

FEDERAL TRADE COMMISSION (FTC)

Statement of Regulatory Priorities

The Federal Trade Commission is an independent agency charged with rooting out unfair methods of competition and unfair or deceptive acts or practices. This mission is vital to our national interest because, when markets are fair and competitive, honest businesses and consumers alike reap the rewards. The Commission is committed to deploying all its tools to realize this mission.

I. New Circumstances Facing the Commission

In 2021, a number of changed circumstances caused the Commission to consider deploying new tools to advance its mission. First, the Supreme Court decided that the Commission cannot invoke its authority under Section 13(b) of the FTC Act to seek restitution or disgorgement in federal court.¹ Second, the Commission, after careful study, streamlined its own Rules of Practice, eliminating extra bureaucratic steps and unnecessary formalities by returning to the statutory text Congress enacted in section 18 of the FTC Act, which will make new consumer-protection rulemakings more feasible and efficient while still preserving robust public participation.² As the Supreme Court noted in its decision, consumer redress remains available for cases that involve a consumer-protection rule violation.³ Third, the case-by-case approach to promoting competition, while necessary, has proved insufficient, leaving behind a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches. Accordingly, the Commission in the coming year will consider developing both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices.

The Commission is particularly focused on developing rules that allow the agency to recover redress for consumers who have been defrauded and seek penalties for firms that engage in data

¹ See *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021). The Commission has called on Congress to restore its ability to seek disgorgement and restitution. The Consumer Protection and Recovery Act, which would fix the adverse court ruling and restore the Commission's powers, passed the U.S. House of Representatives on July 20, 2021. See *Congress.gov, H.R. 2668—Consumer Protection and Recovery Act*, <https://www.congress.gov/bill/117th-congress/house-bill/2668/actions>.

² See Fed. Trade Comm'n, *Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures* (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf.

³ See *AMG Capital*, 141 S. Ct. at 1352.

abuses. The Commission's recent action to prohibit Made in USA labeling fraud offers a model for how the agency can deter the worst abuses without imposing burdens on honest businesses.⁴

Among the many pressing issues consumers confront in the modern economy, the abuses stemming from surveillance-based business models are particularly alarming. The Commission is considering whether rulemaking in this area would be effective in curbing lax security practices, limiting intrusive surveillance, and ensuring that algorithmic decision-making does not result in unlawful discrimination. Importantly, it is not only consumers that are threatened by surveillance-based business models but also competition.

Over the coming year, the Commission will also explore whether rules defining certain "unfair methods of competition" prohibited by section 5 of the FTC Act would promote competition and provide greater clarity to the market. A recent Executive Order encouraged the Commission to consider competition rulemakings relating to non-compete clauses, surveillance, the right to repair, pay-for-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.⁵ The Commission will explore the benefits and costs of these and other competition rulemaking ideas.

Recently, the Commission published in the Federal Register a "Request for Public Comment Regarding Contract Terms that May Harm Fair Competition," which included for reference two public petitions for competition rulemaking the Commission has received.⁶ One of those petitions was to curtail the use of non-compete clauses, and the other was to limit exclusionary contracting by dominant firms, but the Commission also solicited additional examples of unfair terms. Members of the public filed thousands of comments, which the Commission's staff are carefully reviewing.

II. Updates on Ongoing Rulemakings

a. Periodic Regulatory Review Program

⁴ See Fed. Trade Comm'n, *Made in USA Labeling Rule*, 86 Fed. Reg. 37022, 37032–33 (July 14, 2021) (codified at 16 CFR 323.2).

⁵ See Office of the President of the United States, *Executive Order on Promoting Competition in the American Economy*, section 5(g), (h)(i)–(vii) (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁶ See Regulations.gov, Request for Public Comment Regarding Contract Terms that May Harm Fair Competition, No. FTC-2021-0036, <https://www.regulations.gov/docket/FTC-2021-0036>.

In 1992, the Commission implemented a program to review its rules and guides on a regular basis. The Commission's review program is patterned after provisions in the Regulatory Flexibility Act, 5 U.S.C. 601–612, and complies with the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission's review program is also consistent with section 5(a) of Executive Order 12866, which directs executive branch agencies to reevaluate periodically all their significant regulations.⁷ Under the Commission's program, rules and guides are reviewed on a 10-year schedule that results in more frequent reviews than are generally required by the Regulatory Flexibility Act. The public can obtain information on rules and guides under review and the Commission's regulatory review program generally at <https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides>.

The program provides an ongoing, systematic approach for obtaining information about the costs and benefits of rules and guides and whether there are changes that could minimize any adverse economic effects, not just a "significant economic impact upon a substantial number of small entities."⁸ As part of each review, the Commission requests public comment on, among other things, the economic impact and benefits of the rule; possible conflict between the rule and state, local, or other federal laws or regulations; and the effect on the rule of any technological, economic, or other industry changes. Reviews may lead to the revision or rescission of rules and guides to ensure that the Commission's consumer protection and competition goals are achieved efficiently. Pursuant to this program, the Commission has rescinded 40 rules and guides promulgated under the FTC's general authority and updated dozens of other rules and guides since the program's inception.

(1) Newly Initiated and Upcoming Periodic Reviews of Rules and Guides

On July 2, 2021, the Commission issued an updated ten-year review schedule.⁹ Since the publication of the 2020 Regulatory Plan, the Commission has initiated or announced plans to initiate periodic reviews of the following rules and guides:

Business Opportunity Rule, 16 CFR 437. During the latter part of 2021, the Commission plans to initiate periodic review of the Business Opportunity Rule as part of the Commission's systematic review of all current Commission rules and guides. The Commission plans to seek comments on, among other

⁷ 58 FR 51735 (Sept. 30, 1993).

⁸ 5 U.S.C. 610.

⁹ 86 FR 35239 (July 2, 2021).

things, the economic impact, and benefits of this rule; possible conflict between the rule and State, local, or other Federal laws or regulations; and the effect on the rule of any technological, economic, or other industry changes. Effective in 2012, the Rule requires business-opportunity sellers to furnish prospective purchasers a disclosure document that provides information regarding the seller, the seller's business, and the nature of the proposed business opportunity, as well as additional information to substantiate any claims about actual or potential sales, income, or profits for a prospective business-opportunity purchaser. The seller must also preserve information that forms a reasonable basis for such claims.

Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 CFR 432. On December 18, 2020, the Commission initiated periodic review of the Amplifier Rule (officially Power Output Claims for Amplifiers Utilized in Home Entertainment Products Rule).¹⁰ The Commission sought comments on, among other things, the economic impact, and benefits of this Rule; possible conflict between the Rule and State, local, or other Federal laws or regulations; and the effect on the Rule of any technological, economic, or other industry changes. Staff anticipates submitting a recommendation for further action to the Commission by February 2022. The Amplifier Rule establishes uniform test standards and disclosures so that consumers can make more meaningful comparisons of amplifier-equipment performance attributes.

Hart-Scott-Rodino Antitrust Improvements Act Coverage, Exemption, and Transmittal Rules, 16 CFR 801-803. On December 1, 2020, the Commission initiated the periodic review of the Hart-Scott-Rodino Antitrust Improvements Act Coverage, Exemption, and Transmittal Rules (HSR Rules) as part of the Commission's systematic review of all current Commission rules and guides.¹¹ The comment period closed on February 1, 2021, and staff is now reviewing the comments. The HSR Rules and the Antitrust Improvements Act Notification and Report Form (HSR Form) were adopted pursuant to section 7(A) of the Clayton Act, which requires firms of a certain size contemplating mergers, acquisitions, or other transactions of a specified size to file notification with the FTC and the DOJ and to wait a designated period before consummating the transaction.

¹⁰ 85 FR 82391 (Dec. 18, 2020).

¹¹ 85 FR 77042 (Dec. 1, 2020).

During the first quarter of 2022, staff anticipates that the Commission will propose a rulemaking to update the HSR Form and Instructions to the new cloud-based, e-filing system, which will eliminate paper filings.

Guides. During the calendar year of 2022, the Commission plans to initiate periodic review of the Guides Against Deceptive Pricing, 16 CFR 233, the Guides, 16 CFR 238, the Guide Concerning Use of the Word “Free” and Similar Representations, 16 CFR 251, and the Guides for the Use of Environmental Marketing Claims, 16 CFR 260.

(2) Ongoing Periodic Reviews of Rules and Guides

The following proceedings for the retrospective review of Commission rules and guides described in the 2020 Regulatory Plan are ongoing:

Children’s Online Privacy Protection Rule, 16 CFR 312. On July 25, 2019, the Commission issued a request for public comment on its Children’s Online Privacy Protection Rule (COPPA Rule).¹² Although the Commission’s last COPPA Rule review ended in 2013, the Commission initiated this review early in light of changes in the marketplace. Following an extension, the public comment period closed on December 9, 2019.¹³ The FTC sought comment on all major provisions of the COPPA Rule, including its definitions, notice and parental-consent requirements, exceptions to verifiable parental consent, and safe-harbor provision. The FTC hosted a public workshop to address issues raised during the review of the COPPA Rule on October 7, 2019. Staff is analyzing and reviewing public comments.

Endorsement Guides, 16 CFR 255. On February 21, 2020, the Commission initiated a periodic review of the Endorsement Guides.¹⁴ The comment period, as extended, closed on June 22, 2020.¹⁵ FTC staff is currently reviewing the comments received. The Guides are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of the FTC Act. Among other things, the Endorsement Guides provide that if there is a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed. The advertiser must also possess and rely on

¹² 84 FR 35842 (July 25, 2019).

¹³ 84 FR 56391 (Oct. 22, 2019).

¹⁴ 85 FR 10104 (Feb. 21, 2020).

¹⁵ 85 FR 19709 (Apr. 8, 2020).

adequate substantiation to support claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly.

Franchise Rule, 16 CFR 436. On March 15, 2019, the Commission initiated periodic review of the Franchise Rule (officially titled, Disclosure Requirements and Prohibitions Concerning Franchising).¹⁶ The comment period closed on April 21, 2019. The Commission then held a public workshop on November 10, 2020. The closing date for written comments related to the issues discussed at the workshop was December 17, 2020.¹⁷ The Rule is intended to give prospective purchasers of franchises the material information they need to weigh the risks and benefits of such an investment. The Rule requires franchisors to provide all potential franchisees with a disclosure document containing 23 specific items of information about the offered franchise, its officers, and other franchisees. Required disclosure topics include, for example, the franchise's litigation history; past and current franchisees and their contact information; any exclusive territory that comes with the franchise; assistance the franchisor provides franchisees; and the cost of purchasing and starting up a franchise.

Funeral Rule, 16 CFR 453. On February 14, 2020, the Commission initiated a periodic review of the Funeral Industry Practices Rule (Funeral Rule).¹⁸ The comment period as extended closed on June 15, 2020.¹⁹ Commission staff is reviewing the comments received and anticipates submitting a recommendation for further action to the Commission by early 2022. The Rule, which became effective in 1984, requires sellers of funeral goods and services to give price lists to consumers who visit a funeral home.

Health Breach Notification Rule, 16 CFR 318. On May 22, 2020, the Commission initiated a periodic review of the Health Breach Notification Rule.²⁰ The comment period closed on August 20, 2020. Commission staff has reviewed the comments and intends to submit a recommendation to the Commission by January 2022. The Rule requires vendors of personal health records (PHR) and PHR-related entities to provide: (1) notice to consumers whose unsecured personally identifiable health information has been breached; and (2) notice to the Commission. Under the Rule, vendors must notify

¹⁶ 84 FR 9051 (Mar. 13, 2019).

¹⁷ 85 FR 55850 (Sept. 10, 2020).

¹⁸ 85 FR 8490 (Feb. 14, 2020).

¹⁹ 85 FR 20453 (Apr. 13, 2020).

²⁰ 85 FR 31085 (May 22, 2020).

both the FTC and affected consumers whose information has been affected by a breach “without unreasonable delay and in no case later than 60 calendar days” after discovery of a data breach. Among other information, the notices must provide consumers with steps they can take to protect themselves from harm.

Identity Theft Rules, 16 CFR 681. In December 2018, the Commission initiated a periodic review of the Identity Theft Rules, which include the Red Flags Rule and the Card Issuer Rule.²¹ FTC staff is reviewing the comments received and anticipates sending a recommendation to the Commission by January 2022. The Red Flags Rule requires financial institutions and creditors to develop and implement a written identity theft prevention program (a Red Flags Program). By identifying red flags for identity theft in advance, businesses can be better equipped to spot suspicious patterns that may arise and take steps to prevent potential problems from escalating into a costly episode of identity theft. The Card Issuer Rule requires credit and debit card issuers to implement reasonable policies and procedures to assess the validity of a change of address if they receive notification of a change of address for a consumer’s debit or credit card account and, within a short period of time afterwards, also receive a request for an additional or replacement card for the same account.

Leather Guides, 16 CFR 24. On March 6, 2019, the Commission initiated periodic review of the Leather Guides, formally known as the Guides for Select Leather and Imitation Leather Products.²² The comment period closed on April 22, 2019, and staff anticipates submitting a recommendation for further action to the Commission by December 2021. The Leather Guides apply to the manufacture, sale, distribution, marketing, or advertising of leather or simulated leather purses, luggage, wallets, footwear, and other similar products. The Guides address misrepresentations regarding the composition and characteristics of specific leather and imitation leather products.

Negative Option Rule, 16 CFR 425. On October 2, 2019, the Commission issued an Advance Notice of Proposed Rulemaking (ANPRM) seeking public comment on the effectiveness and impact of the Trade Regulation Rule on Use of Prenotification Negative Option Plans (Negative Option Rule).²³ The Negative Option Rule helps consumers avoid recurring payments for products and services they did not

²¹ 83 FR 63604 (Dec. 11, 2018).

²² 84 FR 8045 (Mar. 6, 2019).

²³ 84 FR 52393 (Oct. 2, 2019).

intend to order and to allow them to cancel such payments without unwarranted obstacles. The Commission is studying various options, but the next expected action is undetermined.

Telemarketing Sales Rule (TSR), 16 CFR 310. On August 11, 2014, the Commission initiated a periodic review of the TSR as set out on the 10-year review schedule.²⁴ The comment period as extended closed on November 13, 2014.²⁵ Staff anticipates making a recommendation to the Commission by November 2021.

b. Proposed Rules

Since the publication of the 2020 Regulatory Plan, the Commission has initiated or plans to take further steps as described below in the following rulemaking proceedings:

Care Labeling Rule, 16 CFR 423. On July 23, 2020, the Commission issued a Supplemental Notice of Proposed Rulemaking seeking comment on a proposed repeal of the Rule.²⁶ On July 21, 2021, the Commission voted to retain the Care Labeling Rule (officially the Rule on Care Labeling of Textile Apparel and Certain Piece Goods as Amended) to ensure American consumers continue to get accurate information on how to take care of their fabrics and extend the life of their clothes. In a public statement, the Commission also indicated that it would continue to consider ways to improve the Rule to the benefit of families and businesses. Promulgated in 1971, the Care Labeling Rule makes it an unfair or deceptive act or practice for manufacturers and importers of textile wearing apparel and certain piece goods to sell these items without attaching care labels stating what regular care is needed for the ordinary use of the product. The Rule also requires that the manufacturer or importer possess, prior to sale, a reasonable basis for the care instructions and allows the use of approved care symbols in lieu of words to disclose care instructions.

Energy Labeling Rule, 16 CFR 305. The Energy Labeling Rule requires energy labeling for major home appliances and other consumer products to help consumers compare the energy usage and costs of competing models. Staff anticipates sending the Commission a recommendation to update comparability ranges for 16 CFR 305.12 by April 2022.²⁷

²⁴ 79 FR 46732 (Aug. 11, 2014).

²⁵ 79 FR 61267 (Oct. 10, 2014).

²⁶ 85 FR 44485 (July 23, 2020).

²⁷ See *Final Actions* below for information about a separate completed rulemaking proceeding for the Energy Labeling Rule.

Eyeglass Rule, 16 CFR 456. As part of the systematic review process, the Commission issued a Federal Register notice seeking public comments about the Trade Regulation Rule on Ophthalmic Practice Rules (Eyeglass Rule) on September 3, 2015.²⁸ The comment period closed on October 26, 2015. Commission staff has completed the review of 831 comments on the Eyeglass Rule and anticipates sending a recommendation for further Commission action by November 2021. The Eyeglass Rule requires that an optometrist or ophthalmologist give the patient, at no extra cost, a copy of the eyeglass prescription immediately after the examination is completed. The Rule also prohibits optometrists and ophthalmologists from conditioning the availability of an eye examination, as defined by the Rule, on a requirement that the patient agree to purchase ophthalmic goods from the optometrist or ophthalmologist.

Safeguards Rule (Standards for Safeguarding Customer Information), 16 CFR 314. The FTC's Safeguards Rule, which was issued under the Gramm-Leach-Bliley Act, requires each financial institution subject to the FTC's jurisdiction to assess risks and develop a written information security program that is appropriate to its size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue. On October 27, 2021, the Commission announced the issuance of a Supplemental Notice of Proposed Rulemaking that proposes to further amend the Safeguards Rule to require financial institutions to report to the Commission any security event where the financial institutions have determined misuse of customer information has occurred or is reasonably likely and that at least 1,000 consumers have been affected or reasonably may be affected. The comment period closes 60 days after publication in the Federal Register.²⁹

c. Final Actions

Since the publication of the 2020 Regulatory Plan, the Commission has issued the following final agency actions in rulemaking proceedings:

Energy Labeling Rule, 16 CFR 305. On February 12, 2021, the Commission published a final rule that establishes EnergyGuide labels for portable air conditioners and requires manufacturers to label portable air conditioner units produced after October 1, 2022.³⁰ The Commission also updated the Rule in

²⁸ 80 FR 53274 (Sept. 3, 2015).

²⁹ See *Final Actions* below for information about a separate completed rulemaking proceeding for the Safeguards Rule.

³⁰ 86 FR 9274 (Feb. 12, 2021).

conformity with new DoE energy descriptors for central air conditioner units that will become effective on January 1, 2023. Additionally, on October 20, 2021, the Commission issued a final rule updating the comparability ranges and sample labels for central air conditioners.³¹ The amendments are effective on January 1, 2023.³²

Fair Credit Reporting Act Rules, 16 CFR 640–642, 660, and 680. On September 8, 2021, the Commission announced final rules for each of these Rule reviews that included revisions to the Rules to correspond to changes to the Fair Credit Reporting Act made by the Dodd-Frank Act. The final rules were effective 30 days after publication in the Federal Register. These rules include: Duties of Creditors Regarding Risk-Based Pricing, 16 CFR 640³³; Duties of Users of Consumer Reports Regarding Address Discrepancies, 16 CFR 641³⁴; Prescreen Opt-Out Notice, 16 CFR 642³⁵; Duties of Furnishers of Information to Consumer Reporting Agencies, 16 CFR 660³⁶; and Affiliate Marketing, 16 CFR 680.³⁷

Made in USA Labeling Rule, 16 CFR 323. On July 14, 2021, the Commission issued a final rule that codified the FTC’s longstanding enforcement policy statement regarding U.S.-origin claims.³⁸ The rule was effective on August 13, 2021. The Rule prohibits marketers from making unqualified MUSA claims on labels unless final assembly or processing of the product occurs in the United States; all significant processing that goes into the product occurs in the United States; and all or virtually all ingredients or components of the product are made and sourced in the United States. The rule does not impose any new requirements on businesses. By codifying this guidance into a formal rule, the Commission can increase deterrence of Made in USA fraud and seek restitution for victims. The final rule included a provision allowing marketers to seek exemptions if they have evidence showing their unqualified Made-in-USA claims are not deceptive.

Privacy of Consumer Financial Information Rule, 16 CFR 313. The Privacy of Consumer Financial Information Rule (Rule) requires, among other things, that certain motor vehicle dealers provide

³¹ Final Rule, 86 FR 57985 (Oct. 20, 2021); NPRM, 86 FR 29533 (June 2, 2021).

³² See (2) *Ongoing Periodic Reviews of Rules and Guides (b) Proposed Rules* for information about a separate and ongoing rulemaking under the Energy Labeling Rule.

³³ Final Rule (16 CFR 640), 86 FR 51795 (Sept. 17, 2021); NPRM, 85 FR 63462 (Oct. 8, 2020).

³⁴ Final Rule (16 CFR 641), 86 FR 51817 (Sept. 17, 2021); NPRM, 85 FR 57172 (Sept. 15, 2020).

³⁵ Final Rule (16 CFR 642), 86 FR 50848 (Sept. 13, 2021); NPRM, 85 FR 59226 (Sept. 21, 2020).

³⁶ Final Rule (16 CFR 660), 86 FR 51819 (Sept. 17, 2021); NPRM, 85 FR 61659 (Sept. 30, 2020).

³⁷ Final Rule (16 CFR 680), 86 FR 51609 (Sep. 16, 2021); NPRM, 85 FR 59466 (Sept. 22, 2020).

³⁸ 86 FR 37022 (July 14, 2021).

an annual disclosure of their privacy policies to their customers by hand delivery, mail, electronic delivery, or through a website, but only with the consent of the consumer. On October 27, 2021, the Commission announced the issuance of a final rule to, among other changes, revise the Rule's scope, modify the Rule's definitions of "financial institution" and "federal functional regulator," and update the Rule's annual customer privacy notice requirement.³⁹ This action was necessary to conform the Rule to the current requirements of the Gramm-Leach-Bliley Act. The amendments will be effective 30 days after publication in the **Federal Register**.

The Prohibition of Energy Market Manipulation Rule, 16 CFR 317. On March 2, 2021, the Commission completed its regulatory review and issued a Federal Register Notice confirming that the Rule was being retained without modification.⁴⁰

Safeguards Rule (Standards for Safeguarding Customer Information), 16 CFR 314. The FTC's Safeguards Rule, which was issued under the Gramm-Leach-Bliley Act, requires each financial institution subject to the FTC's jurisdiction to assess risks and develop a written information security program that is appropriate to its size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue. On October 27, 2021, the Commission announced the issuance of a final rule that, among other amendments, provides additional requirements for financial institutions' information security programs. The final rule also expands the definition of "financial institution" to include entities that are significantly engaged in activities that are incidental to financial activities, so that the rules would cover "finders"—for example, companies that serve as lead generators for payday loan companies or mortgage companies. Certain provisions of the amendments, set forth in section 314.5 of the final rule, will be effective one year after the publication of the final rule in the Federal Register. The remainder of the amendments are effective 30 days after Federal Register publication.⁴¹

d. Significant Regulatory Actions

The Commission has no proposed rule that would be a "significant regulatory action" under the definition in Executive Order 12866. The Commission also has no proposed rule that would have

³⁹ Final Rule, 86 FR ----- (----- --, 2021); NPRM, 84 FR 13150 (Apr. 4, 2019).

⁴⁰ 86 FR 12091 (Mar. 2, 2021).

⁴¹ See (2) *Ongoing Periodic Reviews of Rules and Guides (b) Proposed Rules* for information about a separate and ongoing rulemaking under the Safeguards Rule.

significant international impacts, or any international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations, as defined in Executive Order 13609.

Summary

The actions under consideration advance the Commission's mission by informing and protecting consumers while minimizing burdens on honest businesses. The Commission continues to identify and weigh the costs and benefits of proposed regulatory actions and possible alternative actions.

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