



UNITED STATES OF AMERICA
Federal Trade Commission
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Office of Policy and Planning

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

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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 in 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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Fed. Trade Comm'n (May 2021), <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

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¹⁶ J. Howard Beales III & Timothy J. Muris, *Enforcement Efficiency*, 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 Michael F. Sturley,

Enforcement Efficiency, 68 N. C. L. Rev. 953, 954 (1990); Jon

Sheldon et al., *Enforcement Efficiency*, 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, *Enforcement Efficiency*, 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 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 has a

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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 _____ 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
