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## Far From Fair, Farther From Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking

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# Far From Fair, Farther From Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking

## **Cover Page Footnote**

American University Washington College of Law, J.D. Candidate, 2014; U.C. Berkeley, B.A., 2010. I would first like to thank Theresa Amato for alerting me to this issue. I would also like to thank Professor Jeffrey Lubbers for his valued guidance and inspiring contributions to the field of administrative law. I must also thank Jay, Eileen, Grams, and Gary for their good fortune, counsel, love, and support, and especially my late-grandfather, a resolute opponent of unfairness, inefficiency, and inertia. Of course, I am so grateful for my loving parents, Roberta and Joie—my original editors and champions of academic diligence. Finally, I would not be here today without my fiancé, my khorshid, Dana.

# FAR FROM FAIR, FARTHER FROM EFFICIENT: THE FTC AND THE HYPER-FORMALIZATION OF INFORMAL RULEMAKING

COOPER J. SPINELLI\*

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## INTRODUCTION

In the 1969 “Nader Report” on the Federal Trade Commission (FTC or Commission), Ralph Nader characterized the FTC as “a self-parody of bureaucracy.”<sup>1</sup> In some ways, despite ample time for a new act, the

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play proceeds with farce and a similar cast of characters—powerful industries,<sup>2</sup> a hamstrung regulator,<sup>3</sup> and millions of vulnerable consumers.<sup>4</sup>

The FTC's mission is to promote the efficient functioning of the marketplace by seeking to protect consumers from unfair or deceptive acts or practices and to promote vigorous competition.<sup>5</sup> Like many other agencies, the FTC has three primary modes of shaping policy:

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<sup>1</sup> Ralph Nader, *Preface to EDWARD F. COX ET AL., 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION* vii (1969); see also Miles W. Kirkpatrick, *ABA Report on the FTC: Consumer Protection or Consumer Exploitation?*, 3 *ANTITRUST & ECON. L. REV.* 57, 60 (1969–1970) (finding that the FTC 's consumer protection efforts were "inadequate" and "piecemeal").

<sup>2</sup> See *Internet Advertising Revenues Set First Quarter Record at \$8.4 Billion*, IAB.NET (June 11, 2012), [http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/pr-061112](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-061112); Joe Weisenthal, *Corporate Profits Go Parabolic*, BUSINESSINSIDER.COM (May 31, 2012, 5:32 PM), <http://www.businessinsider.com/corporate-profits-go-parabolic-2012-5>; Shawn Tully, *Fortune 500: The Year of Living Profitably*, CNMONEY.COM (May 7, 2012, 12:00 PM), <http://finance.fortune.cnn.com/2012/05/07/500-intro/>.

<sup>3</sup> See *The FTC's Enforcement Tools against Unfair and Deceptive Trade Practices in Financial Products & Services and other Sectors Before the S. Subcomm. on Consumer Prot., Product Safety, & Ins.*, 111th Cong. 6 (2010) (statement of Dee Pridgen) (noting that the FTC has reverted to issuing non-binding guidelines); *H.R. 2309: The Consumer Credit and Debt Protection Act Before the Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 3 (2009) (statement of Kathleen E. Keest on behalf of National Consumer Law Center) (explaining how the FTC now can virtually only rely on "retrospective" or reactive regulation, e.g., filing complaints); Interview by John Villafranco with David Vladeck, former Director of Consumer Protection, Federal Trade Commission, (April 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Apr10\\_VladeckIntrvw4\\_14f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_VladeckIntrvw4_14f.authcheckdam.pdf) (lamenting that the lack of general APA rulemaking authority prevented the FTC from effecting reform on a "wholesale basis"); Telephone Interview with David Vladeck, former Director of the Federal Trade Commission's Bureau of Consumer Protection (Oct. 3, 2012) (admitting that the lack of APA rulemaking authority hamstrings the FTC).

<sup>4</sup> See JANE M. MONROE, *CONSUMER FRAUD IN THE UNITED STATES 2* (1st ed. 2010) (listing findings of study: 30.2 million consumers victims of fraud in 2005); See *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II Before the S. Comm. on Commerce, Science, & Transp.*, 111th Cong. (2010) (Chairman, John D. (Jay) Rockefeller IV) ("With family budgets stretched thin, foreclosures up and unemployment still sky-high, unscrupulous business practices continue to target consumers directly when they can least afford it."); Interview by John Villafranco with David Vladeck, former Director of Consumer Protection, Federal Trade Commission, (April 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Apr10\\_VladeckIntrvw4\\_14f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_VladeckIntrvw4_14f.authcheckdam.pdf) (contending that with APA rulemaking authority the FTC could have spared many consumers from losing thousands of dollars in scams).

<sup>5</sup> See 15 U.S.C. §§ 45(a), 57a (2012); *What We Do*, FED. TRADE COMM'N (last visited Jan. 18, 2014), <http://www.ftc.gov/about-ftc/what-we-do>.

adjudication,<sup>6</sup> enforcement, and rulemaking.<sup>7</sup> With some oversimplification, these modes are functional equivalents to the roles of the judiciary, the executive, and the legislature.<sup>8</sup> Generally, an agency can proactively make rules pursuant to its originating statute, or can issue rules at the behest of Congress on a more ad hoc basis.<sup>9</sup>

Unlike most agencies, however, the FTC—since 1975—cannot make rules pursuant to the “informal” rulemaking provisions in § 553 of the Administrative Procedure Act (APA) unless authorized by Congress.<sup>10</sup> In 2010, when Congress was crafting “Dodd-Frank,” FTC Commissioners, scholars, and consumer advocates implored Congress to restore APA § 553 rulemaking powers permanently to the FTC.<sup>11</sup> By one vote, Congress declined.<sup>12</sup>

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<sup>6</sup> Although adjudication and enforcement are distinct functions, this Article uses them interchangeably because the FTC subsumes both functions under the umbrella term of enforcement. Moreover, both of these functions tend to merge. For instance, the FTC frequently obtains consent orders or settlement agreements through administrative processes, e.g., the Commission issues an “administrative complaint” that often results in a formal hearing before an FTC Administrative Law Judge that can be appealed to the Commission itself. If, however, these orders are violated, then the Commission must seek judicial enforcement through a federal court order that imposes civil penalties or consumer redress. See generally *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMM’N (July 2008), <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

<sup>7</sup> See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14–15 (1947) (stating that rulemaking is essentially legislative in nature); RONALD A. CASS ET AL., ADMINISTRATIVE LAW CASES AND MATERIALS 380, 384, 426 (6th ed. 2011) (discussing the two main functions of agencies and noting that the Court has held policymaking to be appropriately the province of informal rulemaking).

<sup>8</sup> See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–93 (1987).

<sup>9</sup> See *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, Trade Regulation Rule, 29 Fed. Reg. 8324 (1964) (invoking power, for the first time, to issue substantive rules under its enabling statute); *Mortgage Assistance Relief Services*, 75 Fed. Reg. 75,092 (Dec. 1, 2010) (to be codified at 16 CFR pt. 322) (promulgating a MARS rule pursuant to CREDIT CARD Act).

<sup>10</sup> See 15 U.S.C. § 57a(a)(2) (2012).

<sup>11</sup> *Consumer Credit and Debt: The Role of the FTC in Protecting the Public Before Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 21–23 (2009) (statement of The Federal Trade Commission); *The FTC’s Enforcement Tools against Unfair and Deceptive Trade Practices in Fin. Prods. & Services and other Sectors Before the S. Subcomm. on Consumer Prot., Product Safety, & Ins.*, 111th Cong. (2010) (statement of Dee Pridgen); H.R. 2309: *The Consumer Credit and Debt Prot. Act Before the Subcomm. on Commerce, Trade & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 8–9 (2009) (statement of Kathleen E. Keest on behalf of National Consumer Law Center); *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II Before the S. Comm. on Commerce, Science, & Transp.*, 111th Cong. 5 (2010) (statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group); David A. Balto, *Bring the FTC into the 21st Century*, THE HILL (Mar. 4, 2009 3:07 PM), <http://thehill.com/opinion/op-ed/95947-bring-the-ftc-into-the-21st-century>.

<sup>12</sup> See *Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)*, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at scattered provisions of the U.S. Code (Supp. IV & V 2011, 2012)). With regulated industries mounting a concerted lobbying campaign against it, the attempt to abrogate Mag-Moss rulemaking procedures, despite the House’s success in including the provision in its conference report and the valiant efforts of Senator Jay Rockefeller, died in

In light of this development, this Article will examine the effects of the status quo, the consequences of restoring APA rulemaking powers, and how this issue speaks to the role of rulemaking in the administrative state.

Section 553—the foundational vehicle for rulemaking, known as both informal rulemaking and notice-and-comment procedure—sets forth the minimum process an agency must afford the public when promulgating rules: post a notice of a proposed rule in the Federal Register (Notice of Proposed Rulemaking or NPRM), solicit comments from the public, and issue a concise general statement of basis and purpose accompanying the final rule.<sup>13</sup> When Congress enacted the APA in 1946, it felt that this streamlined yet inclusive procedure was superior to a more adversarial trial-type proceeding.<sup>14</sup>

Partially concerned with the proliferation of the “New Deal” agencies,<sup>15</sup> Congress saw the APA as a “compromise measure.”<sup>16</sup> That is, Congress designed it to afford “uniformity and fairness in administrative procedures without at the same time unduly interfering with the efficient and economical operation of government.”<sup>17</sup> Scholars and jurists from across the political spectrum have recognized that the notice-and-comment process allows for relative flexibility that can help “foster better government” by setting policy prospectively and expeditiously, thereby striking a reasonable balance between fairness and efficiency.<sup>18</sup> In contrast to adjudicative measures, informal

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the Senate when some senior Democratic Senators succeeded in repelling it from the Senate’s conference report. *Senate Passes Wall Street Reform Conference Report*, ANA, <http://www.ana.net/content/show/id/1885> (last visited Jan. 17, 2014); Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>13</sup> See 5 U.S.C. § 553(b), (c) (2012).

<sup>14</sup> See H.R. REP. NO. 93–1107, at 45–46 (1974); Joanna Grisinger, *Law in Action: The Attorney General’s Committee on Administrative Procedure*, J. OF POL’Y HIST. 379, 401 (2013) (noting that the Attorney General’s Committee on Administrative Procedure, tasked with helping draft the APA, “found that formal hearings and adversarial proceedings were poorly suited to agency operations, and that even procedures lifted from the legislative context proved awkward in the administrative context” and “Agency representatives reported that hearings simply allowed unhappy parties to voice their grievances”); James Hart, *Final Report of the Attorney General’s Committee on Administrative Procedure*, 35 AM. POL. SCI. REV. 501, 503–504 (1941).

<sup>15</sup> Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 260 (1986).

<sup>16</sup> Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures And Courts—Except When They’re Not*, 59 ADMIN. L. REV. 79, 81 (2007).

<sup>17</sup> *Id.*

<sup>18</sup> See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1977) (upholding agency decision not to hold formal hearings, and in the process, Chief Justice Rehnquist praised the virtues of informal rulemaking: “agencies . . . would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted ‘a formula upon which opposing social and political forces have come to rest,’ but all the inherent advantages of informal rulemaking would be totally

rulemaking can offer holistic treatment to market disorders—with considerable public input—without having to rely on “whack-a-mole” triage that is less publicly accountable and, in some ways, more inequitable for regulated entities.<sup>19</sup>

For the FTC and other stakeholders, these benefits remain elusive.<sup>20</sup> Despite the D.C. Circuit upholding the FTC’s authority to create substantive rules in 1973, Congress passed the Magnusson-Moss Warranty, Federal Trade Commission Improvement Act (Mag-Moss), which sanctioned the FTC’s power of substantive rulemaking.<sup>21</sup> But in doing so, Congress established a “hybrid” rulemaking system in an effort to provide more “due process” safeguards than § 553 of the APA, but less than would be in the adjudicatory context.<sup>22</sup> Congress augmented the procedural “safeguards” over the next two decades; most significantly in 1980 and 1994.<sup>23</sup> Consequently, if the FTC now wishes to promulgate, substantively amend, or repeal binding trade rules proscribing certain “unfair or deceptive acts or practices,” it must identify the practice as “prevalent” before adhering to an eighteen-step, trial-like process that jettisons all the advantages of informal rulemaking in exchange for exceedingly expensive glacial deliberation.<sup>24</sup>

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*lost.*) (emphasis added); *United States v. Fla. E. Coast Ry. Co.* 410 U.S. 224, 245–46 (1973) (basing its decision, which construed the language of a provision authorizing the Interstate Commerce Commission to act ‘after hearing’ as being satisfied by what was in effect notice-and-comment procedure, on the “recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other”); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN L. REV. 59 (1995); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253 (1986); Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REG. 25, 26 (1981).

<sup>19</sup> See, e.g., Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REG. 25, 27 (1981) (“if one considers not *what* agencies do, but *how* they do it, those who are regulated generally prefer the participation and certainty provided by rulemaking.”); *infra* notes 211–13, 265, 270 and accompanying text.

<sup>20</sup> See Interview by John Villafranco with David Vladeck, former Director of Consumer Protection, Federal Trade Commission, 10 (April 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Apr10\\_VladeckIntrvw4\\_14f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_VladeckIntrvw4_14f.authcheckdam.pdf).

<sup>21</sup> See Pub. L. No. 93-637, 88 Stat. 2183–93 (codified in 15 U.S.C. §§ 57a & 2301–12 (2012)).

<sup>22</sup> DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 12:10 (2011).

<sup>23</sup> *Id.*

<sup>24</sup> See 15 U.S.C. § 57a; *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public Before Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 21 n.51 (2009) (statement of The Federal Trade Commission) (describing how it took the FTC ten years to promulgate the Credit Practices Rule); Trade Regulation Rule, *Federal Industry Practice*, 47 Fed. Reg. 422,260 (codified at 16 CFR pt. 453) (Sept. 24, 1982) (devoting two pages to discussing the rule’s progression, which produced, through cross-examination alone, 14,719 pages of transcript, and approximately 4000 additional pages of exhibits); B. BOYER, M. BOWERS, D. EDELMAN, B. CARTWRIGHT & H. TOIV, PHASE II REPORT ON THE TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION 73 (Report to the Administrative Conference of the United States, June 1980) (finding that—in the late 1970s—the expense of a Mag-Moss rulemaking could, without adjusting for inflation, easily exceed a million dollars); cf. Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical*



Indeed, it is a process that can take up to over a decade merely to amend a rule.<sup>25</sup> To put this in perspective, when granted authority to promulgate *new* rules under § 553, the FTC's promulgation can often take only a few months, even when providing opportunity for public input beyond notice-and-comment.<sup>26</sup> Whatever may have been the true motives of Congress in passing Mag-Moss, it cited the FTC's difficulties in protecting the consuming public, over-reliance on adjudicative measures like cease-and-desist orders, and a lack of public understanding regarding agency intention.<sup>27</sup>

Almost four decades later, those good intentions have helped entrench, if not exacerbate, the very problems Congress sought to ameliorate.<sup>28</sup> Finding the Mag-Moss process to be prohibitively profligate, the FTC has refrained from proactively initiating rulemaking proceedings, instead favoring enforcement actions and non-binding guidelines.<sup>29</sup> In the last two decades, Congress has at times granted the FTC—largely as a result of FTC lobbying efforts—the power to promulgate rules through notice-and-comment procedure, but only on

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*Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1457–58 (2012) (setting the average time of FTC rulemaking as a metric of ossification).

<sup>25</sup> See Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444, 15,445 (Mar. 30, 2007) (codified at 16 C.F.R. 436, 437) (stating that the rule's amendment proceeding began in 1995 and an Advanced Notice of Proposed Rulemaking was published in 1997; the final amendment was promulgated in 2007); *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public Before Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 21 n.51 (2009) (statement of The Federal Trade Commission) (describing how it took the FTC ten years to promulgate the Credit Practices Rule); *Panel on Formal/Hybrid Rulemaking*, ABA Section of Administrative and Regulatory Practice Rulemaking Institute 5 (June 2, 2010) (Statement of Jeffrey S. Lubbers) (noting that some Mag-Moss rulemaking efforts, such as regulations governing mobile homes and hearing aid sales, took anywhere from eight to ten years and were ultimately unsuccessful) (on file with author); Thomas O. McGarity, *Some Thoughts on the Ossification of Rulemaking*, 41 DUKE L.J. 1385, 1389–90 tbl.1 (1992) (noting that the average time for completion under Mag-Moss was over five years).

<sup>26</sup> See, e.g., Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,889–90 (Nov. 3, 1999) (noting that an NPRM was published on July 20, 1999 and the FTC, responding to the "particular interest among commenters in the issue of how to obtain verifiable parental consent under the Rule," conducted a 32-panelist public workshop that included industry representatives, privacy advocates, and consumer groups); FTC Contact Lens Rule, 69 Fed. Reg. 40,482, 40,482 (July 2, 2004) (codified at 16 C.F.R. 315) (informing that the Commission, pursuant to the Fairness to Contact Lens Consumer Act, 15 U.S.C. § 7607 (2012), which exempted the FTC from Mag-Moss procedure when prescribing rules under the Act, published an NPRM on February 4, 2004, a mere four months before it issued the final rule). Although the nature of these rules may not have generated the same political backlash as those targeting the television advertising industry or financial sector, the issue of government-imposed restrictions on privacy and children's autonomy is certainly more controversial than the regulation of hearing aids, which occupied ten-years of the FTC's time only to never materialize into a rule.

<sup>27</sup> See H.R. REP. NO. 93–1107, at 7712, 7729 (1974); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1168 (2001).

<sup>28</sup> See *supra* note 3; *infra* notes 211–13, 270.

<sup>29</sup> PRIDGEN, *supra* note 22, at § 12:14.



a temporary ad hoc basis.<sup>30</sup>

Scholars have partially addressed this issue through what is known as the “ossification” thesis: cumbersome procedures, “hard look” judicial review, and probing executive oversight have notably diminished the pace and volume of rulemaking.<sup>31</sup> Some of the ossification scholars’ prescriptive proposals have discussed guidance documents as “de-ossifying” methods, while their diagnostic analyses tend to focus more on the judiciary’s role in regulatory ossification.<sup>32</sup> However, some evidence suggests that agencies such as the FTC cannot adequately address the pernicious practices of some market actors through adjudication and voluntary guidance documents alone.<sup>33</sup> Nor does the FTC’s remedy lie in the softening of judicial review.<sup>34</sup> Therefore, this Article exclusively focuses on the effects of congressionally-imposed strictures, and uses the case of the FTC to argue that in the context of administrative rulemaking, efficiency should not be sacrificed at the altar of formality.

Part I of this Article explores the history of the FTC, the antecedents of the status quo, and recent developments. Part II provides a snapshot of consumer affairs and assesses how the FTC’s hyper-formalized rulemaking process specifically affects its ability to protect consumers, stabilize the market, and provide clarity and notice to regulated entities. Part III addresses the arguments against the restoration of APA rulemaking powers to the FTC and surveys additional judicial, executive,

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<sup>30</sup> *Id.*; see Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (16 C.F.R. pt. 310); Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092 (Dec. 1, 2010) (to be codified at 16 C.F.R. pt. 322).

<sup>31</sup> See generally Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 Duke L.J. 1385 (1992) (propounding the “ossification” theory by examining the rulemaking activity of the EPA, OSHA, and FTC).

<sup>32</sup> See *id.*; CHARLES H. KOCH, JR., 1 ADMIN. L. & PRAC. 329 § 4:30 (3d ed. 2012) (noting that commentators lay a “good deal of blame on overly intrusive judicial review”); Richard J. Pierce, *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 Geo. Wash. L. Rev. 1493, 1496 (2012) (“the long period before an agency issues an NPRM is primarily attributable to judicial decisions that impose heavy burdens on agencies, well beyond those required by statute.”); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. Rev. 1013, 1021 (2000) (arguing that the foremost reason for rulemaking ossification has been judicially-imposed analytical requirements); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (“[T]he judicial branch is responsible for most of the ossification of the rulemaking process.”).

<sup>33</sup> See, e.g., David Gibson, *Awash in Green: A Critical Perspective on Environmental Advertising*, 22 TUL. ENVTL. L.J. 423 (2009) (concluding that guidelines have not been as effective in correcting deceptive marketing claims as rules could be).

<sup>34</sup> See *The Federal Trade Commission’s Enforcement Tools against Unfair and Deceptive Trade Practices in Financial Products & Services and other Sectors Before the S. Subcomm. on Consumer Prot., Prod. Safety, & Ins.*, 111th Cong. (2010) (statement of Dee Pridgen) (“The Federal Trade Commission’s work to protect consumer in the marketplace could be significantly enhanced if Congress were to grant the Commission the authority to use APA informal rulemaking procedures in all cases under its general authority.”).

and legislative features that already operate as administrative checks. Finally, Part IV analyzes the status quo in relation to the normative role and conception of the administrative state.

In sum, this Article argues that through the hyper-formalization and judicialization of the rulemaking process,<sup>35</sup> Congress has created a burdensome, superfluous check on administrative authority that harms consumers, sows uncertainty among market actors, and furthers a paradigmatic shift towards an inert administrative state. Accordingly, Congress should reconsider restoring § 553 of the APA as the minimal procedural standard because, while it is far from perfect, it is not far from fair.

Alternatively, this Article concludes by proposing a modest reform that is consistent with the purpose of the APA, recommendations of academia and the Administrative Conference of the United States (ACUS), and Mag-Moss.<sup>36</sup> Specifically, Congress could allow Mag-Moss to operate on a dual-track system where interested parties debate and attempt to influence the substance of the proposed rule through traditional notice-and-comment procedure. Concurrently, the trial-type components of Mag-Moss procedure would remain compulsory for “adjudicative fact” questions, if they arise in a particular rulemaking. Professor Kenneth C. Davis, one of the principal drafters of the APA, analogized such questions to those that a jury would consider, such as: who did what, where, when, how, why, with what motive or intent.<sup>37</sup> Such facts are to be distinguished from “legislative facts,” which constitute “general fact[s] on which all legal institutions predicate rules of law.”<sup>38</sup> By re-calibrating the judicial procedures of Mag-Moss

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<sup>35</sup> See Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 483 (1986) (using *judicialization* in the rulemaking context).

<sup>36</sup> See *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1160 (D.C. Cir. 1979) (quoting the 1947 Attorney General's Manual on the Administrative Procedure Act which stated that, “the object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts”); Richard J. Pierce, *Seven Ways to Deossify Rulemaking*, 47 ADMIN. L. REV. 59, 64 (1995) (“the legislative history of FTCA indicates that Congress intended to confer a right of limited cross-examination only with respect to some issues of adjudicative fact.”); Administrative Conference of the United States (ACUS), Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 38 Fed. Reg. 19,782 (1973) (recommending that Congress should never require trial-type procedures for resolving questions of policy or of broad general fact); *infra* note 113 (excerpting the Senate and House reports concurrence on the purpose of cross-examinations in FTC informal rulemaking—resolving questions of adjudicative fact).

<sup>37</sup> KENNETH CULP DAVIS, RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 7.7, 341 (3d ed. 1994) (writing that in theory, the FTC is already only supposed to limit cross-examination to question of adjudicative fact, but this is not borne out in practice).

<sup>38</sup> *Id.* at 322 (describing legislative facts also as “highly imperfect understandings of complicated

to serve its inherent function—the resolution of factual, not policy, issues—affected parties can avail themselves of procedural protection if necessary, while not unduly ossifying the execution of sound policy.<sup>39</sup>

## I. THE HISTORY OF FTC RULEMAKING: FROM AN EXEMPLAR OF “AGENCY CAPTURE”<sup>40</sup> TO A VICTIM OF ITS OWN SUCCESS

In the mid-twentieth century, both rulemaking and the FTC were considered relatively innocuous, immaterial, or repositories of squandered potential.<sup>41</sup> By 1980, however, many attacked both as representing the unmitigated dangers of “Big Government.”<sup>42</sup> Today, the opprobrium for rulemaking and the FTC has subsided somewhat, but the greater insouciance to the import of their shared history portends an uncertain future.

### A. AN INDEPENDENT AGENCY: ANTITRUST ROOTS AND THE WHEELER–LEA ACT

Congress established the FTC in 1914 as an independent agency, empowering it to prohibit “unfair methods of competition” in the hopes of supplementing antitrust laws.<sup>43</sup> Sponsors of the FTC Act spoke of the need for “‘expertise’ and the corresponding necessity for ‘insulation’ from ‘political influence.’”<sup>44</sup> The mandate was soon expanded when the FTC and the courts acknowledged the causal relationship between consumer protection and competition.<sup>45</sup> Writing for the Supreme Court majority in *Federal Trade Commission v. Winstead Hosiery Co.*,<sup>46</sup> Justice Brandeis upheld an FTC cease-and-desist order on a falsely labeled good, reasoning that deceiving consumers hurt the honest competitor.<sup>47</sup>

Within little more than a decade of *Winstead*, Congress passed the Wheeler-Lea Act in 1938, which expanded the FTC’s objective to include the proscription of “unfair or deceptive acts or practices.”<sup>48</sup> The Bill’s Senate sponsor, Burton Wheeler (D-MT), noted in the course of

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relationships”).

<sup>39</sup> *Ass’n of Nat’l Advertisers, Inc.*, 627 F.2d at 1163.

<sup>40</sup> In the field of administrative law, “capture” occurs when an agency is unduly influenced by the very groups or industries it is charged with regulating. See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Agency Capture through Institutional Design*, 89 TEX. L. REV. 15 (2010).

<sup>41</sup> See Schiller, *supra* note 27, at 1146, 1150; Nader, *supra* note 1.

<sup>42</sup> See RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 191 (2d ed. 1996); Schiller, *supra* note 27, at 1154.

<sup>43</sup> PRIDGEN, *supra* note 22, at § 8:2.

<sup>44</sup> CASS, *supra* note 7, at 63.

<sup>45</sup> PRIDGEN, *supra* note 22, at § 8:2.

<sup>46</sup> 258 U.S. 483, 493 (1922).

<sup>47</sup> See PRIDGEN, *supra* note 22, at § 8:2.

<sup>48</sup> PRIDGEN, *supra* note 22, at § 8:2 (2011).

debate on the legislation, “Congress is not interested in whether John Smith lost some money as the result of the advertising complained of, but the question is whether or not the general public has been deceived or injured by reason of it.”<sup>49</sup>

It was not until 1964, that the Commission first asserted its authority to issue binding substantive rules, pursuant to its enacting statute, when it promulgated the Cigarette Rule.<sup>50</sup> The decision to turn to binding trade rules largely arose from the cumbersome cease-and-desist process and the dissatisfaction with voluntary guidelines.<sup>51</sup> This assertiveness, however, was atypical for a period marked by profound agency capture.<sup>52</sup>

### B. THE NADIR AND RENEWAL

By 1969, the FTC was widely criticized as lethargic, inept, and nepotistic.<sup>53</sup> The FTC was accused of obsessing over inconsequential technicalities, propping up competitors,<sup>54</sup> failing to establish priorities, consciously declining to enforce, and general complacency.<sup>55</sup> Within a few years, however, the cumulative force of practitioner, scholarly, and consumer criticisms, along with a change in administrations, seemed to cure the Commission’s sclerotic state.<sup>56</sup> Throughout the next decade, the FTC initiated a flurry of rules relating to children’s advertising, credit practices, food advertising, funeral practices, health spa services, hearing aids, mobile home warranties, over-the-counter drugs, used cars, and vocational schools.<sup>57</sup>

### C. A PYRRHIC VICTORY

The advent of FTC rulemaking followed growing consternation among judges regarding agencies’ excessive reliance on adjudicative methods of regulation, and relative neglect of rulemaking.<sup>58</sup> In the

<sup>49</sup> HARRIS, *supra* note 42, at 146.

<sup>50</sup> Trade Regulation Rule for the Prevention of Unfair or Deceptive Acts or Practices in the Sale of Cigarettes, 29 Fed. Reg. 8324 (1964).

<sup>51</sup> See CASS, *supra* note 7, at 387. This decision coincided with a general and momentous shift away from adjudications to an embrace of rulemaking in administrative law. Antonin Scalia, Vermont Yankee: *The APA, The D.C. Circuit, and The Supreme Court*, 1978 SUP. CT. REV. 345, 376.

<sup>52</sup> See Nader, *supra* note 1.

<sup>53</sup> *Id.*

<sup>54</sup> Nader, *supra* note 1.

<sup>55</sup> Kirkpatrick, *supra* note 1 (finding that the FTC’s consumer protection efforts were “inadequate” and “piecemeal”); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 61–82 (1969) (criticizing the FTC for using consumer protection as a pretext for propping up competitors).

<sup>56</sup> HARRIS, *supra* note 42, at 165–167.

<sup>57</sup> PRIDGEN, *supra* note 22, at § 12:10; HARRIS, *supra* note 42, at 181.

<sup>58</sup> See, e.g., Schiller, *supra* note 27, at 1148–52 (citing Judge Friendly’s Oliver Wendell Holmes Lecture in 1962 where he admonished the administrative state for its dearth of clear standards

seminal 1973 case, *National Petroleum Refiners Ass'n v. Federal Trade Commission*, the D.C. Circuit also expressed this view in upholding the FTC's authority to issue substantive rules.<sup>59</sup> The court's reasoning is worth quoting in full:

Thus there is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication . . . .<sup>60</sup>

Just two years later, Congress expressly authorized the FTC to issue substantive rules, while conferring additional regulatory abilities.<sup>61</sup> However, despite the protestations of the Commission that it had and would continue to judiciously and fairly exercise its procedural discretion under the APA,<sup>62</sup> Congress saw fit to saddle the Commission's newly-approved legislative powers with judicial-like procedures. That is, Congress required that the FTC grant oral hearings where participants would be allowed to present evidence, cross-examine witnesses, and adduce rebuttal testimony.<sup>63</sup> Interestingly, Congress was ostensibly reacting to a 1969 ABA commission that described incipient symptoms of agency "capture."<sup>64</sup> Congress therefore hoped that imposing trial-type procedures would facilitate the participation of public interest groups.<sup>65</sup>

#### D. CONGRESS SEEKS GREATER CONTROL OVER THE "GREAT NATIONAL NANNY"

Of the nineteen major rules and amendments proposed by the FTC after the passage of Mag-Moss, only seven were completed, averaging a completion time of over five years, compared to the general pre-Mag-

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and encouraged a shift away from policymaking through adjudication to policymaking through rulemaking; "if the apparatus of government had fallen into a malaise, rulemaking was a solution").

<sup>59</sup> 482 F.2d 672, 697-98 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

<sup>60</sup> *Id.* at 681-683 (emphases added).

<sup>61</sup> 15 U.S.C. §§ 2301-12 (2012).

<sup>62</sup> See H.R. REP. No. 93-1107, at 7737 (1974); 15 U.S.C. § 57a.

<sup>63</sup> 15 U.S.C. § 57a(b), (c); H.R. REP. No. 93-1107, at 7728 (1974).

<sup>64</sup> HARRIS, *supra* note 42, at 173.

<sup>65</sup> *Id.*

Moss completion time of one to two years.<sup>66</sup> Of course, Mag-Moss did not solely cause the protraction of the rulemaking process.<sup>67</sup> By 1981, the dogged consumer advocate and FTC Chairman, Michael Pertschuk, was no longer steering FTC policy, and the Reagan “Revolution,” marked by its general aversion to regulation, was afoot.<sup>68</sup> Nevertheless, ACUS, which remained relatively restrained in its criticism of Mag-Moss, attributed the problem, in part, to the implementation of “broad procedural rights.”<sup>69</sup>

Perhaps more than any single event, it was Chairman Pertschuk’s decision to take on the advertising industry that not only resulted in the foisting of more procedural fetters, but also indicated that Congress’s grievances stemmed from the substance of FTC rules, not the procedure.<sup>70</sup> By the mid-seventies, a growing number of parents, psychologists, and politicians had expressed concern about the impact of television on young children’s perceptions, beliefs, and behavior.<sup>71</sup> Several congressional committees held hearings, and at Pertschuk’s confirmation hearing, Senator Warren Magnuson (D-WA) urged him to focus on children’s advertising.<sup>72</sup> In 1978, the FTC presented several options for comment by the public. In addition to alternative approaches, such as limitations on the frequency of advertisements

<sup>66</sup> Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1388–90 (1992).

<sup>67</sup> HARRIS, *supra* note 42, at 191–192.

<sup>68</sup> *Id.* at 188.

<sup>69</sup> ACUS, Recommendation 79-1, Hybrid Rulemaking Procedures of the Federal Trade Commission 9, 44 Fed. Reg. 38,817 (July 3, 1979); see ACUS, Recommendation 80-1, Trade Regulation Rulemaking Under the Magnusson-Moss Warranty-Federal Trade Commission Improvement Act 5, 45 Fed. Reg. 46,772 (July 11, 1980) (“Congress should not ordinarily require, for agency rulemaking, procedures in addition to those specified by § 553 of the Administrative Procedure Act, although the agencies should have the discretion to utilize them.”); *id.* at 7 (separate statement of Kenneth Culp Davis) (criticizing ACUS for not repudiating the use of cross-examination).

<sup>70</sup> See S. REP. NO. 96–500, at 2, 4 (1979) (prefacing the proposal of the new restrictions with a long discussion of the children’s advertising event; characterizing the proposals as a means to “minimize these problems of confusion and contention”); *The Federal Trade Commission’s Enforcement Tools against Unfair and Deceptive Trade Practices in Financial Products & Services and other Sectors Before the S. Subcomm. on Consumer Prot., Product Safety, & Ins.*, 111th Cong. 4–5 (2010) (statement of Dee Pridgen) (noting that Congress responded to the FTC’s proposed rule to ban children’s advertising by passing new restrictions in 1980); HARRIS, *supra* note 42, at 190–191 (arguing that Pertschuk’s decision to take on children’s advertising was the breaking point, but congressional and industry opposition had been building before Pertschuk’s tenure).

<sup>71</sup> See Proposed Trade Regulation Rulemaking and Public Hearing on Children’s Advertising, 43 Fed. Reg. 17,967, 17,968 (April 27, 1978) (disclosing that several groups petitioned the Commission to regulate children’s advertising, including, Action for Children’s Advertising, Consumer’s Union of America, Committee on Children’s Television, and the Center for Science in the Public Interest); CASS, *supra* note 7, at 462 (6th ed. 2011); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 778 (1983).

<sup>72</sup> CASS, *supra* note 7, at 462.



directed at very young children, the Commission's central proposal included a categorical ban for any product that was directed to or seen by a "significant proportion of children who are too young to understand the selling purpose or otherwise comprehend or evaluate the advertising."<sup>73</sup>

The advertising industry's reaction was apoplectic,<sup>74</sup> and the Washington Post derided the FTC as the "great national nanny."<sup>75</sup> Promptly thereafter, the national trade associations of advertisers, advertising agencies, and toy manufacturers sued the FTC when Pertschuk, supported by his four colleagues, refused to remove himself from the rulemaking proceeding after publicly criticizing children's advertising.<sup>76</sup> After the D.C. Circuit rejected the advertisers' attempts to disqualify Pertschuk,<sup>77</sup> Congress passed another Federal Trade Commission Improvement Act in 1980, which, among other things, explicitly forbade the Commission from regulating children's advertising.<sup>78</sup> The Senate Report took care to voice its disconcertion with the FTC's alleged attempt to broaden the definition of "unfairness" in justifying the regulation of children's advertising.<sup>79</sup> In particular, the Senate rejected the very premise of the action, namely, that the disparity in sophistication and power between an advertiser and a child is unfair.<sup>80</sup>

The upshot was characterized by Pertschuk as a "triumph of business in diverting public attention and congressional outrage from consumer injury to business's hardships at the hands of the regulators."<sup>81</sup> The Act required advance notice of proposed rulemaking, a preliminary and final regulatory analysis, prohibitions on ex parte contacts between the rulemaking staff and the commissioners, and limitations on public

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<sup>73</sup> Proposed Trade Regulation Rulemaking and Public Hearing on Children's Advertising, 43 Fed. Reg. 17,967, 17,969 (April 27, 1978). The central proposal also included a ban on televised advertising for sugared products directed to children and a requirement that televised advertising for sugared food products directed to a "significant proportion of older children be balanced by nutritional and/or health disclosures funded by advertisers." *Id.*

<sup>74</sup> Cass, *supra* note 7, at 465.

<sup>75</sup> *Financial Services and Products: The Role of the Federal Trade Commission on Protecting Consumers, Part II Before the Subcomm. on Consumer Prot., Product Safety, & Ins. of the S. Comm. on Commerce, Science & Transp.*, 111th Cong. 7 (2010) (statement of Linda A. Woolley Executive Vice President, Government Affairs Direct Marketing Association).

<sup>76</sup> Cass, *supra* note 7, at 465.

<sup>77</sup> See *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

<sup>78</sup> See 15 U.S.C. § 57a(h).

<sup>79</sup> S. REP. NO. 96-500, at 2 (1979) ("The Commission apparently endorsed a broad and virtually unbounded definition of 'unfairness' in the Federal Trade Commission Act in initiating the children's television advertising proceeding.").

<sup>80</sup> *Id.*

<sup>81</sup> PRIDGEN, *supra* note 22, at § 12:12.



funding of rulemaking participants.<sup>82</sup> The Act also established that any FTC rule would be subject to a 90-day congressional review period and could be vetoed by a joint resolution of both houses, a provision the Supreme Court subsequently overturned as unconstitutional.<sup>83</sup>

Before the end of Pertschuk's tenure in 1981, the Commission indicated its willingness to apply, and subject itself to, internal restrictions by issuing a policy statement that established a tripartite test for the FTC to deem any act or practice "unfair": (1) it must be substantial; (2) it must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.<sup>84</sup>

Often finding substantial countervailing benefits to competition,<sup>85</sup> the FTC, under newly Reagan-appointed leadership, spent most of the decade withdrawing or repealing rules, sparking renewed criticisms from consumer protection groups and the ABA.<sup>86</sup> Nevertheless, in 1994, Congress passed amendments mandating that the FTC find a practice "prevalent" before it initiated rulemaking proceedings.<sup>87</sup> Congress emphasized that the FTC should not regulate "isolated" or "insignificant" violations, and should only find prevalence if it issued several cease-and-desist orders or had "other information" that indicated a pattern of unlawful conduct.<sup>88</sup> The statute also codified the Commission's policy statement that established a three-part test, which must be satisfied before finding an act or practice unfair.<sup>89</sup>

## E. THE NINETIES TO THE PRESENT

Non-binding guidelines and enforcement actions have defined the FTC's activity during the last twenty years.<sup>90</sup> For the first time in almost two decades, the FTC started setting policy through guidelines,

<sup>82</sup> See Pub. L. No. 96-252, 94 Stat. 374 (codified at 15 U.S.C. §§ 57a(b)(2)(A), (j), 57b-3 (2012)).

<sup>83</sup> PRIDGEN, *supra* note 22, at § 12:12.

<sup>84</sup> *Id.* at Appendix 9.

<sup>85</sup> HARRIS, *supra* note 42, at 204 ("the increased role of economic analysis throughout the agency was a critical factor in the commission dropping or curtailing many pending rules, as well as preventing the initiation of ambitious programs in the area of consumer protection.").

<sup>86</sup> See ANNUAL REPORT OF THE FTC 1 (1981), available at [http://www.ftc.gov/sites/default/files/documents/reports\\_annual/annual-report-1981/ar1981\\_0.pdf](http://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1981/ar1981_0.pdf) (remarking that "the Commission transferred resources from broad industry-wide projects to more precisely defined and manageable case-enforcement activities"); PRIDGEN, *supra* note 22, at § 12:13; cf. HARRIS, *supra* note 42, at 193 (citing a Wall Street Journal editorial celebrating the "FTC Metamorphosis" from its activist role in the 1970s).

<sup>87</sup> Pub. L. No. 103-312, § 5, 108 Stat. 1691 (codified as amended at 15 U.S.C. § 57a(b)).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* § 9 (codified as amended at 15 U.S.C. § 45); HARRIS, *supra* note 42, at 330-31 (describing the Act as a compromise between business and public-interest advocates).

<sup>90</sup> See PRIDGEN, *supra* note 22, at §§ 12:8, 12:14; CASS, *supra* note 7, at 387.

which are considered “policy statements” under the APA and are thus not subject to Mag-Moss’s procedural restrictions.<sup>91</sup> As an auxiliary regulatory method, FTC has issued several rules, but only pursuant to a particular law where Congress temporarily allowed the Commission to promulgate a specific rule under § 553 of the APA.<sup>92</sup> Consequently, rules like the Telemarketing Sales Rule (TSR) and the Mortgage Assistance Relief Services (MARS) Rule took just one and two years to complete, respectively.<sup>93</sup>

During the last two years, much of the FTC’s rulemaking has been confined to issuing technical amendments to existing rules, substantively amending guidelines, and finalizing rules, such as the MARS Rule, that were products of specific congressional mandates.<sup>94</sup> In 2010, the FTC issued a substantive amendment to the TSR, but because the Commission promulgated that rule under notice-and-comment procedure, it was able to substantively amend it the same way.<sup>95</sup> Overall, enforcement through adjudications and consent orders has comprised the predominant regulatory activity of the FTC.<sup>96</sup>

## II. DEBILITATION THROUGH DELIBERATION?

Congress’s transmutation of the FTC rulemaking process has, at least for the time being, undoubtedly paralyzed the FTC’s ability to make rules.<sup>97</sup>

While it may not be readily apparent that the practical absence of independent rulemaking vitiates the Commission’s effectiveness, it is clear that scholars have long acknowledged the inherent advantages of forging policy through rulemaking, and rulemaking’s ability to fairly and efficiently carry out an agency’s purpose in a way that adjudication cannot.<sup>98</sup> Recognizing the benefits of rulemaking relative to adjudication,

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<sup>91</sup> See PRIDGEN, *supra* note 22, at § 12:14. Nor are guidelines required to be issued through § 553 notice-and-comment procedure. Nevertheless, the FTC issues its guidelines using notice-and-comment. See *Guides for the Use of Environmental Marketing Claims; Proposed Rule*, 75 Fed. Reg. 63,552 (Oct. 15, 2010).

<sup>92</sup> *Id.*

<sup>93</sup> *Mortgage Assistance Relief Services*, 75 Fed. Reg. 75, 092 (Dec. 1, 2010) (to be codified at 16 C.F.R. pt. 322); *Telemarketing Sales Rule*, 68 Fed. Reg. 4580 (Jan. 29, 2003) (16 C.F.R. pt. 310).

<sup>94</sup> See Article history of Federal Trade Commission, rules and proposed rules, FED. REG., [https://www.federalregister.gov/articles/search?conditions%5Bagency\\_ids%5D%5B%5D=192&conditions%5Btype%5D%5B%5D=RULE&page=2&quiet=true](https://www.federalregister.gov/articles/search?conditions%5Bagency_ids%5D%5B%5D=192&conditions%5Btype%5D%5B%5D=RULE&page=2&quiet=true).

<sup>95</sup> *Telemarketing Sales Rule*, 75 Fed. Reg. 48,458 (Aug. 10, 2010) (16 C.F.R. pt. 310).

<sup>96</sup> See CASS, *supra* note 7, at 387.

<sup>97</sup> See Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>98</sup> See, e.g., *Natl Petroleum Refiner’s Ass’n v. FTC*, 482 F.2d 672, 697–98 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (Wright, J.) (“[U]se of rulemaking by the Commission is convincingly linked to the goals of agency expedition, efficiency, and certainty of regulatory standards . . .”);

moreover, has not exclusively been within the purview of liberal academia. Eminent conservative jurists such as Justice Scalia and former Chief Justice Rehnquist have heeded the utility of notice-and-comment procedure.<sup>99</sup> Conversely, guidelines do not seem to hold comparable levels of approval.<sup>100</sup> Although they provide the industry some notice, guidelines are not as effective in inducing general compliance.<sup>101</sup> As a result, the FTC has recently adopted a more formidable enforcement strategy that has, in some instances, yielded new policy without the notice or clarity that would accompany a rulemaking.<sup>102</sup> Finally, if the FTC continues to only promulgate rules when Congress grants it APA procedural powers, then in certain situations the FTC will have to let systemic unfair or deceptive practices fester while Congress amasses the votes to pass remedial legislation.<sup>103</sup> Such was the case with the efforts to render relief in the mortgage arena during the Great Recession.<sup>104</sup>

While Congress did ultimately authorize the FTC to forgo Mag-Moss to pass the MARS Rule, the same congressional amenability to dispensation in special instances of new rulemaking does not appear to extend to substantive amendments to rules passed under Mag-Moss

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RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 6.8 (5th ed. 2010); Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 *ADMIN. L. REV.* 121, 122–36 (1990); Andrew P. Morriss et al., *Regulation by Litigation*, 9 *ENGAGE* 109, 110 (2008) (stating that, although it is not beyond reproach, rulemaking has several advantages over policymaking approaches primarily defined by litigation); cf. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 448 (2d ed. 1978) (describing “administrative rulemaking as ‘one of the greatest inventions of modern government’”). *But see* Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 *U. PA. L. REV.* 485 (1970).

<sup>99</sup> See *infra* notes 119–127 and accompanying text.

<sup>100</sup> See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L.J.* 1385, 1441–43 (1992) (proposing guidelines as a possible solution, but ultimately concluding that great reliance on guides could lead to arbitrary decisionmaking); Gibson, *supra* note 33, at 440 (concluding that “‘Green Guides’ fail to adequately regulate the increasing problem of ‘greenwash’ in advertising”).

<sup>101</sup> Gibson, *supra* note 33, at 440 (concluding that “‘Green Guides’ fail to adequately regulate the increasing problem of ‘greenwash’ in advertising”). Indeed, the mere consideration of rulemaking can have a conforming effect. See *ANNUAL REPORT OF THE FTC 16* (1978), available at [http://www.ftc.gov/sites/default/files/documents/reports\\_annual/annual-report-1978/ar1978\\_0.pdf](http://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1978/ar1978_0.pdf) (citing a Washington Post report that the ABC network curtailed its advertising aimed at children by 20% simply in response to the FTC’s staff proposal to ban or limit television advertising aimed at children).

<sup>102</sup> *Id.*

<sup>103</sup> Interview by John Villafranco with David Vladeck, former Director of Consumer Protection, Federal Trade Commission, (April 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Apr10\\_VladeckIntrvw4\\_14f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_VladeckIntrvw4_14f.authcheckdam.pdf); Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>104</sup> Mortgage Assistance Relief Services, 75 *Fed. Reg.* 75,092 (Dec. 1, 2010) (to be codified at 16 *C.F.R.* pt. 322).

procedure, such as the Credit Practices Rule.<sup>105</sup> Save for one instance,<sup>106</sup> Congress has not disencumbered the FTC from making substantive amendments to “Mag-Moss rules” using § 553, and the FTC seems wanting in the willingness or resources necessary to use Mag-Moss to make such amendments.<sup>107</sup>

### A. APA v. MAG-MOSS

To better appreciate the differences between APA and Mag-Moss procedure, an enumeration of the latter’s requirements is instructive: (1) if the Commission identifies an unfair or deceptive act or practice it must issue cease-and-desist orders or collect information indicating a widespread pattern; (2) the Commission must also make a determination whether the act or practice is prevalent; (3) the FTC must publish an advance notice in the Federal Register, briefly describing the area of inquiry, the intended objectives, and possible regulatory alternatives; (4) the Commission must also submit advance notice to the Senate Committee on Commerce, Science, and Transportation and to the House Committee of Energy and Commerce; (5) the FTC then publishes initial notice of proposed rulemaking in the Federal Register specifically stating the text of the rule, including any alternatives that the Commission proposes to promulgate, and the reasons for the proposed rule; (6) the FTC receives comments; (7) the FTC publishes final notice identifying disputed issues and setting hearing sites and dates; (8) each interested person who desires to avail himself or herself of the procedures notifies the presiding officer in writing; (9) the presiding officer identifies groups of persons with the same or similar interests in the proceeding; (10) the FTC conducts a hearing with a presiding officer, which includes oral and documentary presentations of evidence, in addition to cross-examination; (11) the FTC allows for a post-hearing rebuttal period; (12) the FTC provides a presiding officer report; (13) the FTC provides a Bureau of Consumer Protection (BCP) staff report; (14) the FTC provides public comments on the presiding officer and BCP reports; (15) the Director of the BCP makes final recommendations; (16) the FTC allows for oral presentations by

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<sup>105</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012); MARGOT SAUNDERS, NAT’L CONSUMER L. CTR., TIME TO UPDATE THE CREDIT PRACTICES RULE: CFPB SHOULD MODERNIZE FTC RULE ADDRESSING ABUSIVE CREDITOR COLLECTION PRACTICES (2010), available at [http://www.nclc.org/images/pdf/debt\\_collection/credit-practices-rule-update.pdf](http://www.nclc.org/images/pdf/debt_collection/credit-practices-rule-update.pdf).

<sup>106</sup> 12 U.S.C. § 5519(d) (2012); Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012) (stating the FTC believes Dodd-Frank granted it APA power to amend the Used Car Rule).

<sup>107</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012) (declining to comment on any plans to amend Credit Practices Rule).

interested persons; (17) the Commission holds meetings to consider the rule; (18) the FTC publishes a final rule and statement of basis and purpose.<sup>108</sup>

A critical piece in this cadre of procedural encumbrances is the use of cross-examination for issues of legislative fact.<sup>109</sup> Because virtually every rule is based on myriad contestable legislative facts, permitting cross-examination on each would likely de-incentivize an agency from rulemaking.<sup>110</sup> Despite some efforts of Congress and the FTC, this is exactly what has occurred.<sup>111</sup> While the text of Mag-Moss requires cross-examination on disputed issues of material fact,<sup>112</sup> Conference Reports on the Statute have construed ‘material fact’ to mean only issues of specific fact in contrast to legislative fact.<sup>113</sup> Naturally, the FTC incorporated this distinction in its procedural rules,<sup>114</sup> which could have significantly mitigated the cost and delay of Mag-Moss rulemaking.<sup>115</sup> However, the presiding officers (who are independent of the FTC) have resisted complying with this qualification.<sup>116</sup> Consequently, the unbounded application of cross-examination, like other adjudicative procedures, creates inefficiency and potential for abuse, which have compelled the FTC to effectively desert a fundamental regulatory tool that now bears no resemblance to the tool’s moniker — rulemaking.<sup>117</sup>

It is axiomatic that efficiency is one of the hallmarks of informal rulemaking under the APA.<sup>118</sup> In 1981, Justice (then Professor) Scalia

<sup>108</sup> 15 U.S.C. § 57a(b)–(c); ACUS, Recommendation 79-1, Hybrid Rulemaking Procedures of the Federal Trade Commission 9, 44 Fed. Reg. 38,817 (July 3, 1979).

<sup>109</sup> See KENNETH CULP DAVIS, RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 7.7 (3d ed. 1994).

<sup>110</sup> *Id.* (describing it as a “terrible waste of time” that would convert informal rulemaking into formal rulemaking).

<sup>111</sup> *Id.* (contending that because of the cost and delay of cross-examination, the FTC has nearly abandoned its use of rulemaking as a regulatory tool).

<sup>112</sup> 15 U.S.C. § 57a(c).

<sup>113</sup> S. REP. NO. 1408, at 7765 (1974) (Conf. Rep.); H.R. Rep. No. 93-1107, at 7728 (1974) (“Cross-examination is not required regarding issues in rulemaking proceedings which are not issues of fact. Examples of such issues are matters of law or policy or matters whose determination has been primarily vested by Congress in the Federal Trade Commission.”).

<sup>114</sup> 16 C.F.R. § 1.13(d)(5)(A) (“an issue for examination including cross-examination, or the presentation of rebuttal submissions, is an issue of specific in contrast to legislative fact.”).

<sup>115</sup> See KENNETH CULP DAVIS, RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 7.7 (3d ed. 1994).

<sup>116</sup> *Id.* (declaring that Congress’s experiment with limited cross examination has failed, and that ALJs seem unable or unwilling to distinguish between adjudicative and legislative fact).

<sup>117</sup> *Id.*

<sup>118</sup> See Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 255 (1986); Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REG. 25, 26 (1981); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 59 (1995); cf. *Bi-Metallic Investment Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445 (1915) (Holmes, J.) (“when a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole . . . there must be a limit to individual argument if government is to go on.”).

asserted that, without question, the greatest advantage of the APA for agencies was its relative lack of demanding restrictions.<sup>119</sup> Scalia did warn that organizations with substantial public constituencies could exploit rulemaking opportunities that allowed everyone to participate, thereby “inject[ing] political calculations” into “those agency decisions that should be made on a technical basis.”<sup>120</sup> Tellingly, however, Scalia was only expressing concern for exploitation of a rulemaking process that merely allowed for the submission of public comments, not an eighteen-step process that allowed for virtually a full-scale trial.<sup>121</sup> In fact, the latter elicited a slightly more pointed analysis from Scalia three years prior, when he opined that it was an “unfathomable prescription” and part of a “statutory Babel” that evinced a “devil-may-care attitude about departing from the APA” and a “profound ignorance concerning just what is being departed from.”<sup>122</sup> Although Scalia was not necessarily averse to congressional control over agency autonomy and was disturbed by the proliferation of rulemaking, he acknowledged that “interest groups” opposed to FTC rules succeeded in commandeering the legislative reins to attain through procedural impositions what they could not otherwise.<sup>123</sup>

Writing for the majority in the 1978 case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>124</sup> Justice Rehnquist was less equivocal in discussing the APA and the advantages of informal rulemaking.<sup>125</sup> He held that “[a]bsent constitutional constraints or extremely compelling circumstances the ‘administrative agencies’ should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”<sup>126</sup> While Rehnquist was speaking in the context of judicial, not congressional, interference with administrative procedure, his message was clear: “conduct[ing] all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings” would subvert the inherent advantages of informal rulemaking.<sup>127</sup>

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<sup>119</sup> Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REG. 25, 26 (1981).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 SUP. CT. REV. 345, 387 (commenting on the Consumer Product Safety Act and the FTC Improvement Act of 1975).

<sup>123</sup> *Id.* at 402, 407.

<sup>124</sup> 435 U.S. 519, 543 (1978).

<sup>125</sup> *See id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 547. Of course, then Justice Rehnquist was opining against the utility and providence of affording additional procedures to interested parties from a position generally opposed to extensive government regulation of industry.



## B. “THE FULL PANOPLY OF PROCEDURAL DEVICES” AND ITS EFFECTS

The subversive effects of Mag-Moss can be observed, in part, through the following ways. First, Mag-Moss provides regulated entities more opportunities to delay or skew the outcome in a way that the beneficiaries of regulation cannot.<sup>128</sup> Second, by having to wait for Congress’s permission to use APA procedures, the FTC is deprived of the rapidity necessary to stem the damage wrought by unfair or deceptive practices.<sup>129</sup> Third, the profligacy of Mag-Moss procedure has likely contributed in deterring the FTC from substantively amending the Credit Practices Rule to respond to novel deceptive practices.<sup>130</sup>

### 1. IMBALANCE OF PARTICIPATORY CAPACITY AND INTENTIONS

In theory, attempts at increasing public accessibility of a process governed by unelected regulators seem consistent with democratic ideals and efforts to empower citizens.<sup>131</sup> Practically, the theory runs into at least one problem: it falsely presupposes fairly matched participants and intent of both parties to develop the underlying factual issues in good faith.

For the targets of a regulation, the societal good that the regulation may produce rarely exceeds the expense of compliance with that regulation.<sup>132</sup> Therefore, the regulatory targets usually have an interest in protracting the process of writing rules with “which they will someday have to comply.”<sup>133</sup> Moreover, because the cost of paying attorneys and experts to attack the proposed rule is generally less than the cost of compliance, regulated industries can allocate considerable resources to dilatorily prolonging implementation of a rule by challenging the underlying administrative analysis in court.<sup>134</sup> What Mag-Moss offers

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<sup>128</sup> See Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51, 129 (1981); see also Kimberly D. Krawiec, *Don’t “Screw Joe the Plumber” The Sausage Making of Financial Reform*, 54 ARIZ. L. REV. 55, 77, 80 (2012).

<sup>129</sup> *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II Before the S. Comm. on Commerce, Science, & Transp.*, 111th Cong. 5 (2010) (statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) (“As many have noted, the FTC’s inability to swiftly enact predatory mortgage lending rules was a contributor to the mortgage meltdown.”).

<sup>130</sup> See SAUNDERS, *supra* note 105, at 2; *supra* note 107.

<sup>131</sup> See HARRIS, *supra* note 42, at 161; Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1508 (1996).

<sup>132</sup> Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 533 (1997); see Richard J. Pierce, *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1496 (arguing that the threat of hard-look judicial review is the principal source of delay during the NPRM period).

<sup>133</sup> Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 533 (1997).

<sup>134</sup> *Id.* at 535.



are far more effective methods of regulatory obstructionism: materially altering a rule's final iteration without ever having to go to court or maximizing the procedural pain to the point that rulemaking no longer remains a viable option.<sup>135</sup>

One of the principal purposes of the modern rulemaking process is serving the interest of the public through reasonably balanced public participation.<sup>136</sup> In trial-like proceedings, the presence of equally matched parties becomes even more imperative because the objective is to fully resolve underlying factual issues.<sup>137</sup> In APA informal rulemaking proceedings, the issue of balanced participation is generally limited to the volume and sophistication of public comments.<sup>138</sup> Conversely, the trial-like system of Mag-Moss presents obvious obstacles to achieving parity in participatory capacity.<sup>139</sup> Interested parties must present witness and expert testimony, submit rebuttal evidence, conduct cross-examinations, and prepare 'post-record' comments.<sup>140</sup>

Presumably discerning this problem, Congress included a provision in the Magnusson-Moss Warranty Act of 1975 that allowed the FTC to subsidize impecunious parties "in trade regulation rulemaking proceedings who would otherwise be unable to effectively participate."<sup>141</sup> In 1980, Congress amended the provision and reduced the funds authorized for the program.<sup>142</sup> Within one year, the program ceased to exist.<sup>143</sup> In a comprehensive study of the program, Professor Barry Boyer found that the reimbursements enabled consumer groups to participate on more "equal footing with industry at both the hearing and post-hearing stages of rulemaking."<sup>144</sup>

Boyer's conclusion also substantiated a 1977 comprehensive Senate Report on public participation in regulatory agency proceedings, which found that the single greatest obstacle to active public participation in regulatory proceedings was the lack of financial resources to meet the

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<sup>135</sup> See, e.g., *supra* note 25.

<sup>136</sup> See ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79th Congress, 1944-46, 200-201, 259 (1946).

<sup>137</sup> See S. REP. NO. 96-500, at 22 (1979) (recognizing that to effectively participate in Magnusson-Moss rulemaking proceedings participants may need funding for all stages of the proceeding, like the cross-examination on disputed issues, written rebuttals, and oral submissions before the Commission).

<sup>138</sup> See Krawiec, *supra* note 128, at 77.

<sup>139</sup> See *supra* note 137.

<sup>140</sup> Boyer, *supra* note 128, at 128-29.

<sup>141</sup> See CASS, *supra* note 7, at 519.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See *id.*; Boyer, *supra* note 128, at 128-29.

“great costs” of formal participation.<sup>145</sup> The report went on to attribute the lack of public participation to the protracted nature of formal proceedings, which it described as having a “chilling effect.”<sup>146</sup> Finally, the study discovered that citizen groups acutely felt the attendant burdens of procedural delays.<sup>147</sup>

While there is no recent empirical study on what adverse effects the repeal of this program continues to have on consumers individually and organizationally, mainly because there have been no Mag-Moss rulemakings to examine, one can reasonably conclude that the balance between consumer groups’ resources and the resources of companies on the Fortune 100 list is just as lopsided as it was three decades ago.<sup>148</sup> This asymmetry therefore gives one side a decisive advantage in influencing the outcome of the proceeding—thereby hindering Congress’s intent to fully and truly disclose all disputed issues of material fact<sup>149</sup>—in two ways. First, qualitatively, the industries’ domination of the proceedings<sup>150</sup> and capacity to continue mounting vigorous challenges to the proposed rule regardless of the duration can enfeeble the final version of the rule.<sup>151</sup> Second, the heightened formality and judicial character of Mag-Moss proceedings present more occasions for regulated entities to delay compliance, thereby deterring future agency decisions.<sup>152</sup>

## 2. MAKING SOME RULES MORE EFFECTIVE THAN OTHERS

In the judicial interference context, scholars have described the foregoing deterrent as promoting “managerial bias.”<sup>153</sup> That is, litigation creates a “managerial bias . . . toward regulating newly discovered hazards at the expense of long recognized, but still inadequately

<sup>145</sup> STAFF OF S. COMM. GOV. AFFAIRS, 95TH CONG., REPORT ON PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS (Comm. Print Vol. III 1977).

<sup>146</sup> *Id.* at VII.

<sup>147</sup> *Id.*

<sup>148</sup> *Financial Services And Products: The Role of the Federal Trade Commission on Protecting Consumers, Part II Before the Subcomm. on Consumer Prot., Product Safety, & Ins. of the S. Comm. on Commerce, Science & Transp.*, 111th Cong. 1 n.1 (2010) (statement of Linda A. Woolley Executive Vice President, Government Affairs Direct Marketing Association) (noting that the Direct Marketing Association represents many companies on the Fortune 100 list).

<sup>149</sup> See H.R. REP. No. 93-1107, at 45–46 (1993).

<sup>150</sup> See *id.* at 59 (statement of Charles A. Tobin, Secretary of the Federal Trade Commission) (citing the “skills and inclinations of the FTC Bar,” Tobin warned that the additional procedures would create “fodder for the litigation mill”).

<sup>151</sup> See PRIDGEN, *supra* note 22, at § 16:3.

<sup>152</sup> Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 533 (1997).

<sup>153</sup> Cross, *supra* note 32, at 1034 (accusing judicial review of introducing “systemic biases that impede sound regulation”).

regulated hazards.”<sup>154</sup> This can also result in “legalism” controlling an agency’s policymaking agenda; instead of policy concerns driving policymaking, the agency opts for the best, i.e., easiest, legal argument, which may produce more anodyne regulations.<sup>155</sup>

The drawn-out, trial-like procedures of Mag-Moss, like the threat of litigation and a scrutinizing judiciary, can have the same effect on the FTC in deciding what areas of regulation to amend or promulgate; either by forcing the FTC to lobby Congress for APA powers or proceeding under Mag-Moss.<sup>156</sup> In turn, this decisionmaking process naturally favors concerns grounded in exigent circumstances, where the problem has become so acute that inaction is socially and politically untenable, as in the case of mortgage assistance,<sup>157</sup> or areas of less consequence and less powerful industries, such as the regulation of commercial emails.<sup>158</sup> If, however, the cost of battling industry truculence through Mag-Moss procedure or lobbying for temporary § 553 procedural power outweighs concerted consumer demand, rulemaking becomes infeasible.<sup>159</sup>

For example, consumer groups have announced that the Credit Practices Rule requires updates to respond to changes in the credit industry.<sup>160</sup> Although the FTC has had time to react in some way to the pressure for updates, it has no foreseeable intentions of amending the rule.<sup>161</sup> In 1984, after nearly nine years, the FTC promulgated the Credit Practices Rule under Mag-Moss procedure.<sup>162</sup> The rule prohibits confessions of judgment, exemption waivers, irrevocable wage assignments, non-purchase security interests in household goods, pyramiding late charges, and deceptive cosigner practices.<sup>163</sup> Since its

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1035 (arguing that it would have been unlikely for Public Citizen to focus so much attention on and litigate over color additives when so many more consequential health risks remained unregulated except for the fact that the former provided an easier legal claim). Cross also quotes Sunstein’s warning that “to regulate new risks in the interest of health and safety is to perpetuate old ones, and thus to reduce health and safety.” *Id.* at 1034.

<sup>156</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012) (admitting that the FTC prods Congress for ad hoc APA power, but that in itself is cumbersome).

<sup>157</sup> Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092 (Dec. 1, 2010) (to be codified at 16 C.F.R. pt. 322) (promulgating a MARS rule pursuant to CREDIT Card Act, which was passed near the depths of the Great Recession, that received mostly supportive comments from industry and consumer groups).

<sup>158</sup> See 15 U.S.C. § 7703 (prohibiting predatory or abusive email including fraud and obscenity).

<sup>159</sup> See *infra* notes 160–65 and accompanying text.

<sup>160</sup> See, e.g., SAUNDERS, *supra* note 105.

<sup>161</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>162</sup> See 49 Fed. Reg. 7740 (Mar. 1, 1984) (codified at 16 C.F.R. pt. 444).

<sup>163</sup> *Id.*

promulgation, the credit industry has developed new practices, which some consider unfair and deceptive, such as securing a loan by check or electronic access to a consumer's bank account, when at the time of the loan, there are insufficient funds in the account to cover the check or promise to pay.<sup>164</sup> While the Consumer Financial Protection Bureau (CFPB) has assumed control over most FTC rules relating to financial products, this rule remains in the FTC's purview, yet the FTC has no plans to amend it.<sup>165</sup>

### 3. OPPORTUNITY LOST

'Agile' and 'swift' are characteristics not typically associated with bureaucracies. In certain circumstances, however, agencies can act with considerable agility when provided with the right procedural tools.<sup>166</sup> For example, the FTC promulgated the Children's Online Privacy Protection Rule within a few months of Congress granting it APA powers.<sup>167</sup> Such expediency, however, can be offset by the lag time it takes for Congress to confer this authority, thus adversely affecting the Commission's purpose of crisis prevention or mitigation.<sup>168</sup> Moreover, prodding Congress for a rulemaking directive is a cumbersome and resource-intensive process in itself.<sup>169</sup> For example, these exact problems manifested during the mortgage meltdown that predated and partially precipitated the "Great Recession."<sup>170</sup>

The impending danger of the mortgage crisis was evident by 2007.<sup>171</sup> In the spring of 2006, several states had enacted laws that imposed on mortgage originators some sort of duty with respect to their customers.<sup>172</sup> Although the FTC does not have the authority

<sup>164</sup> See, e.g., SAUNDERS, *supra* note 105, at 7–10.

<sup>165</sup> See, e.g., SAUNDERS, *supra* note 105; *supra* note 107.

<sup>166</sup> See *supra* note 26 and accompanying text; see also Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (16 C.F.R. pt. 310).

<sup>167</sup> See *supra* note 26.

<sup>168</sup> Interview by John Villafranco with David Vladeck, former Director of Consumer Protection, Federal Trade Commission, (April 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Apr10\\_VladeckIntrvw4\\_14f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_VladeckIntrvw4_14f.authcheckdam.pdf).

<sup>169</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission's Bureau of Consumer Protection (Oct. 3, 2012).

<sup>170</sup> See *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public Before Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 22–23 (2009) (statement of The Federal Trade Commission); *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II Before the S. Comm. on Commerce, Science, & Transp.*, 111th Cong. 5 (2010) (statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) ("As many have noted, the FTC's inability to swiftly enact predatory mortgage lending rules was a contributor to the mortgage meltdown.").

<sup>171</sup> See H.R. 2309: *The Consumer Credit and Debt Protection Act Before the Subcomm. on Commerce, Trade, & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 3 (2009) (statement of Kathleen E. Keest on behalf of National Consumer Law Center).

<sup>172</sup> *Id.* at 7.

to regulate banks, it could have issued rules regulating non-bank entities offering loan-modifications.<sup>173</sup> Moreover, under the Unfair and Deceptive Practices Act (UDAP), if the FTC had promulgated a UDAP rule regulating consumer credit, the Federal Reserve, which regulates banks, would have been required to pass “me too” rules.<sup>174</sup>

Because the FTC, practically speaking, cannot initiate rulemaking without congressional approval, it had to wait for authorization until May 2009, when the President signed the Credit Card Act requiring the FTC to issue rules regulating unfair or deceptive practices in the mortgage arena pursuant to § 553 notice-and-comment procedure.<sup>175</sup> The FTC issued its first rule in November 2010, which proscribes the collection of money from a homeowner unless the homeowner agrees to allow the loan-modifier to send a written offer to the mortgage originator.<sup>176</sup> It also requires clear-and-conspicuous disclosure of salient information.<sup>177</sup>

In an interview with the American Bar Association in April 2010, the then-Director of the FTC’s Bureau of Consumer Protection, David Vladeck, lamented the lack of general APA rulemaking authority.<sup>178</sup> He characterized the fact that the FTC could have completed mortgage service rules much sooner, if it had § 553 rulemaking authority, as a “serious opportunity lost.”<sup>179</sup> In short, earlier promulgation of the above rule could have spared many consumers thousands of dollars lost in homeowner scams.<sup>180</sup>

### C. DELIVERING THE MESSAGE? GUIDELINES AND ENFORCEMENT FOR GREEN MARKETING, FOOD ADVERTISING, AND MORE

The FTC’s use of guides reflects the theory that a non-binding guideline, or a policy statement, satisfies the basic functions of rulemaking without having to adhere to rulemaking procedural requirements: (1) it can set policy prospectively, (2) put industries on

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<sup>173</sup> *Id.* at 9.

<sup>174</sup> *Id.*

<sup>175</sup> Mortgage Assistance Relief Services, 75 Fed. Reg. 75,092 (Dec. 1, 2010) (to be codified at 16 CFR pt. 322).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Interview by John Villafranco with David Vladeck, former Director of Consumer Protection, Federal Trade Commission, (April 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Apr10\\_VladeckIntrvw4\\_14f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_VladeckIntrvw4_14f.authcheckdam.pdf).

<sup>179</sup> *Id.*; see also *The Consumer Credit and Debt Protection Act Before the Subcomm. on Commerce, Trade & Consumer Prot. of the H. Comm. on Energy and Commerce*, 111th Cong. 3 (2009) (statement of Kathleen E. Keest on behalf of National Consumer Law Center).

<sup>180</sup> Interview by John Villafranco with David Vladeck, former Director of Consumer Protection, Federal Trade Commission, (April 2010).

notice that enforcement actions will hew to the interpretations within the guidelines, and (3) serve as a deterrent.<sup>181</sup>

However, it was the very inability of guides to perform these functions adequately that led the FTC to pursue substantive rulemaking.<sup>182</sup> Moreover, the FTC originally turned to guides in the period before substantive rulemaking emerged because cease-and-desist orders were onerous and wasteful of limited resources “where the unlawful practices were widespread throughout a particular industry.”<sup>183</sup>

Now, the FTC has come full circle. Because guidelines do not inherently have the force of law, the FTC must issue cease-and-desist orders and allege violation of the statute on which the guide was based, rather than on violation of the guide itself.<sup>184</sup> Further, the reliance on “self-regulation” casts larger penumbras where certain regulated entities feel more comfortable operating “close to the edge” of questionable advertising practices.<sup>185</sup> Therefore, the absence of the force of law as a sufficient deterrent and basis for automatic liability can hamper the adjudicatory process by increasing the need for more enforcement actions which will either be more limited in effect, or pioneering in a way that develops new Commission policy without input from market actors and without optimal clarity.<sup>186</sup>

The FTC published the Green Guides in 1992 to provide advertisers with a basis for voluntary compliance by offering them “safe harbors” in the form of examples and potentially qualifying claims.<sup>187</sup> The use of deceptive green-marketing claims shows little sign of abating, however.<sup>188</sup> In 2007, an environmental marketing firm conducted a study of 1,753 claims on 1,018 products, and “tested the claims against

<sup>181</sup> See Gibson, *supra* note 33; Cass, *supra* note 7, at 387; Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1441 (1992). For more on the nature of guidance documents, see generally JEFFREY S. LUBBERS, A FEDERAL GUIDE TO AGENCY RULEMAKING 63–93 (5th ed. 2012).

<sup>182</sup> See Earl W. Kinter & Christopher Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651, 673 (1975).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*; HARRIS, *supra* note 42, at 313 (noting that it is still necessary “for the FTC to follow a case-by-case approach, determining that individual environmental advertisements were deceptive”); see generally *Pac. Gas & Electric Co. v. Fed. Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974) (“a [guideline] . . . does not establish a “binding norm.” It is not finally determinative of the issues or rights to which its addressed . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the [guideline] had never been issued.”).

<sup>185</sup> See Gibson, *supra* note 33, at 434; LUBBERS, *supra* note 181, at 70.

<sup>186</sup> See Gibson, *supra* note 33, at 434; *infra* notes 211–13.

<sup>187</sup> PRIDGEN, *supra* note 22, at § 11:43.

<sup>188</sup> Gibson, *supra* note 33, at 424–25.



the best available practices in environmental marketing.”<sup>189</sup> The study found that all but one of the products committed a false or misleading claim.<sup>190</sup>

While the FTC’s Bureau of Consumer Protection, under the leadership of former Director David Vladeck, has deservedly earned praise for its campaign against deceptive advertising, guidelines and adjudications remain highly imperfect vehicles for effectuating regulatory objectives.<sup>191</sup> That guidelines are largely designed to condition *voluntary* compliance provides more disengaged administrations with a convenient pretext for regulatory abdication.<sup>192</sup> Further, it is incredible to believe that non-comprehensive and non-binding policy statements will succeed in widely deterring companies from doing something against their short-term interests.<sup>193</sup> The use of green-marketing claims is very effective in influencing consumers.<sup>194</sup> Given the relative challenges of prosecuting companies that are not automatically liable under the guides and the profitability of sophisticated yet misleading green-marketing, the FTC does not have the resources to do anything but adopt a case-by-case approach that may only target the most egregious violators operating on the margins of the market,<sup>195</sup> or risk a “profitable and lengthy game of postponing the effect of the rule on [a company’s] current practice.”<sup>196</sup>

Similarly, the FTC’s Enforcement Policy Statement on Food

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 425. In 2012, the FTC finalized updates to the Green Guides which provided guidance on “carbon-offset” and “free-of” claims, but declined to provide guidance on “organic, natural, or sustainable” claims. See *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62,122 (Oct. 11, 2012) (codified at 16 C.F.R. pt. 260).

<sup>191</sup> See, e.g., Jeff Gelles, *Consumer Chief Leaves FTC a Feistier Place*, THE PHIL. INQUIRER, Dec. 3, 2012, [http://articles.philly.com/2012-12-03/news/35550208\\_1\\_ftc-s-bureau-jon-leibowitz-small-ball](http://articles.philly.com/2012-12-03/news/35550208_1_ftc-s-bureau-jon-leibowitz-small-ball).

<sup>192</sup> PRIDGEN, *supra* note 22, at § 11:45 (noting that from 2000 to 2009, the FTC took a “hiatus” from enforcement actions against deceptive green-marketing).

<sup>193</sup> See Greg Northern, *Greenwashing the Organic Label: Abusive Green-Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. Food. L. & Pol’y 101, 119 (2011) (remarking that due to the omissions of “organic” and “sustainable” claims under the 2012 updates to the Guides, “many claims will remain unguided, and marketers remain free to aggressively market their products without clear boundaries in which they must remain”).

<sup>194</sup> See Gibson, *supra* note 33, at 424–25.

<sup>195</sup> See Thomas C. Downs, “Environmentally Friendly Advertising:” *Its Future Requires a New Regulatory Authority*, 42 AM. U. L. REV. 155, 179, 185 (1992) (arguing that, even after publication of the 1992 Guides, the FTC was not adequately equipped to combat the burgeoning market of green-advertising); David C. Vladeck, ABI Winter Leadership Development Conference 8 (Dec. 10, 2010), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/abi-winter-leadership-development-conference/101210vladeckabi.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/abi-winter-leadership-development-conference/101210vladeckabi.pdf) (telling the Conference that the FTC recently brought seven suits against companies claiming their bamboo textiles are environmentally friendly, when most, if not all, bamboo textile products are made from Rayon, which is made from an environmentally unfriendly process).

<sup>196</sup> Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 691 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (explaining that this risk is minimized by the use of substantive rules).



Advertising has not been immune to the ineluctable flaws of guidelines, namely, a deterrence deficit and amorphous boundaries.<sup>197</sup> The FTC issued its food advertising guidelines in May 1994, permitting considerable flexibility for advertisers.<sup>198</sup> The policy statement indicates what sorts of acts or practices may constitute deceptive advertising and what advertisers should not do, such as fail to disclose nutrients, or make health claims unsubstantiated by competent and reliable scientific evidence.<sup>199</sup> The statement's guidance is also heavily conditioned, written with enough ambiguity to allow for yawning prosecutorial discretion.<sup>200</sup>

Unsurprisingly, in the realm of children's advertisements, the guides' efficacy has been questionable.<sup>201</sup> In the past nine years, the Institute of Medicine, Henry J. Kaiser Family Foundation, American Academy of Pediatrics, and the American Psychological Association found that many experts "have linked dramatic increase in the prevalence of childhood obesity to the emergence of advertising of unhealthy foods to children."<sup>202</sup> A recent study by the Center for Science in the Public Interest found that a majority of all food and beverage manufacturers do not have policies on marketing food to children, or their policies have loopholes that allow for such advertising.<sup>203</sup> The study surveyed 128 food and entertainment companies and restaurant chains, giving seventy-five percent of these companies an "F" grade for their food marketing policies.<sup>204</sup> The FTC's annual snapshot of enforcement activities in the last two years also indicates that deceptive advertisements are not merely the province of peripheral companies,

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<sup>197</sup> Katy Bachman, *Putting Brands in Their Place: FTC's David Vladeck leads the charge in the feds' crackdown on deceptive advertising*, ADWEEK (Nov. 13, 2012, 12:12 AM), <http://www.adweek.com/news/advertising-branding/putting-brands-their-place-145058?page=1> (commenting that, until recently, the FTC's guideline was "vague and flexible," resulting in mixed outcomes for the FTC and settlements that failed to adequately clarify the guideline).

<sup>198</sup> HARRIS, *supra* note 42, at 323.

<sup>199</sup> See *Enforcement Policy Statement on Food Advertising*, FED. TRADE COMM'N (May 1994), <http://www.ftc.gov/enforcement-policy-statement-on-food-advertising>.

<sup>200</sup> *Id.* ("The Commission recognizes that there may be certain limited instances in which carefully qualified health claims may be permitted under Section 5 although not yet authorized by the FDA, if the claims are expressly qualified to convey clearly and fully the extent of the scientific support. At the same time, however, the Commission believes that qualified claims based on evidence that is inconsistent with the larger body of evidence have the potential to mislead consumers, and, therefore, are likely to violate Section 5.").

<sup>201</sup> See Michelle M. Mello, *Federal Trade Commission Regulation of Food Advertising to Children: Possibilities for a Reinvigorated Role*, 35 J. HEALTH POL. POL'Y & L. 227, 239 (2010); Roseann B. Termini et al., *Food Advertising and Childhood Obesity: A Call to Action for Proactive Solutions*, 12 MINN. J.L. SCI. & TECH. 619, 643 (2011); Jennifer L. Pomeranz, *Extending the Fantasy in the Supermarket: Where Unhealthy Food Promotions Meet Children and How the Government can Intervene*, 9 IND. HEALTH L. REV. 117 (2012).

<sup>202</sup> See Mello, *supra* note 201, at 231.

<sup>203</sup> Termini, *supra* note 201, at 643-44.

<sup>204</sup> *Id.* at 644.

but, rather, that major companies are flouting industry guidelines.<sup>205</sup>

Nevertheless, the defining element of guidelines has typically been the promotion of self-regulation.<sup>206</sup> The corresponding diminution in the deterrent or incentive factor renders the remedy incommensurate with the problem it seeks to address.<sup>207</sup> Instead of conducting binary examinations where the FTC can see whether a company is complying with a rule, the FTC must proceed circuitously to determine whether and prove how a company's advertising claim is deceptive.<sup>208</sup> More importantly, the remedies obtained by the FTC through enforcement actions against food advertisers and others are often consent orders proscribing factually unique, highly-particularized claims that until recently have provided little or no precedent to regulate industry-wide deception.<sup>209</sup>

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<sup>205</sup> THE FTC IN 2011: FEDERAL TRADE COMMISSION ANNUAL REPORT 37–40 (April 2011), available at [http://www.ftc.gov/sites/default/files/documents/reports\\_annual/annual-report-2011/2011chairmansreport\\_0.pdf](http://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-2011/2011chairmansreport_0.pdf) (detailing the FTC's actions against Nestle, Kellogg, POM Wonderful, and Dannon); cf. Lydia Depillis, *The Government Will Never Win its War on Bogus Diet Products*, WASH. POST. WONKBLOG (Jan. 7, 2014 4:14PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/07/in-the-fight-between-government-and-bogus-diet-products-the-government-will-always-lose/> (suggesting that the FTC's most recent enforcement against purveyors of diet products, involving a use of updated guidelines and adjudications, is, like prior FTC attempts at regulating Internet marketers, somewhat like "playing whack-a-mole," and stating as fact that weight-loss companies "seem not to be dissuaded by some of them getting busted in awhile").

<sup>206</sup> See Mello, *supra* note 201, at 238 (discussing the use of guidelines in conjunction with the FTC's traditional preference for industry self-regulation); *Enforcement Policy Statement on Food Advertising*, FED. TRADE COMM'N (May 1994), <http://www.ftc.gov/enforcement-policy-statement-on-food-advertising> (using precatory phrases like "advertisers should" thirteen times).

<sup>207</sup> See Mello, *supra* note 201, at 238 (revealing that the American Psychological Association has also countenanced the belief that categorical restrictions on certain claims, rather than disclosures, would be a more effective remedy because studies make clear that young children do not comprehend the intended meaning of the most widely used disclaimers.)

<sup>208</sup> See *supra* notes 183–84 and accompanying text.

<sup>209</sup> See *Enforcement Policy Statement on Food Advertising* n.13, FED. TRADE COMM'N (May 1994), <http://www.ftc.gov/enforcement-policy-statement-on-food-advertising> (May 1994), <http://www.ftc.gov/enforcement-policy-statement-on-food-advertising> (claiming that companies can glean some sort of coherent precedent from twenty-one somewhat disparate cases and consent orders involving everything from an indeterminate insufficiency of scientific evidence in different contexts; permissible representations based on approved labeling pursuant to FDA regulations; claims of milk found to be inappropriate because, in an unidentified context, they contained implied claims about calcium content; a requirement that claims involving health or safety issues require a "relatively high level of substantiation;" a requirement to disclose conflicting medically expert beliefs in a claim about dietary cholesterol and heart disease; and articulation of a general principle that claims should not be provided in a manner that overstate a particular benefit or product); see also *In the matter of Pfizer, Inc.*, 81 F.T.C. 23, 91–93 (1972) (setting forth the substantiation factors, which seem tantamount to a "totality of the circumstances" test, previously relied on by the Commission in assessing advertising claims); THE FTC IN 2011, *supra* note 205, at 37 (acknowledging, albeit by implication, that past consent orders failed to provide desirable clarity to companies); Katy Bachman, *Putting Brands in Their Place: FTC's David Vladeck leads the charge in the feds' crackdown on deceptive advertising*, ADWEEK (Nov. 13, 2012, 12:12 AM), <http://www.adweek.com/news/advertising-branding/putting-brands-their-place-145058?page=1> (noting that for years

This, however, has notably changed with two recent groundbreaking settlements against Nestle and Iovate. The settlements established a new policy that defines the previously malleable and ambiguous standard for assessing food-marketing claims—whether those claims are supported by “competent and reliable scientific evidence”—as requiring two clinical trials and FDA pre-approval.<sup>210</sup> While this development evidences that, under the right leadership, rulemaking is not always necessary to set policies that provide effective consumer protections, it nevertheless exposes the shortcomings of policymaking by adjudication. For instance, the marketing industry was blindsided; it neither had the opportunity to comment on, nor have notice of, the new standard.<sup>211</sup> Moreover, the two clinical trials and FDA pre-approval requirement does not necessarily extend to the entire industry, to every case, or even to every company product.<sup>212</sup> Such indeterminacy leaves individual companies wondering what level of substantiation the Commission will apply to their products. A question that may not be answered until a company is defending itself in litigation.<sup>213</sup>

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the FTC’s standards for food-marketing claims were “vague and flexible” resulting in inefficient litigation).

<sup>210</sup> THE FTC IN 2011, *supra* note 205, at 40–41; Bachman, *supra* note 209.

<sup>211</sup> Bachman, *supra* note 209 (quoting industry attorney, Marc Roth: “[the new policy] shook us as an industry . . . [it’s] a game changer”). The advertising industry has also been reeling from the FTC’s new policy of seeking restitution, a remedy previously reserved for extreme cases or those involving fraud, in more garden-variety deceptive-advertising cases. *Id.* (discussing a \$25 million settlement—that had “marketer’s heads spinning”—with Reebok over claims that its shoes promised “better legs and a better butt with every step”).

<sup>212</sup> For instance, in the Commission’s consent order with Reebok, the order provides two different definitions of scientific substantiation. Reebok is prohibited from claiming that its shoes, EasyTones, are effective in strengthening muscles unless the claim is supported by “one adequate and well-controlled human clinical study evaluated in light of all other available scientific evidence.” For any other muscle tone claims related to EasyTones, however, Reebok has to provide “tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.” See Heather M. Mandelkehr, *When Toning Shoes Strengthen Nothing More Than Likelihood of Lawsuit: Why the Federal Trade Commission needs Guidelines Regarding Proper Substantiation of Fitness Advertisements*, 20 JEFFREY S. MOORAD SPORTS L.J. 297, 329–30 (2013). Notwithstanding the vestigial uncertainty, it appears the food advertising industry is treating these adjudications as establishing industry-wide rules. See *infra* n.213.

<sup>213</sup> See *In the Matter of POM Wonderful LLC*, No. 9344, 2013 WL 268926, at \*65 n.37 (F.T.C. Jan. 6, 2013) (requiring two clinical trials, but not FDA pre-approval and warning that “our ruling today does not foreclose that we may again conclude, in an appropriate case, that FDA pre-approval would be an appropriate remedy.”); *FTC v. Springtech 77376, LLC, et al.*, 2013 WL 3783645 (July 16, 2013) (citing footnote 37 in *Pom Wonderful* and requiring that Springfield obtain FDA pre-approval to substantiate claims concerning its lice-treatment product); *infra* note 270. *In the matter of POM Wonderful LLC* was recently argued before the D.C. Circuit, with oral argument scheduled for May 2, 2014. POM and its supporting amici curiae unsurprisingly accused the FTC, among other things, of contravening Mag-Moss and the APA by unilaterally crafting and establishing an “industry-wide” rule through adjudication. See Brief for Natural-Health U.S.A. & Techfreedom as Amici Curiae Supporting Petitioners, *POM Wonderful LLC v. FTC*, No. 13-1060, 2013 WL 4477444 at \*23 (D.C. Cir. Aug. 21, 2013). In its brief, the FTC countered by arguing that its two-clinical-trial substantiation requirement for medical benefit claims in food advertising conforms to decades-

### III. THE FTC “ON STEROIDS”

Perhaps viewing the early enforcement actions of the FTC under the Obama Administration as harbingers of a more invigorated Commission, former FTC Chairman Jim Miller, a Reagan appointee, has argued that allowing the FTC to operate under § 553 APA rulemaking procedures would be akin to “putting the FTC on steroids.”<sup>214</sup> This oft-repeated warning, however, fails to appreciate or deliberately ignores the robust rulemaking fetters foisted by all corners of the federal government that challenge the veracity of such a claim and obviate the need for Mag-Moss.

#### A. ADDITIONAL CONGRESSIONAL CONTROLS

The Constitution and the realities of modern-day politics provide Congress with a versatile toolbox to rein in overzealous agencies.<sup>215</sup> First, the appropriations process gives Congress the “power of the purse.”<sup>216</sup> The FTC must justify its budget based on its annual report and performance plans.<sup>217</sup> This is no mere formality. Congress has already exercised its appropriations power over the FTC.<sup>218</sup> Following the hearings and investigations surrounding the proposal to regulate children’s advertising, the FTC was officially allowed to go “out of business” when Congress did not renew funds for its operation in 1980<sup>219</sup> and gave the FTC two days to close down operations. Although funds were ultimately appropriated, the FTC received the message—over the next year and a half, the FTC aborted nearly all of its controversial rulemaking investigations.<sup>220</sup> Second, Congress can prevent a rule from taking effect. Pursuant to the Congressional Review Act, Congress reviews all “major” final agency rules and is empowered with a fast-track process to pass a joint resolution that would bar the regulation from taking effect.<sup>221</sup>

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old precedent. *See* Brief of Respondent, Federal Trade Commission, *POM Wonderful LLC v. FTC*, No. 13-1060, 2013 WL 507440 at \*8–9 (D.C. Cir. Feb. 7, 2014) (citing its 2001 Dietary Supplement Guide and *Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986)). Although defending the authority to make policy through adjudications, the FTC denied that is what has occurred. *See id.* at \*56 n.24, \*83–85.

<sup>214</sup> *See* Brody Mullins and John D. McKinnon, *FTC’s Powers Would Grow Under Financial Overhaul*, WALL ST. J., October 29, 2009, <http://online.wsj.com/article/SB125677809189114853.html>.

<sup>215</sup> *CASS*, *supra* note 7, at 60.

<sup>216</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>217</sup> *See* *FTC Submits Fiscal Year 2013 Budget Request and Performance Plans to Congress*, FED. TRADE COMM’N (Feb. 13, 2012), <http://www.ftc.gov/opa/2012/02/budget.shtm>.

<sup>218</sup> *See* Weingast & Moran, *supra* note 71, at 775.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> 5 U.S.C. §§ 801(b)(1), 802 (2012). Although only successfully used once in its history, some senators have recently invoked the Act’s powers to try an overturn various EPA rules, nearly succeeding in doing so. Thomas McGarity, *Administrative Law as Blood Sport: Policy Erosion in a*

Congress also has less overt means of combating controversial rules. Courts have not yet found congressional communication in informal rulemaking to be improper.<sup>222</sup> If a challenging party wanted to overturn a rule based on such *ex parte* contacts, it would have to demonstrate that the agency's decision was based upon factors introduced by the *ex parte* communications irrelevant to the agency's decision under the applicable statute.<sup>223</sup> Therefore, blatant threats to withhold appropriations would constitute extraneous factors, but this still leaves room for more discreet indications of congressional disapproval.<sup>224</sup> Finally, although the APA permits *ex parte* communications between the decisionmaker and agency personnel, Mag-Moss does not.<sup>225</sup> Consequently, members of Congress can discuss rulemaking with FTC personnel and decisionmakers during the process in the presence of no one, but the FTC staff and FTC decisionmakers may not do the same.

## B. EXECUTIVE CONTROL

The Executive can dramatically alter the outcome of the rulemaking process by setting regulatory goals and subjecting agency rules to stringent cost-benefit analysis.<sup>226</sup> Specifically, executive agencies must quantitatively justify "significant" rules by submitting cost-benefit analyses to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB),<sup>227</sup> widely considered to be the most powerful agency that few have ever heard of.<sup>228</sup> In fact, many scholars and pro-regulatory groups have generally come to view OIRA as a "one-way ratchet" that primarily functions to dilute or derail proposed agency rules.<sup>229</sup> While the FTC is an independent

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*Highly Partisan Age*, 61 DUKE L.J. 1671, 1717 (2012).

<sup>222</sup> Weingast & Moran, *supra* note 71 at 314.

<sup>223</sup> *Id.* at 315.

<sup>224</sup> *Id.* at 315 n.61.

<sup>225</sup> See 12 U.S.C. § 57a (2012).

<sup>226</sup> See *infra* note 227.

<sup>227</sup> Cass, *supra* note 7, at 532; see Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 69 (1995) (noting that the OIRA "reviews all agency statements of basis and purpose in major rulemakings to insure that the agency has addressed each of the myriad considerations adequately before the agency issues its final rule").

<sup>228</sup> Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 994 (2011) (citing Martha Minow's, Dean of Harvard Law School, introduction of Cass Sunstein in 2010).

<sup>229</sup> See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Overview of the Regulatory State*, 106 COLUM. L. REV. 1260, 1268 (2006) (noting that "OIRA stands as a structural roadblock on the path of regulation, but not deregulation—an asymmetry which cannot be justified on cost-benefit grounds . . ." and "OIRA generally does not review agency inaction. Agency inertia is therefore privileged under the current system of OIRA review"); Rachel E. Barkow, *Insulating Agencies: Avoiding Agency Capture through Institutional Design*, 89 TEX. L. REV. 15, 31–36 (2010) (arguing that OIRA likely adds to the problem of agency capture); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 74 (2006) (finding, based on an empirical review of the Bush I and Clinton administrations, that OIRA, when reviewing EPA rulemaking, almost exclusively focused on



agency and thus not subject to OIRA review that applies rigid cost-benefit analysis, this could easily be changed through executive order.

The President can also temper “activist” rulemaking through executive orders that set the administration’s regulatory priorities.<sup>230</sup> For example, President Obama’s Executive Order 13,563 requires agencies to develop ways to review and eliminate unnecessary regulation, expressing concern for economic growth and innovation, terms often used by regulated industries to caution against regulation.<sup>231</sup> Further, the head of the OMB during President Obama’s first term, Professor Cass Sunstein, has written extensively on the need for thorough deliberation in rulemaking, checked by a probing judiciary.<sup>232</sup>

Finally, under the Regulatory Flexibility Act, agencies must consider, among other things, the potential impact of regulations on small businesses and other small entities and provide any significant alternatives to the proposed rule.<sup>233</sup> These considerations are compiled into a formal analysis that is submitted to the Chief Counsel for Advocacy of the Small Business Administration (SBA) before rulemaking proceedings begin.<sup>234</sup> The Act, as amended by the Small Business Regulatory Fairness Act of 1996,<sup>235</sup> also expressly authorizes judicial review for any small entity adversely affected by final agency action.<sup>236</sup> For some agencies, including the CFPB, the Act further requires consideration of comments and suggestions from interested individuals representing small entities, determined by the SBA, on the proposed rule, and the convening of regulatory review panels that review all pertinent materials and collect advice and recommendations that become part of the rulemaking record.<sup>237</sup> Despite its mandate to protect small businesses, the SBA’s Office of Advocacy has elicited accusations, based on detailed studies, that it sometimes serves as a

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the cost side of cost-benefit analysis and “routinely sought to reduce regulatory burdens” by, in part, disproportionately focusing on short-term costs and benefits); RENA STEINZOR, ET AL., *CTR. FOR PROGRESSIVE REFORM, WHITE PAPER #1111, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT* 4, 8, 9 (November 2011), available at [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf) (characterizing OIRA as a “court of last resort” for industry lobbyists, and finding that, based on a ten year empirical study, the number of people representing regulated industries at OIRA meetings was five times the number of people representing public-interest groups, and that OIRA has changed seventy-six percent of the rules submitted to it under President Obama).

<sup>230</sup> Cass, *supra* note 7, at 532.

<sup>231</sup> *Id.* at 535.

<sup>232</sup> Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 468 (1986).

<sup>233</sup> See 5 U.S.C. § 603 (2012).

<sup>234</sup> *Id.*

<sup>235</sup> Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.).

<sup>236</sup> 5 U.S.C. § 611.

<sup>237</sup> *Id.* § 609(b), (d)(2).



proxy agency for the interests of large corporations.<sup>238</sup>

### C. “HARD LOOK”

The “hard look” doctrine is a notable counter to the proposition that the recoupling of APA procedure with the FTC would dangerously amplify the Commission’s power.<sup>239</sup> The doctrine—that courts must take a “hard look” at the administrative record and the agency’s explanatory material, criteria, relevant factors, regulatory options, and support of material empirical propositions—has spawned an entire body of scholarship devoted to its ossifying effect.<sup>240</sup>

Its proponents champion it for endeavoring to achieve the same outcome that Mag-Moss supporters espouse, namely the promotion of careful deliberation.<sup>241</sup> Its detractors, such as Professor Thomas McGarity, critique it for causing judicial overreach and agency stagnation; agencies, constantly fearful of future challenges, are either less inclined to initiate rulemakings or amend rules, or the process slows because the agency is concerned about making an extensive record to defend in court.<sup>242</sup> In short, the continued vitality of hard-

<sup>238</sup> RANDY RABINOWITZ ET AL., *CTR. FOR EFFECTIVE GOV’T, SMALL BUSINESS, PUBLIC HEALTH, AND SCIENTIFIC INTEGRITY: WHOSE INTERESTS DOES THE OFFICE OF ADVOCACY AT THE SMALL BUSINESS ADMINISTRATION SERVE?* 1 (2013) (finding that the Office’s comments against regulating, among other things, formaldehyde, did not raise any issues concerning small businesses, instead, it parroted talking points provided by trade associations representing major chemical companies opposing the proposed regulation); SIDNEY SHAPIRO & JAMES GOODWIN, *CTR. FOR PROGRESSIVE REFORM, WHITE PAPER #1302, DISTORTING THE INTERESTS OF SMALL BUSINESS: HOW THE SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY’S POLITICIZATION OF SMALL BUSINESS CONCERNS UNDERMINES PUBLIC HEALTH AND SAFETY* (2013) (finding, among other things, that the Office “sponsors anti-regulatory research designed to bolster attacks on the U.S. regulatory system” —including a much-discredited study that purported to calculate the annual cost of federal regulations in 2008 to be \$1.75 trillion—and “pushes for rule changes that would benefit large firms instead of narrowly tailoring its recommendations so that they help only truly small businesses”); see generally Robb Mandelbaum, *A Small Business Office is Accused of Advocating for Big Business*, NY TIMES BLOG, March 18, 2013, 11:00 AM, [http://boss.blogs.nytimes.com/2013/03/18/a-small-business-office-is-accused-of-advocating-for-big-business/?\\_r=0](http://boss.blogs.nytimes.com/2013/03/18/a-small-business-office-is-accused-of-advocating-for-big-business/?_r=0).

<sup>239</sup> Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); see Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1693–95 (2012) (documenting the fight surrounding the Durbin Amendment to highlight how outside groups and regulated industries can and will spend millions of dollars to influence agency decisionmaking through lobbying, public-relations campaigns, and attack advertising).

<sup>240</sup> See, e.g., Cross, *supra* note 32; Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991).

<sup>241</sup> See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1570 (1992) (arguing that civic republicanism merits the use and expansion of a “hard look” approach to judicial review).

<sup>242</sup> See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992); see also Cross, *supra* note 32, at 1019.

look judicial review should allay fears of omnipotent agencies riding roughshod over regulated industries.<sup>243</sup>

#### D. "THE APA IS NOT RADICAL"

Speaking before the Senate Subcommittee on Consumer Protection in 2010, FTC Commissioner J. Thomas Rosch declared that "APA rulemaking is not radical."<sup>244</sup> He followed that understatement by noting that the Securities and Exchange Commission has APA rulemaking powers, as do most other agencies.<sup>245</sup> Indeed, the APA has remained the central pillar of administrative procedure without any significant amendments for almost seventy years.<sup>246</sup> That Congress did not create the APA to augment administrative power, but to restrain it, also militates against viewing § 553's provisions as vesting an agency with some extraordinarily aggrandizing power.<sup>247</sup>

Finally, scholarly proponents of the ossification thesis have not only attributed the obstruction of quality rulemaking to "hybrid" statutes and judicial review, but also to the APA itself.<sup>248</sup> The lacuna that is the APA's pre-proposal period provides opportunities for regulated entities to exert undue pressure on agencies.<sup>249</sup> A recent study on the agencies operationalizing the "Volcker Rule"<sup>250</sup> concluded

<sup>243</sup> See, e.g., *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (striking down an SEC rule that provided a modest change to shareholder voting as arbitrary and capricious, finding that the rule "failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters"); Leen Al-Alami, *Business Roundtable v. SEC: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Regulation*, 15 U. PA. J. BUS. L. 541, 559 (2013) (arguing that *Business Roundtable* expanded the scope of arbitrary-and-capricious review and "raise[d] serious questions about how . . . any agency can succeed at a cost-benefit showing"); *The FTC's Enforcement Tools against Unfair and Deceptive Trade Practices in Financial Products & Services and Other Sectors Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 9 (2010) (statement of Dee Pridgen).

<sup>244</sup> *Financial Services and Products: The Role of the FTC in Protecting Consumers, Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci., & Transp.* 111th Cong. 1 (2010) (statement of J. Thomas Rosch, Commissioner of the Federal Trade Commission).

<sup>245</sup> *Id.*

<sup>246</sup> Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254 (1986).

<sup>247</sup> *Id.* at 260–61; William Funk, *Bargaining*, 46 DUKE L.J. 1351, 1379 (1997) "[the APA] is designed to constrain the discretion of agencies through procedural regularity and judicial oversight."

<sup>248</sup> Krawiec, *supra* note 128, at 55, 56.

<sup>249</sup> *Id.* at 59.

<sup>250</sup> Created by the Dodd-Frank Act and named after the former Federal Reserve Chairman, Paul Volcker, the eponymous rule, in essence, prohibits banks from engaging in proprietary trading, i.e., trading using the bank's own funds, and from entering into certain relationships with hedge or private equity funds, subject to exceptions, of course. See 12 U.S.C. § 1851 (2012). For more on how capacious some of those exceptions are, see Alan Sloan, *The Volcker Rule: A Triumph of Complexity Over Common Sense*, WASH. POST., Dec. 19, 2013, [http://www.washingtonpost.com/business/economy/the-volcker-rule-a-triumph-of-complexity-over-common-sense/2013/12/19/92b09ed6-68ef-11e3-8b5b-a77187b716a3\\_story.html](http://www.washingtonpost.com/business/economy/the-volcker-rule-a-triumph-of-complexity-over-common-sense/2013/12/19/92b09ed6-68ef-11e3-8b5b-a77187b716a3_story.html).

that, “the pre-proposal phase is a battleground for agenda setting, and that battleground is dominated by regulated industry.”<sup>251</sup> The paper also analyzed comments submitted during the notice-and-comment process.<sup>252</sup> Although individual citizens supportive of the rule constituted the overwhelming majority of total comments, most were duplicative (standard form), or lacked the sophistication and substance of industry comments.<sup>253</sup> The author noted that this validated prior research that questioned the efficiency and utility of the notice-and-comment process.<sup>254</sup>

Nevertheless, despite these questions, the APA is remarkable for the procedural protections it does afford through notice-and-comment and judicial review of rulemaking, which in design and in practice strengthen democratic legitimacy, especially when compared to the administrative law of other advanced western democracies.<sup>255</sup>

#### IV. WHAT IS TO BE DONE?

Although the Mag-Moss “albatross”<sup>256</sup> does not pose an existential threat to the FTC, it has circumscribed the Commission by effectively depriving it of an integral means to fulfill its mandate.<sup>257</sup> Since the FTC’s desired recourse—permanent restoration of § 553 APA rulemaking authority—failed in the Senate by one vote in 2010,<sup>258</sup> the question remains: what is to be done?

##### A. STATUS QUO

The easiest option is for the FTC to continue adapting to its lack of general informal rulemaking authority by triaging with adjudications, guidelines, and requests to Congress for discrete, temporary § 553 rulemaking power.<sup>259</sup> This allows the FTC to conserve political capital,

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<sup>251</sup> Krawiec, *supra* note 128, at 84.

<sup>252</sup> *Id.* at 54.

<sup>253</sup> *Id.* at 58.

<sup>254</sup> *Id.* at 84.

<sup>255</sup> See generally Eduardo Jordao & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. (forthcoming March, 2014) (comparing rulemaking procedures and judicial review in the United States, France, Canada, and Italy, and finding that in France, Canada, and Italy there is limited and in some cases no judicial review of rulemaking and generally no broad legally enforceable provisions for public participation or agencies contemporaneously providing reasons for their actions).

<sup>256</sup> H.R. 2309: *The Consumer Credit and Debt Protection Act Before the Subcomm. on Commerce, Trade & Consumer Prot. of the H. Comm. on Energy & Commerce*, 111th Cong. 9 (2009) (statement of Kathleen E. Keest on behalf of National Consumer Law Center) (coining the phrase, “Mag-Moss albatross”).

<sup>257</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (suggesting the FTC lacks the “appetite” to make another “run” on Congress in the same

by not lobbying Congress again for the repeal of Mag-Moss, for more targeted requests like the MARS rule. Moreover, policymaking through adjudication is much more diffuse and less public.<sup>260</sup> When acting through adjudication, an agency is generally more “impregnable to political attack,” as opposed to rulemaking where it might often have to endure a public and protracted process before it takes any substantive action.<sup>261</sup> Guidelines may also be able to shore up some deficiencies by inducing compliance as more and more enforcement actions are brought against non-compliant companies.<sup>262</sup>

The current nostrums, however, are in many ways more inefficient and unfair to both consumers and regulated industries. First, it was the time, expense, and relative inequity of adjudicatory measures that prompted the rise of informal rulemaking.<sup>263</sup> In the words of the former Director for the Bureau of Consumer Protection: “[rules] give you a better bang for your buck.”<sup>264</sup> Bereft of the force of law, guidelines are simply less likely to induce compliance than rules, thereby increasingly hinging the former’s success on the scope, nature, and volume of enforcements, which (1) should trouble regulated industries because the guidelines provide the Commission with considerable latitude in the targets of its actions and the content of its consent orders, and (2) may require high-profile resource-intensive actions that strive to effect greater deterrence.<sup>265</sup> Second, because rulemaking is a response to “serious defects in the marketplace,” a reliance on guides and adjudications lacks the requisite breadth and immediacy to adequately remedy and respond to such crises.<sup>266</sup> Third, informal rulemaking is more democratically accountable and legitimate.<sup>267</sup> Having § 553

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fashion).

<sup>260</sup> LUBBERS, *supra* note 181, at 126–27.

<sup>261</sup> *Id.*

<sup>262</sup> See Gibson, *supra* note 33, at 433 (attributing the problem of “greenwashing” to the lack of adequate enforcement of the “green guides”).

<sup>263</sup> See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1440 (1992).

<sup>264</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>265</sup> See *supra* notes 211–13 and accompanying text. In crafting its consent orders, the Commission is not restricted to the “narrow lane of a respondent’s past actions;” it may “close all roads to the prohibited goal, so that its order may not be bypassed with impunity.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *In the Matter of POM Wonderful LLC*, No. 9344, 2013 WL 268926, at \*65 n.37 (F.T.C. Jan. 6, 2013) (applying the consent order any other food, drug, or dietary supplement products sold by POM and Roll Global, a separate company owned by the same trust).

<sup>266</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>267</sup> While the FTC does issue guidelines through notice-and-comment, which may enhance their “substantive impact,” the FTC is not bound to these interpretations and the adjudications largely form the policy. See *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666, 668 (D.C. Cir. 1978) (holding that an agency pronouncement is not a binding regulation

rulemaking authority allows all parties to assist the FTC in efficiently and fairly developing an industry-wide rule.<sup>268</sup> The result is a quantum of certainty which better enables regulated entities to act without fear of sudden penalization for practices whose legality can be obfuscated by the informational opacity that can often define policymaking through adjudications and guidelines.<sup>269</sup> Otherwise, some companies can find themselves facing an enforcement action based on a policy that an agency does not fully articulate until the commencement of the enforcement process.<sup>270</sup> In short, clarity, fairness, deterrence, process, efficiency, and broad relief are often victims of a regulatory scheme devoid of informal rulemaking.<sup>271</sup>

The acceptance of the status quo may also shift the balance of power to those advancing a dogmatic laissez-faire conception of regulation and the administrative state.<sup>272</sup> This would be yet another defeat to those who view regulatory agencies such as the FTC as an ancillary yet ameliorative force in the market.<sup>273</sup> The notion that deliberative decisionmaking through adjudicative hearings is an empowering vehicle that produces better regulation is fraught with risk. In the regulatory context, it is premised on, at best, a quixotic notion of parity in participatory capacity, or, at worst, the sophistries of scheming lobbyists.<sup>274</sup> Regardless of the basis, the accretions of overly-circumspect

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simply because it may have “some substantive impact, as long it ‘leaves the administrator free to exercise his informed discretion’); Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363, 36,364 (Aug. 13, 1992) (“conduct inconsistent with the positions articulated in these guides *may* result in corrective action by the Commission . . . .”) (emphasis added); SUSAN E. DUDLEY & JERRY BRITO, *REGULATION: A PRIMER* 39 (2d ed. 2012) (“businesses are guided by the kind of cases an agency brings.”); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 919 (2004) (“a policy statement must genuinely leave the agency free to exercise discretion.”).

<sup>268</sup> See *The FTC’s Enforcement Tools against Unfair and Deceptive Trade Practices in Financial Products & Services and other Sectors Before the S. Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 9 (2010) (statement of Dee Pridgen).

<sup>269</sup> See Richard J. Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308 (1984) (arguing that rulemaking produces “much clearer rules” than adjudications; *supra* notes 211–13, 265).

<sup>270</sup> See *supra* notes 211–13 and accompanying text; David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Shortcut*, 120 YALE L.J. 276, 315 (2010) (finding that in two cases, *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87 (1995) and *United States v. Cinemark U.S.A., Inc.*, 348 F.3d 569 (6th Cir. 2003), both courts underscored that the agency could have advanced a reasonable interpretation of its underlying statute for the first time during the enforcement process without publishing any sort of rule in advance).

<sup>271</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission’s Bureau of Consumer Protection (Oct. 3, 2012).

<sup>272</sup> Thomas O. McGarity, *The Expanded Debate over the Future of the Administrative State*, 63 U. CHI. L. REV. 1463, 1484–91 (1996) (describing the characteristics of “radical anti-interventionists”).

<sup>273</sup> See *The Federal Trade Commission’s Enforcement Tools against Unfair and Deceptive Trade Practices in Financial Products & Services and other Sectors Before the S. Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 9 (2010) (statement of Dee Pridgen).

<sup>274</sup> See ABA, *Report Of The Section Concerning FTC Trade Regulation Rulemaking Procedures Pursuant*



regulatory principles by some center-left bureaucrats and eminent scholars,<sup>275</sup> and the unremitting de-regulatory crusade led by the U.S. Chamber of Commerce, which champions hyper-formalization as a more subtle means of achieving its objective,<sup>276</sup> help erode rulemaking's already-infirm foundation in two ways.

First, by failing to take into account the inherent discrepancy in participatory capacity of the regulated and the beneficiaries of regulation, the deliberative process becomes more of a forum to indict policy rather than resolve issues of material fact.<sup>277</sup> Second, as a corollary, because the process does not effectively empower the intended beneficiaries, the remaining justification is *sui generis* solicitude for regulated industries. This may help to further shift the primary focus of rulemaking from treating or curing a problem to not "burdening" the very entities complicit in the creation or continuation of that problem, which is essentially the rationalization for a disproportionately market-based approach to administrative governance.<sup>278</sup> The very same principle that impels critics of judicial interference of agency action applies here. That is, the public interest in avoiding delay in implementing the law—the regulation of unfair or deceptive acts or practices—far outweighs the short-term private interest—expense and inconvenience of compliance.<sup>279</sup> The only difference here is that the culpability

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To *The Magnuson-Moss Act*, 49 ANTITRUST L.J. 347 (Feb. 7, 1980); *infra* note 276.

<sup>275</sup> See, e.g., Thomas O. McGarity, *The Expanded Debate over the Future of the Administrative State*, 63 U. CHI. L. REV. 1463, 1502 (1996) (characterizing Cass Sunstein, former head of the Office of Management and Budget for most of President Obama's first term, as someone sympathetic to more "deliberative" administrative procedure); Brad Plumer, *Is the White House Delaying Too Many Health and Safety Rules?*, WASH. POST WONK BLOG (June 11, 2013, 3:35 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/11/why-is-the-white-house-delaying-so-many-safety-and-environmental-rules/> (noting that "OIRA took an average of sixty-nine days to review 'economically significant rules,' a longer wait than any year since 1994"); Kate Sheppard, *Former EPA Climate Adviser Rips Obama Over Environmental Regulations*, MOTHER JONES (Apr. 4, 2013, 9:33 AM), <http://www.motherjones.com/environment/2013/04/former-epa-climate-adviser-rips-obama-admins-regulatory-approach> (interviewing Professor and former Senior Climate Policy Counsel at the EPA, Lisa Heinzerling, who characterized the Obama Administration's OMB as, in some ways, more aggressive than previous administrations and "notably aggressive" for a Democratic administration).

<sup>276</sup> See *The Views of the Administration on Regulatory Reform: An Update: Hearing Before the H. Comm. on Energy & Commerce, H. Subcomm. on Oversight & Investigations* 112 Cong. 13–14 (2011) (statement of William L. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs U.S. Chamber of Commerce) (urging Congress to universalize "hybrid" rulemaking, i.e., hearings with cross-examination, for all "major rules and guidance"); Antonin Scalia, Vermont Yankee: *The APA, The DC Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 403, 406 (explaining why hybrid rulemaking is "so well insulated from effective criticism:" "An incumbent can be excoriated by his opponent in the next election for permitting X million dollars to be slashed from the budget of the new and highly popular Federal Happiness Commission. The criticism has a good deal less bite when it degenerates into a debate over what procedures are appropriate.").

<sup>277</sup> See Grisinger, *supra* note 14, and *supra* notes 128–143 and accompanying text.

<sup>278</sup> *Id.*

<sup>279</sup> See *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (FORTAS, J., concurring and dissenting)



rests with Congress's decision to give regulated entities access to an extensive platform where they can unduly undermine valid agency action. Such a victory may prove pyrrhic for opponents of informal rulemaking, however, if they find that they have been "squeezing the balloon of bureaucratic arbitrariness at one point, only to have it pop out somewhere else."<sup>280</sup>

### B. PROPOSAL: DUAL TRACK

A more appealing model of policymaking may lie in the corners of ACUS's 1972 report, and Congress's original construction of the Mag-Moss Act.<sup>281</sup> The report recommended that Congress ordinarily should not further engraft mandatory procedures onto § 553;<sup>282</sup> Congress should never require trial-type procedures for resolving questions of policy or general fact (in contrast to "specific" or "adjudicative" fact);<sup>283</sup> and agencies should decide, in light of the needs of particular proceedings, whether to employ additional procedures, such as hearings.<sup>284</sup>

Reconciling these recommendations with the reality of Mag-Moss warrants a bifurcation of FTC informal rulemaking that would operate on a dual-track system in appropriate situations. Affected parties would continue to resolve underlying questions of "adjudicative fact" through mandatory Mag-Moss procedure. First, however, if the FTC does not find there to be sufficient adjudicative fact to necessitate Mag-Moss procedure, the parties alleging the proposed rule implicates adjudicative facts integral to the rulemaking would bear the burden of making such a showing through an expedited process and in a non-adversarial setting before an FTC administrative law judge (ALJ). If the ALJ finds that the parties preponderantly evidenced the existence of such adjudicative facts, the parties would be entitled to the "full panoply" of Mag-Moss procedure and the finding would be non-appealable.<sup>285</sup> Therein, the party or parties would attempt to prevent their potential inclusion in the rule's ambit by, for example,

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(excoriating the majority's decision to permit a pre-enforcement injunction where the regulated only claimed a generalized grievance); Cross, *supra* note 32, at 1019 (arguing that the "shadow of judicial review" has a pervasive effect on agency "decisionmaking, and in turn can have a substantial adverse effect on public welfare, costing the public the benefits of regulation, including lives saved").

<sup>280</sup> Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REG. 25, 28 (1981); see *supra* notes 211–13, 265, 270.

<sup>281</sup> ACUS, Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 38 Fed. Reg. 19,782 (1973).

<sup>282</sup> *Id.* ¶ 2; see also LUBBERS, *supra* note 181, at 283.

<sup>283</sup> ACUS Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 38 Fed. Reg. 19,782 (1973).

<sup>284</sup> *Id.* at ¶ 5.

<sup>285</sup> An adverse finding, however, would be appealable to the Commission.

formally demonstrating how their act or practice materially differs from the one the rule seeks to or may proscribe. Simultaneously, the policy parameters comprising the thrust of the proposed rule would be constituted through § 553 notice-and-comment. If the FTC promulgates the rule first, then whatever party-factual issues are resolved through the Mag-Moss track would automatically obtain in the final rule in the form of an amendment forgoing the comment period.

Admittedly, this proposal does not liberate the FTC from many of the same burdens that plague the status quo. Such a proposal would likely fail to significantly reduce the expenditure of agency resources. Moreover, the line between adjudicative fact and policy is often nebulous and not impervious to manipulation. Nevertheless, even a flawed dual track system could assist in impeding co-optation of additional procedures to influence policy, while retaining robust procedural protections for innocent actors. It dispenses relief to consumers more efficiently without sacrificing a pre-litigation venue to contest over-inclusive rules that may be based on distortions of adjudicative facts.

Finally, if this modest proposal is still not congressionally palatable, the courts should enforce the FTC's procedural rule restricting cross-examination and rebuttal evidence to adjudicative fact. Courts have long differentiated between adjudicative and legislative fact, and the distinction is relatively well established in judicial, as well as administrative, proceedings.<sup>286</sup> While this relief may not be commensurate to the ailment, it could optimize Mag-Moss enough to entice the Commission to resume some independent rulemaking.<sup>287</sup>

### CONCLUSION

Far from mooted the issue, Congress's failure to restore APA rulemaking procedural power by one vote<sup>288</sup> highlights the importance and practicality of reforming Mag-Moss. The current regulatory regime thwarts the benefits of rulemaking—fairness and efficiency—by mandating procedure redolent of a court of law that determines the factual transpirations of a small set of parties, rather than an agency process that is designed as a functional analogue to prospective legislative actions. This superfluous check on the FTC's protective function has only muddied the regulatory waters. Mag-Moss has rendered independent rulemaking moribund, forcing the FTC to continually play catch-up by imploring Congress on ad-hoc bases to

<sup>286</sup> Richard J. Pierce, *Seven Ways to Deossify Rulemaking*, 47 ADMIN. L. REV. 59, 64 (1995).

<sup>287</sup> KENNETH CULP DAVIS, RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 7.7, 341 (3d ed. 1994).

<sup>288</sup> Telephone Interview with David Vladeck, former Director of the Federal Trade Commission's Bureau of Consumer Protection (Oct. 3, 2012).

promulgate rules under § 553. Alternatively, the FTC must rely on enforcement actions, positioning adjudicative regulation in a starring position, when it was the very excess of adjudication and its potential for arbitrariness that prompted Congress to pass the APA in the first place.

Given the narrowness of defeat, proposing a more moderate prescription that utilizes both APA and Mag-Moss procedure and is consonant with congressional intent may have the broader attraction necessary for congressional approval. Certainly, its flexible process is more consistent with the traditional principles of rulemaking procedure. Of course, comporting with traditions of rulemaking will not placate its chronic critics or de-politicize the immutably politicized nature of governance. But de-formalizing an inappropriately hyper-formal process does stand a better chance of re-equipping an agency to regulate with greater balance. To do otherwise, is to “exalt form over necessity.”<sup>289</sup>

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<sup>289</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).