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FTC's Rulemaking Authority: Update Following Recent Developments

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Opening Keynote Speech

> "One of the biggest challenges of the FTC since its creation is to reconcile competing visions of what it ought to do."

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William E. Kovacic

William Kovacic stated the phenomenon of adaptation by competition agencies to new requirements and its importance for the development of a regulatory system is global in scope. In this context, the 1973 National Petroleum Refiners decision has passed its expiration date as a basis to guide future rulemaking. Moreover, a cynical and dubious interpretation of the 1914 FTC legislation is that it created the highest expectations for innovative and far-reaching policy-making but did not provide the means for the FTC to achieve them.

According to Bill, there are two conceptions of what administrative and regulatory authorities might do with a stated grant of power. Grants of power embody fundamental compromises that allowed legislation to emerge from Congress. One of the biggest challenges of the FTC since its creation is to reconcile competing visions of what it ought to do. One conception of the regulatory process is that agencies should be creative in pushing the envelope, which is an important element of effective administration, especially in light of adjustments in the business environment not anticipated in the original grant of authority. Another conception of what the agency should do is that it operates strictly within the boundaries established by legislation and related policy guidelines. In this context, stretching is not only inevitable but also sometimes necessary. Indeed, an urgent public need implies finding a solution. This solution may come from the adminis-

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trative body that takes creative steps and applies its existing authority.

The policy context in which the FTC has developed over time begins with a mandate in 1914 that it be an expansion joint in the U.S. competition policy system. The FTC was seen to be the ideal instrument to adapt in the face of market dynamism. Through the Clayton Act, Congress has provided the FTC with collateral enforcement authority with the DOJ. In parallel, the FTC has been given with consumer protection function. This was not the intention of Congress. With each new issue, Congress asks the FTC to find a solution. Some other institutions could intervene, but these latter were not enthusiastic about doing so, because of poor funding to carry out the function. The FTC has sometimes gone further than it should have, partly because of the lack of clear delineation. All these elements are part of slow legislative responses, which struggle to find solutions quickly.

Bill highlighted that there are several cases in which stretching occurs. One is there was a regulatory coverage gap. In the 1960s and 1970s, the FTC had a modest data protection mandate, which is called today data protection or privacy protection. The FTC saw that as terra nova and it moved in. Of course, other regulators could act, such as state officials and federal officials who arguably could challenge fraud, but there are not trained. And throughout it all businesses are adapting; they find other ways to get to the same destination.

All of these stretching efforts take place within a three-way interaction where the regulators are always engaged in a continuing conversation with legislators and the courts. According to him the idea that the FTC simply rose about without effective oversight is a deplorable fiction. There are lots of mechanisms built into the system to discipline the FTC when it goes too far.

Bill stated that one way Congress can authorize adaptation is to give a broad, scalable mandate, and that is what Section 5 originally, with “unfair methods of competition” and the Wheeler-Lea Act in 1938 with “unfair or deceptive acts or practices”, has done. However, at the same time, it is like Congress was recognizing that it moved so slowly. The FTC interpreted its mandate under the 1973 legislation to seek equitable monetary relief.

In the 1920s and 1930s, the FTC realized that bringing one case at a time would be a clumsy way to try to carry out its norms-creation function. Therefore, it has decided to organize trade practice conferences on an industry-wide sector basis and issue guides based on those conferences while using Section 5 to proscribe the deviation as an unfair method of competition. Moreover, there is the Do-Not-Call Rule, as promulgated had some soft spots. There was no clear declaration that Congress intended the Federal Trade Commission to establish the registry that is the heart of the operation of the Rule. Instead, there was a body of Supreme Court jurisprudence that suggested that commercial speech was entitled to much larger protection.

To conclude, Bill explained that there are different ways for the agency to stretch. One way is to make sure that its policy intervention does indeed use extensively the research tools it has to document the importance of the intervention. Another way is to interaction with the legislators and courts. ■

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Panel Discussion

> There is a sort of skeptical-of-stretching approach that the comments by the Washington Legal Foundation on the rule summarize very well."
>
> Peter Swire

Peter Swire

Peter Swire focused on the reasons for stretching the FTC's rulemaking authority for privacy. The starting point for this stretch is people's desire to fill the regulatory framework gap. Except for the US, every major country in the world has a comprehensive privacy law. Thus, the first reason to stretch is to protect privacy. The current regime of privacy protection is a hollow promise, companies draft a policy, a trivial percentage of people will opt out of the policy and data will leak everywhere, while knowing that the first violation is free, and there is no monetary risk. Chairwoman Khan talks about business models, but these latter are premised on incentivizing persistent tracking and surveillance, and nobody is in favor of persistent tracking. Peter regrets that the U.S. is not legislating in this area if only to have a better understanding with the European Union with GDPR, or to be part of a global understanding of the world.

Peter underlined that stretching by the FTC might be particularly appropriate, to harmonize with the rest of the world. However, he recalled that there is a sort of skeptical-of-stretching approach that the comments by the Washington Legal Foundation on the rule summarize very well. In 1975, Congress stated that it will use the Magnuson-Moss Warranty Act with its stricter rulemaking procedures rather than the Administrative Procedure Act. Thus, the authority in Section 18 requires the FTC to have reason to believe that the elements are: "unfair", "deceptive", and "prevalent" to write a rule. The "unfairness" has its importance because it has been put into statute by Congress, and it requires a substantial injury, which usually means monetary harm, which is difficult to quantify in the field of privacy violations. In addition, the Commission may declare a practice unfair or deceptive only if the injury is not reasonably avoidable by consumers, and lots of times consumers can avoid doing things online. In addition, there are countervailing benefits. All these criteria are proving to be difficult to meet.

Peter describes an opposition between Commissioners who supported the Reg and those who did not like it, that claimed that there will be terrible interference with Congress. He underlined that there are some reasons to wait. First, Congress

is the legislating authority here and it has primacy. Second, the statutory authority is unclear. Third, there is no need for this rule if Congress acts because Congress will recreate the landscape. Peter also underlined some reasons not to wait. First, waiting for Congress can mean waiting forever. There is never a right time. Second, there is a need for action, with a consensus that a lot of these practices are unpopular. Third, the best reason to move forward with it is to create a record that will get lots of comments from different kinds of people on the privacy and industry side. Indeed, creating a record forcing people's attention onto these issues in some ways is a necessary step toward eventual action.

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The cost/benefit analysis under Section 22 of the FTC Act is interesting as applied to the junk fee rulemaking"

Svetlana Gans

Svetlana Gans

Svetlana Gans underlined that, in the past year, the FTC has issued a total of six proposed consumer protection rules. For example, during one of the last FTC open meetings, it issued three Advance Notices covering junk and hidden fees, fake reviews and endorsements, and a proposed rulemaking covering the Funeral Rule. The FTC has also issued a rulemaking covering auto dealerships and energy labeling and has a host of other open rulemakings in conjunction with its ten-year regulatory review cycle.

Concerning the Advance Notice on Junk and Hidden Fees, the FTC defined "Junk fees" as fees that are charged for goods and services that have little or no added value to consumers, including fees that consumers reasonably assume to be included with the overall advertised price. The FTC defined "hidden fees" as fees for goods and services that are deceptive or unfair. The FTC noted that junk fees and hidden fees are particularly widespread in the hotel, room-sharing, car rental, cruise industries, and higher education. A few of the prohibitions a new rule might include misrepresenting the total cost of any good or service or misrepresenting or failing to disclose in an advertisement the nature or purpose of any fee, interest charge, or other costs. This specific rule gives rise to many questions and observations, namely whether the FTC will be able to show the prevalence of widespread harms across the entire economy or if deterrence is an adequate justification for rulemaking. Commissioner Wilson noted that additional rules may not necessarily succeed where industry-specific rules have failed. Moreover, the cost/benefit analysis under Section 22 of the FTC Act is interesting as applied to the junk fee rulemaking. For example, the FTC may be considering additional disclosures even though the agency stated consumers do not necessarily read or understand disclosures in the privacy context.

Concerning the Advance Notice on fake reviews and endorsements, the FTC is focusing on issues that have been the subject of investigations or law enforcement actions. Chair Khan and Commissioner Slaughter emphasized that fake views, review suppression, and incentivized reviews can hurt consumers and honest businesses. The FTC also issued an Earnings Claim ANPR in March. It is considering requiring a disclosure document, substantiation, and recordkeeping for any earnings claims, which leaves a lot of questions unanswered.

Regarding the rulemaking process, the consumer protection rules are governed under Section 18 of the Magnuson-Moss Act, which is hybrid rulemaking. It requires that the FTC satisfy several elements, in addition to the APA requirements. The first step is the issuance of an Advance Notice. Then, there is a sixty-day public comment period. The FTC reviews the comments and gives its congressional oversight committees thirty days' notice of proposed rulemaking before it is issued publicly. Afterwards, the FTC issues a Notice of Proposed Rulemaking to the public. The next step is the informal hearings process, which could be lengthy depending on the number of questions of material facts presented. The FTC would then develop and publish a final rule.

On July 1st, the FTC adopted several procedural reforms to speed up the rulemaking process.

John D. Graubert

John D. Graubert observed that none of the competition rulemaking ideas from last year's White House Executive Order have progressed as far as rulemaking yet. "Right to repair," for example, was first boiled down as a warranty issue; then made a brief appearance in the Energy Labeling Rule proposal, then eventually become a Policy Statement. Secondly, for non-compete agreements, it seems difficult to draft a rule when the line between lawful and unlawful conduct is difficult to establish, as the mixed results of DOJ litigation in this area demonstrates. More broadly there is some serious blurring of the UMC prong of Section 5 and the UDAP prong in some of the pending proposals, including "commercial surveillance" and "junk fees." The competition and consumer protection pathways in Section 5 have very distinct statutory standards, however, thus "unfair" may not have the same meaning in both places. Trying to do a straight unfair competition rule would be subject to serious questions. It is not possible to only rely on Section 18 which is for UDAP. On the issue of statutory authority for competition rulemaking, many authors have identified serious issues about whether or not the agency has that authority. According to John, the FTC is facing some serious warning signs from the Supreme Court that could burst on this issue. There is serious interest at the Court in requiring agencies to have clear statements of authority from Congress before taking actions in significant areas, as seen most recently in West Virginia v. EPA and the COVID cases.

Two aspects of the West Virginia v. EPA case could be particularly relevant to the FTC. The first one is that the EPA had not previously claimed that it had authority under the Clean Air Act to do this, thus, it was sort of a new position the agency was taking. The second is that Congress has repeatedly reviewed and rejected the exact type of plan that the EPA then put in place itself. The Court thought that both of those factors weighed against finding the agency had the asserted authority, and both of those arguments are equally applicable to many of the FTC's current rulemaking proposals.

Even though the current rulemaking program has serious substantive problems, on the agency is putting substantial effort into the development of new rules. The reason is money. The money that comes from civil penalties cannot be used for consumer redress. There has been an intense effort by the authority to find alternative routes for consumer redress somewhere in the FTC Act after the Supreme Court removed the Section 13(b) alternative in the AMG case. Now, Section 19 is studied because it provides a way to get damages and other forms of consumer redress for rule violations in Section 19(a). However, there are limits, such as a three-year statute of limitations, and this authority is limited to cases in the Bureau of Consumer Protection. Interestingly, Section 19(a) has been very rarely used in the past.

Significant legal standards apply to implementation of a new rule. In this context, prevalence has been mentioned a couple of times. That is a statutory standard that there must be a widespread pattern of unfair or deceptive practices that cause consumer injury. Then, the statute also requires evidence that the practice at issue is unfair or deceptive. The Commission must recognize that there are alternatives, including inaction, and explain why its alternative is the best choice. They also need to demonstrate that the rule as proposed will accomplish the stated objectives. Within the framework of Section 5(n), The Commission must show that consumers will suffer a substantial injury that they cannot reasonably avoid. ■

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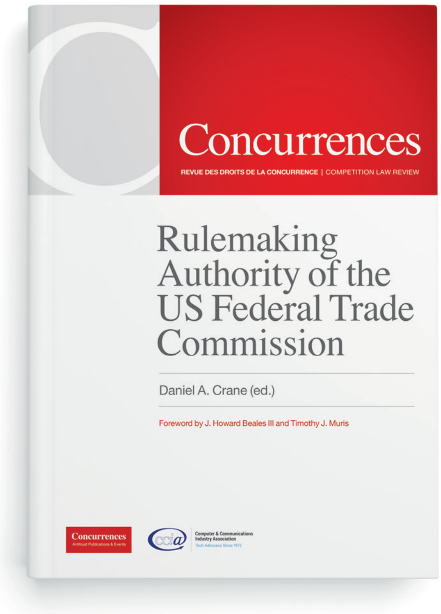

Foreword by J. Howard Beales III and Timothy J. Muris

This book analyses one of the major initiatives proposed within the movement for competition reform, rulemaking at the US Federal Trade Commission (FTC). The collection of essays draws on the experience of lawyers and academics, including practitioners with backgrounds at the FTC, to address the myriad questions raised by the prospect of notice-and-comment rulemaking to make major changes in antitrust law. Several chapters focus on unfair methods of competition (UMC) rules, both whether the FTC has this authority, and, if it does, whether and how that authority should be exercised. Others consider the choice between writing rules and case-by-case enforcement from different perspectives, while others yet evaluate the consequences for the FTC if it does become a rulemaking agency. An essential read for all interested in the future of competition law, enforcement, and policy. Published in collaboration with the Computer Communications Industry Association (CCIA).

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DETAILS

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