



Office of Commissioner
Rebecca Kelly Slaughter

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

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Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Ave., SE
West Building Ground Floor, Room W12-140
Washington, DC 20590-0001

VIA www.regulations.gov

Re: Notice of Proposed Rulemaking
Defining Unfair or Deceptive Practices
Dkt. No. DOT-OST-2019-0182; RIN 2105-AE72

Dear Secretary Chao:

Thank you for the opportunity to comment¹ on the Department of Transportation's Notice of Proposed Rulemaking, Defining Unfair or Deceptive Practices, 85 Fed. Reg. 11,881 (Feb. 28, 2020). Thank you also for approving a 30-day extension to the comment period to allow interested parties, including myself, additional time to prepare helpful comments while adjusting to the new realities of the global pandemic.

The Department's proposal draws heavily on the Federal Trade Commission's existing statutory authorities and their limitations, so I expect that it would be useful for the Department to hear a perspective from within the FTC about the wisdom of the Department's voluntarily importing those authorities and limitations. In short, I advise you against finalizing this proposed rule because it will seriously hamper the Department's ability to fulfill its statutory mission of protecting aviation consumers. (In full disclosure, I am, in normal times, an aviation consumer,

¹ The views expressed in this comment are my own and do not necessarily represent the views of the Commission or any other commissioner. My colleague, Commissioner Rohit Chopra, also submitted a wise and detailed comment, which can be read as a companion to this comment. I share his views that the Department would be better off terminating this rulemaking instead of formally codifying the FTC Act's unfairness standard, which Congress notably did not impose on sectoral regulators and even recognized as unduly limited by introducing "abusiveness" in the Consumer Financial Protection Act to supplement unfairness and deception.

and I generally do not find airlines to be models for treating consumers well.)

Before I share my concerns about the proposed procedural hurdles, I offer some positive feedback about two aspects of the Notice. First, the Department correctly notes that no “intent” requirement exists for bringing an enforcement action for an unfair or deceptive practice. *See* 85 Fed. Reg. at 11,885. To the extent that industry commenters seek to persuade the Department to invent such a requirement, I hope that you will reject such an approach, which would entirely undermine the Department’s stated goal of creating uniformity among different laws’ prohibitions against unfair and deceptive practices. It would also create an often insuperable barrier to effectively enforcing the law.

Second, the Department was wise to refrain from attempting to define “practice.” *See id.* The Department specifically requested comment on whether to define “practice,” indicating that it generally views a single, isolated incident that is not the product of a policy as typically falling short of a practice. The Department’s current commonsense approach does not need to be codified through formal rulemaking, which would not clarify anything for regulated entities but instead give them another bad argument to make in defending against an enforcement action. Defining “practice” would also, like inventing an “intent” requirement, undermine the Department’s stated goal of fostering uniformity across sectors and regulators: The Federal Trade Commission and Consumer Financial Protection Bureau have both been careful not to do so. I hope that you will reject any approach that attempts to define “practice.”

I harbor grave reservations about the Department’s proposal to erect a number of procedural barriers to limit rulemaking under its authority to protect aviation consumers from unfair or deceptive practices, 49 U.S.C. § 41712. These proposed barriers mirror those that Congress enacted for the Federal Trade Commission in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637 (codified at 15 U.S.C. § 57a) (“Mag-Moss”).

The Notice candidly acknowledges that this rulemaking was initiated in response to a petition from the airlines’ trade association and in furtherance of the anti-regulation Executive Order No. 13,777 (Feb. 24, 2017), so it is no surprise that many commenters have inferred a motivation of preventing or frustrating new consumer-protection rulemaking. The Notice acknowledges the probability of diminished rulemaking to protect consumers.² And there can be no doubt that the new procedures, if they are adopted and endure, will tend to have the effect, at a minimum, of requiring significantly greater expenditures of the Department’s staff time for any new rulemaking it undertakes. But, if hampering new rulemaking by future administrations is the goal, the proposed rule is unlikely to succeed for the simple reason that it can be repealed in thirty days, as it is a pure “rule[] of agency . . . procedure” exempt from notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A) (“APA”). It also bears

² *See* 85 Fed. Reg. at 11,888 (“[T]he opportunity cost of these enhanced procedural requirements could translate into the Department performing fewer enforcement and rulemaking actions. In addition, enhanced procedures would likely lengthen the time needed to complete these actions.”).

mentioning that a deregulatory agenda, such as the repeal-two-for-each-new-rule edict of Executive Order No. 13,771 (Feb. 3, 2017), will not be well served by the new procedures because a rulemaking that repeals an existing regulation would require clearing the same time-consuming hurdles as enacting a new one.

In my experience at the Federal Trade Commission, I have often heard the conventional wisdom that Mag-Moss rulemaking procedures are the agency’s “albatross.”³ This metaphor surely informs the industry’s zeal for the Department’s proposal, as indicated by its steadfast opposition to even a modest extension, in light of the global pandemic, of the deadline to comment.⁴ In my view, this conventional wisdom overstates the futility of Mag-Moss rulemaking. Last fall, we initiated a Mag-Moss rulemaking procedure to explore significantly expanding our pre-Mag-Moss Negative Option Rule, 16 C.F.R. pt. 425, the first such undertaking in quite some time. *See* 84 Fed. Reg. 52,393 (Oct. 2, 2019). And I have called for us to deploy our Mag-Moss rulemaking authority in a variety of other contexts, including data privacy and artificial intelligence.⁵

The conventional wisdom may confuse difficulty with impossibility, but the great difficulty of undergoing a Mag-Moss rulemaking compared with rulemaking under the APA should not be understated. The additional procedural requirements represent an enormous drain on staff resources, to say nothing of the additional time and effort they require of stakeholders. For that reason, with respect to the debate over a federal privacy law, a bipartisan majority of the Commission has called for the power to issue implementing rules under the APA instead of Mag-Moss.⁶ Congress, too, has repeatedly recognized the importance of providing the

³ *See, e.g.*, H.R. 2309: The Consumer Credit and Debt Protection Act, Hr’g 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).

⁴ *See* Cmt. of Airlines for America, DOT-OST-2019-0182-0183 (Apr. 20, 2020), <https://www.regulations.gov/contentStreamer?documentId=DOT-OST-2019-0182-0183&attachmentNumber=1&contentType=pdf>.

⁵ *See* Fed. Trade Comm’n, Comm’r Rebecca Kelly Slaughter, *The Near Future of U.S. Privacy Law*, remarks at Silicon Flatirons, University of Colorado Law School, at 8–9 (Sept. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf; Fed. Trade Comm’n, Comm’r Rebecca Kelly Slaughter, *Algorithms & Economic Justice*, remarks at U.C.L.A. School of Law, at 15–16 (Jan. 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf.

⁶ *See* Press Release, Fed. Trade Comm’n (May 8, 2019) (“The testimony urges Congress to enact privacy and data security legislation, enforceable by the FTC, which would grant the agency civil penalty authority, targeted APA rulemaking authority, and jurisdiction over non-profits and common carriers.”), <https://www.ftc.gov/news-events/press-releases/2019/05/ftc-testifies-house-energy-commerce-subcommittee-its-work-protect>.

Commission with APA rulemaking authority when it wants to see a rule implemented, including specifically in the privacy arena.⁷

There is a broad, bipartisan consensus behind APA rulemaking for privacy.⁸ Even industry leaders have come around to supporting APA rulemaking for a privacy law.⁹ It is notable that the Department proposes to bind itself with heightened procedural requirements for even rulemakings that would reach “the area of airline privacy.” 84 Fed. Reg. at 11,884; *see also id.* n.15. No notable stakeholder in the debate over privacy, an issue that features fast developments fueled by technological change, believes that Mag-Moss-like procedures are necessary or appropriate. Despite its stated goal of fostering uniformity among varying laws and regulators, if the Department adopts the proposed rule without change, it will create a regulatory incongruence in which the Department is the slowest and least capable regulator in the privacy arena.

In my experience, APA rulemakings provide all of the essential elements of good governing: notice of the proposal, an opportunity for the public to comment and submit evidence, and transparent reasoning that is subject to judicial review. It is clear to me that most discretionary consumer-protection rulemakings do not benefit one iota from trial-like formal hearings in which lawyers duke it out over minutiae. Congress’s decision not to impose Mag-Moss-like procedures on sectoral regulators should be respected. Formal hearings, in addition to involving enormous time and expense for the agency and stakeholders, tend to exclude the voices of ordinary members of the public who, as consumers, have a lot at stake in the outcome but are ill-equipped to influence it. If the Department encounters a thorny factual question that it decides would benefit from such a formal hearing before proceeding to a notice of proposed rulemaking, it can use a resource-intensive fact-determining process in that instance without requiring one in every rulemaking.

Consider the case of one of my favorite rules issued by the Department, Full Fare Advertising, 14 C.F.R. § 399.84. I have cited the Department’s rule as a model to use in other contexts,¹⁰

⁷ *See, e.g.*, Children’s Online Privacy Protection Act, 15 U.S.C. § 6502(b)(1) (children’s privacy); Gramm-Leach-Bliley Act, 15 U.S.C. § 6804(a)(1)(C) (financial privacy).

⁸ *See, e.g.*, Christian T. Fjeld et al., *Congressional Privacy Action – Part 1: The Senate* (Jan 28, 2020) (describing how both the Republican and Democratic privacy bills would provide the FTC with APA rulemaking authority).

⁹ *See, e.g.*, Alex Propes, IAB, *Privacy & FTC Rulemaking Authority: A Historical Context* (Nov. 6, 2018) (“As evidence of the current momentum behind an expanded regulatory remit, consider the recent Senate hearing on data privacy at which representatives from AT&T, Google, Charter, and other leading media and technology companies testified: while numerous Senators expressed strong support for broader rulemaking authority, not one objected. Even the industry witnesses expressed ‘qualified’ support for including broader authority in any federal privacy framework.”), <https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context/>.

¹⁰ *See* Fed. Trade Comm’n, *That’s the Ticket: An FTC Workshop about Online Ticket Sales*, Opening Remarks of Comm’r Rebecca Kelly Slaughter, at 4 (June 11, 2019),

particularly for protecting consumers of hotels and live-event ticket sellers, who often cannot learn until too late the initially undisclosed mandatory fees that are ultimately imposed, a delay that fatally inhibits effective price-based competition. How would this widely beloved rule have fared under the proposed heightened procedures? It seems possible that the proposal would still be sitting before a hearing officer on its fifth round of formal hearings as stakeholders battled over a factual determination such as precisely how much time an average consumer would have to spend clicking back and forth to ascertain comparisons of true final prices in online ticket sales on different platforms. But here, as in so many contexts, especially when technology is involved, the facts on the ground may change faster than a formal fact-finder can finally determine them. Unnecessarily elongated rulemaking proceedings risk ossified rules that are out of step and cannot keep up.

In closing, I thank the Department for the opportunity to comment, and I encourage it to terminate this proposed rulemaking (or at least to engage in further consideration of its questionable utility). The two best aspects of the Notice—declining to define “practice” and declining to invent an “intent” requirement—are equally achieved through termination. And the most troublesome aspects, including wasting precious Department staff resources with little or no upside and the creation of procedural incongruence in privacy rules among different sectors and regulators, can be avoided only by termination. Aviation consumers deserve better protections, and I encourage the Department to focus its efforts on providing those protections instead of finalizing this unnecessary and counterproductive proposal.