of appeals, for the last forty years.) Without a rule violation, though, it is only after a firm violates the Commission's order that a court can impose a civil penalty.

When there is a rule already in place, enforcement is a different story altogether. Rules must be developed in a transparent way with substantial opportunity for stakeholder input. Rules can and should be updated regularly, to keep pace with developments in the markets and technology. And, of course, rules are subject to judicial review both facially and as applied to any particular firm. The substantial process involved in rule development (which I will discuss further below) may have significant benefit: Once developed and published, rules provide clarity about the boundaries of illegal behavior, and in exchange for that clarity companies can face penalties even for first-time rule violations. As a result, rules create strong incentives to comply with the law. Powerful deterrence makes for lawful markets that are good for consumers and businesses alike.

But not all rules are created equally, from a statutory perspective. To explain the rulemaking nuances further, I need you all to put on your wonk hats for a minute—and I know that those hats fit this crowd quite comfortably.

[3] 15 U.S.C. § 45(a).
[4] *See AMG Capital Mgmt. v. FTC*, 131 S. Ct. 1341 (2021).

Most rules written by most agencies follow the process laid out in the Administrative Procedure Act, or APA.[5] The APA's typical output is commonly known by its two major steps—"notice and comment rulemaking." The agency provides the public with *notice* of what rule it proposes and then carefully analyzes the public's *comments* before finalizing a rule.

Unlike most federal agencies, there is a limited amount of APA-process rulemaking the FTC can do today; what does exist is delineated by specific Congressional grants of authority. The FTC has used many of these specific grants of authority to important effect. For example, when Congress adopted the Children's Online Privacy Protection Act, or COPPA, it gave the FTC the authority to write an implementing rule using the APA.[6] We have a great rule that implements COPPA, which we strengthened about a decade ago to keep pace with technological changes and which we are in the process of reviewing currently.[7]

Congress also gave us APA authority when it passed the Fairness to Contact Lens Consumers Act[8]—giving rise to the Contact Lens Rule. We recently completed a strong update[9] to the Contact Lens Rule that continues to ensure that you can get a copy of your contact-lens prescription and shop for contact lenses wherever you please, not only at your optometrist's office.

And the Energy Policy and Conservation Act authorized us to write the Energy Labeling Rule, which is why when you shop for major appliances you can see the same, simple yellow sticker that helps you easily compare the energy cost of different makes and models. For my super-wonks out there, you can find all of the rules we have written using the APA under specific acts of Congress in subchapter C, which is parts 300 through 322, of Title 16 of the Code of Federal Regulations, covering everything from financial privacy and telemarketing sales to CAN-SPAM and health-breach notification.

These rules collectively make everyday life better for literally every American with a phone or email address or contact lenses, and Congress is principally to thank for passing the authorizing laws (though of course the brilliant FTC staff do a great job implementing them and keeping them updated).

A few Congressional acts that authorize the FTC to do APA rulemaking, however, have gone unused. In 1994, Congress authorized us to enact a rule that would outlaw deceptive "Made in USA" labels. Twenty-five years later, we finally published, on a bipartisan basis, a proposed rule to do just that, which I strongly supported. Other APA rulemaking authorizations that we have not used include the Energy Policy Act of 2005, which allows us to protect the privacy and prevent slamming and cramming of energy consumers, and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, which allows us, jointly with the Antitrust Division of the Department of Justice, to prescribe rules to interpret and implement the statute

[5] *See* 5 U.S.C. § 553(b).
[6] *See* 15 U.S.C. § 6502(b).
[7] *See* 78 Fed. Reg. 3972, 3972 (Jan. 17, 2013).
[8] *See* 15 U.S.C. §§ 7601–7610.
[9] *See* Press Release, Fed. Trade Comm'n, *FTC Announces Final Amendments to the Agency's Contact Lens Rule* (June 23, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/ftc-announces-final-amendments-agencys-contact-lens-rule.

concerning agreements around generic-drug entry. Those rulemaking powers may be worth exploring if the problems Congress had in mind are still pressing.

A truly important but mostly unused APA rulemaking authority to protect consumers that Congress has given us came in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. It was a compromise Congress reached not long before final passage: The Consumer Financial Protection Bureau, which was created by that Act, would not have jurisdiction over most auto dealers, but the Federal Trade Commission would be empowered to write rules about the unfair or deceptive practices of auto dealers using the APA instead of section 18.[10] More than a decade later, we have not made good use of that authority. Last year, in conjunction with an enforcement action against an auto dealer called Bronx Honda, which allegedly intentionally discriminated against Black and Hispanic borrowers, among other law violations, I called for the FTC to initiate a rulemaking to put an end to the tricks and traps that remain all-too prevalent for consumers shopping for cars.[11]

And, finally, lots of academic and stakeholder attention has been given to the potential for the FTC to write rules addressing unfair methods of competition.[12] With the limited time I have with you today, I am not going to dwell on all the possibilities for potential rulemakings on unfair methods of competition other than to note that the FTC has already received petitions from advocates to enact rules to prohibit non-compete clauses in most employment contracts[13] and to ban exclusionary contracts by dominant firms.[14]

Outside of the specific APA-style rulemaking grants, Congress also gave the FTC a more general grant of consumer protection rulemaking power, in section 18. This general grant of rulemaking power comes with specific procedures; you may have heard it referred to in the past as "Mag-Moss rulemaking," after the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act of 1975,[15] which first created section 18. Section 18 rulemaking empowers the FTC to write new rules that prohibit or regulate any unfair or deceptive practice that is prevalent in interstate commerce. In other words, if we could sue someone for committing an unfair or deceptive practice in violation of section 5 of the FTC Act, then we can also write a rule that outlaws or limits such a practice if it is prevalent. These rules are called "trade regulation rules." The top-line difference between the APA and section 18 is that section 18 adds more steps to the APA notice-and-comment process.[16]

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[10] *See* 12 U.S.C. § 5519(d).
[11] *See* Fed. Trade Comm'n, Concurring Statement of Comm'r Slaughter, *In re Bronx Honda* (May 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1576006/bronx_honda_2020-5-27_bx_honda_rks_concurrence_for_publication.pdf.
[12] *See* Rohit Chopra & Lina M. Khan*, The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020), https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4.
[13] *See* Open Markets Institute et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* (Mar. 20, 2019), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.
[14] *See* Open Markets Institute et al, *Petition for Rulemaking to Prohibit Exclusionary Contracts* (July 21, 2020), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf.
[15] Pub. L. No. 93-637, 88 Stat. 2183, 2193 (1975).
[16] *See* 15 U.S.C. § 57a.

Section 18 rulemaking is a powerful tool but one that has gathered dust for generations, in part because of fear about whether the process is too burdensome to result in timely and effective rules. Although some of the trade regulation rules issued under section 18 have been updated, the last *new* rulemaking finalized under section 18 occurred way back in the 1980s. But the trade regulation rules we have issued were of great consequence, taking industries that were opaque and rife with abusive practices and creating instead transparency and a restoration of trust, so much so that we take them for granted now.[17]

Take for example the Funeral Rule, which transformed the purchasing of funeral services.[18] Before the Rule, most funeral homes would walk grieving loved ones through all their options for the service without disclosing the prices of any of the options, only revealing one total all-in price at the very end (which was, needless to say, often quite high). Now, with the Rule, consumers get immediately handed a general price list when they arrive or call, which must disclose the costs of services offered such as embalming or cremation or use of a hearse or limousine, as well as a casket price list and an outer burial container price list. Far too many Americans have had to grieve far too much in the pandemic; now more than ever we should collectively appreciate the importance of not compounding the pain of grieving a lost loved one with the opacity and burden around the financial pressures of a funeral.

As a four-eyed American, I am also grateful for the Eyeglass Rule.[19] Before its adoption, many optometrists and ophthalmologists declined to give patients a copy of their prescriptions, offering instead to fulfill the prescription by selling them eyeglasses directly. The Eyeglass Rule ended that—now, consumers must be handed a copy of their prescription immediately upon the conclusion of an eye exam, and those consumers can shop for eyeglasses wherever they please, which has spurred a world of competition in cost-effective online eyeglass sales. The prescription-release requirement was so popular that Congress extended it to contact lenses with the law I mentioned earlier.

Other groundbreaking rules issued under section 18 include the Credit Practices Rule,[20] which bans the use of confessions of judgment and other wildly unfair practices in consumer lending, and the Holder Rule,[21] which preserves consumers' legal rights even if their lender sells a loan to another party. Then there is the Mail, Internet, or Telephone Order Merchandise Rule,[22] which says that, unless another date is expressly stated, consumers should get their orders in a month and otherwise have the right to cancel. As you might expect, with Americans shopping from home for the last year, this Rule has come up a lot! I could continue waxing poetic about groundbreaking section 18 rules, from the Negative Option Rule[23] and the Cooling-Off Rule[24] to

[17] My super-wonks can find all our section 18 rules in Subchapter D, which is parts 423 to 460, of Title 16 of the Code of Federal Regulations.
[18] 16 C.F.R. pt. 432.
[19] 16 C.F.R. pt. 456.
[20] 16 C.F.R. pt. 444.
[21] 16 C.F.R. pt. 433.
[22] 16 C.F.R. pt. 435.
[23] 16 C.F.R. pt. 425.
[24] 16 C.F.R. pt. 429.

the Business Opportunity Rule[25] and the Franchise Rule,[26] but I think that you get the point: Section 18 rules have brought more structure, fairness, clarity, transparency, and trust to markets where those qualities had been lacking.

The conventional wisdom is that new section 18 rulemaking is just not worth the candle, it is far more cumbersome than APA rulemaking, and no one in their right mind would try it. Later rules took *more than eight years* from start to finish![27] It was "the Mag-Moss albatross."[28] And so no one tried. But I believe that this conventional wisdom is, if not wholly mistaken, then quite overblown.

Take a close look at the law itself. The first thing you notice is that Congress instructs, essentially, "Do everything the APA requires plus the following."[29] And what follows includes, before ever proposing a rule, publishing an advance notice of proposed rulemaking for public comment, which is an option but not a requirement under the APA, and also informing Congress that we've done so. Then we can propose a specific rule for public comment. That's standard under the APA with the added requirement, which is only common sense, that we believe that the unfair or deceptive practice we propose to regulate is prevalent.[30] We also have to inform Congress again.

What can follow that comment period is the unusual wrinkle: Anyone who wants to make an oral presentation to the FTC about the proposed rule can request what section 18 calls "an informal hearing" before an independent hearing officer.[31] Sometimes, there might be a disputed issue of material fact, such as whether a given claim misleads consumers or is substantiated by competent evidence; when that happens, the independent officer may allow interested parties who ask to cross-examine those who made oral presentations or to present rebuttal evidence. The independent hearing officer then makes factual findings and recommendations, which are also subject to public comment, for the Commission to consider in promulgating a final rule. These are meaningful and time-consuming additional steps that section 18 provides.

But what became known as "Mag-Moss rulemaking" is so much more formal and cumbersome, looking more like high-stakes litigation in federal court than a public-input hearing before a state legislative committee. Many of the burdens associated with "Mag-Moss" come not from the enabling statute but from the Commission's own rules,[32] which have not been updated recently. Just as it is incumbent on us to regularly review our substantive rules to ensure they are keeping pace with developments in the markets, so too should we review our own rules of practice to

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[25] 16 C.F.R. pt. 437.
[26] 16 C.F.R. pt. 436.
[27] Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1987–88 & nn.63, 65. (2015).
[28] Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Commerce, Sci., and Transp., 11th Cong. 5 (2010), https://www.commerce.senate.gov/services/files/0012F656-577F-4AE2-959A-9DA56C203143 (statement of Edmund Mierzwinski, Dir., Consumer Program, U.S. Pub. Interest Research Grp.).
[29] 15 U.S.C. § 57a(b).
[30] *Id.* § 57a(b)(3).
[31] *Id.* § 57a(c).
[32] *See* 16 C.F.R. §§ 1.7–1.20.

ensure they continue to adequately balance due process and efficiency and enable the Commission to live up to its statutory mandate. So, as we consider how to clarify the application of our twentieth-century statute to twenty-first century markets, our first job must be to ensure our own procedures are up to the task.

I believe that the efficient, democratic spirit of section 18's text can be revived through a streamlining of the FTC's own implementing rules, and I hope that we do just that.

And let's be clear, effective use of our statutory authority to address pressing problems, especially in technology markets, is not just a big-government, big-D Democratic vision. The consumer-protection implications of widespread collection and dissemination of personal data fueled by surveillance-based business models and especially by dominant technology firms has raised bipartisan alarm bells. I fervently hope that Congress passes a national privacy law that would, among other things, allow the FTC to implement the law with APA rulemaking authority.

But Congress has not yet acted, and my colleague and friend Commissioner Wilson has repeatedly reflected recently that there is value in "launching a Mag-Moss rulemaking on privacy and data security."[33] The worst outcome, in my view, is not that we get started but Congress passes a law; it's that we never get started and Congress never passes a law. I have also previously discussed my interest in a rulemaking to address the failure of ticket sellers and hotels to disclose mandatory fees upfront like airlines must.[34] And Commissioner Chopra has expressed an interest in codifying our guides into rules through section 18.[35]

But we Commissioners are not the only source of ideas about what problems the FTC most needs to tackle; YOU are a critical vault of inspiration. Where else should we focus? What prevalent unfair or deceptive practices are harming your communities the most? I cannot emphasize enough how serious I am about hearing from you. Under the APA, agencies have to accept petitions for rulemaking—be they from industry or consumer advocates.

You may worry that spending a lot of time and energy in putting together a great petition for rulemaking is just not worth it compared with all the other important work you are doing. After all, it has been a whole generation since the last new section 18 rule. But I should point out to skeptics that the Made in USA proposed rule I mentioned earlier was published not too long after we received a petition for rulemaking from TruthInAdvertising.org. I cannot promise that we will act on every petition we receive, but I do promise that we will consider them all carefully. And then, when new rulemakings are underway, please participate: Raise your hand to speak, put together a coalition, and elevate and center the voices of affected consumers.

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[33] *See* John Hendel, *FTC Republican 'beginning to see the wisdom' of launching data privacy rulemaking*, Politico (Feb. 12, 2021).

[34] *See* Fed. Trade Comm'n, Opening Remarks of Comm'r Rebecca Kelly Slaughter, "That's the Ticket": An FTC Workshop about Online Ticket Sales (June 11, 2019), https://www.ftc.gov/system/files/documents/public_statements/1527238/slaughter_-_prepared_remarks_ftc_tickets_workshop_6-11-19.pdf.

[35] *See* Fed. Trade Comm'n, *Statement of Comm'r Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers* (Oct. 19, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581862/p144400choprastatementolderamericansrpt.pdf.

Some may think that this vision is a folly. True, rulemaking is not a panacea for all the problems consumers face. Even APA rulemakings may be procedurally daunting and time-consuming, depending on the subject, and section 18 rulemakings will always be harder still. When we do complete a rule, it could still be overturned in court. These reasonable concerns have kept this tool tucked away for more than a generation, but the world continues to change. Dark patterns haunt the internet, robbing consumers of their privacy, time, and money. Algorithms are super-charging deceptive and unfair practices. Corporate concentration climbs. To my mind, these new challenges must be met by new rules, which we can adopt, ironically, through a return to the text Congress passed long before the internet entered our lives. I look forward to working with you all to rise to the occasion and protect American consumers now and in the future. Thank you.