

# It's Time to Remove the "Mossified" Procedures for FTC Rulemaking

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## ABSTRACT

*This Essay, prepared for The George Washington Law Review's Symposium "The FTC at 100," addresses the Federal Trade Commission's ("FTC") rulemaking process—specifically the quasi-adjudicative process mandated by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, and the additional procedures added by the Federal Trade Commission Improvements Act of 1980 (collectively called the "Magnuson-Moss Procedures"). This Essay compares how long it took the FTC to complete or terminate the rulemakings it undertook under the Magnuson-Moss Procedures (including amendments to previously issued rules) with the amount of time it took the FTC to issue rules under the "regular" Administrative Procedure Act ("APA") notice-and-comment rulemaking process. This latter category includes rules now on the books that were either issued before the Magnuson-Moss Procedures, or after it—with special authorization from Congress. As the title indicates, the main finding is that the Magnuson-Moss Procedures take significantly longer—leading the author to advocate for allowing the FTC to use APA procedures, like most agencies, in its rulemaking while giving it the discretion to use procedures in addition to notice and comment when desirable.*

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## INTRODUCTION

I want to thank *The George Washington Law Review* for inviting me to participate in this Symposium and to comment on the interest-

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ing, provocative, and rather contrarian papers by Professors Pierce<sup>1</sup> and Crane.<sup>2</sup> One issue they both hone in on is the Federal Trade Commission (“FTC” or “the Commission”)’s rulemaking, or lack thereof. Professor Crane found only one antitrust rulemaking in its history.<sup>3</sup> Professor Pierce suggested that this be remedied by giving the FTC more clear Administrative Procedure Act (“APA”)<sup>4</sup> rulemaking authority over antitrust matters.<sup>5</sup> Professor Crane seems skeptical that such an approach would be feasible.<sup>6</sup> I am not sure why it would not be, unless the agency is saddled with the same procedures it must use for trade regulation rulemaking under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (“Magnuson-Moss Act”)<sup>7</sup> and the additional procedures added by the Federal Trade Commission Improvements Act of 1980 (“FTC Improvements Act”)<sup>8</sup> (collectively referred to as the “Magnuson-Moss Procedures”).

The focus of this Essay is the agency’s travails under these acts when it seeks to undertake consumer protection rulemaking. But first, a few quick comments on Professor Crane’s paper on *Humphrey’s Executor v. United States*,<sup>9</sup> which I found quite eye-opening, both in terms of its historical analysis of the case itself, and its study showing the FTC’s lack of use of its power to administratively adjudicate violations of the Federal Trade Commission Act<sup>10</sup> as op-

1 Richard J. Pierce, Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026 (2015).

2 Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835 (2015).

3 *Id.* at 126 (“Over the course of its first century, the FTC promulgated exactly one substantive antitrust rule (in 1968), which it apparently never enforced.” (footnote omitted)).

4 Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2012)).

5 Pierce, *supra* note 1, at 115 (“FTC could use rulemaking to issue legislative rules that perform important functions, like creating and describing the presumptions it will apply and the decisional frameworks and criteria it will use in various types of cases.”). But he also suggested concomitantly repealing Section 5 of the FTC Act and eliminating the concurrent powers of DOJ and the courts to interpret and to implement antitrust statutes. *See id.* at 115.

6 *See* Crane, *supra* note 2, at 1861–62. He suggested that despite earnest efforts to do so, the agency had “found no plausible candidates” for such rulemaking and that a 1989 ABA report on the FTC expressed pessimism about the idea. *See id.*

7 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193–95 (1975).

8 Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §§ 7–12, 15, 21, 94 Stat. 374, 376–80, 388–90, 393–96.

9 *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

10 Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).

posed to litigating in court.<sup>11</sup> Professor Crane makes a compelling case that, at least in the antitrust area, the FTC in practice acts like an executive law enforcement agency and that its purported independence does not add much, and is maybe even unnecessary.<sup>12</sup>

Professor Crane's empirical study also provides a good roadmap for studying other agencies that have a choice of bringing injunctive actions in court versus administrative penalty actions—such as the SEC.<sup>13</sup> His essay contributes a lot to understanding why administrative law judges have become an endangered species at regulatory agencies.<sup>14</sup>

On the other hand, one may read too much into his essay to see it as an indictment of the independent agency model, simply because the FTC is often more responsive to Congress than a purely Executive agency would be. Although he says the agency tends to be *more* activist to please the "more populist" House of Representatives,<sup>15</sup> that certainly was not true when it got its wings clipped in the era of the Pertschuk chairmanship; the agency became *less* activist due to congressional pressure.<sup>16</sup>

Finally, I do not believe that Professor Crane's critique really extends to the consumer protection function of the FTC. There, the agency *has* engaged in rulemaking and could do a lot more but for the formalized and ossified<sup>17</sup> rulemaking procedures required by the

11 See Crane, *supra* note 2, at 133 (finding that in an eighteen-year period, the agency had only brought seventy-nine enforcement cases through administrative adjudication, as opposed to 1524 cases ending in consent decrees without any adjudicatory activity at all, and 475 cases with adjudicatory activity in federal district court).

12 See *id.* at 129-33.

13 See, e.g., Peter J. Henning, *S.E.C. Faces Challenges over the Constitutionality of Some of Its Court Proceedings*, N.Y. TIMES (Jan. 27, 2015, 8:58 AM), <http://dealbook.nytimes.com/2015/01/27/s-e-c-faces-challenges-over-the-constitutionality-of-some-of-its-court-proceedings/>.

14 For an early alarm about this issue, see Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65 (1996).

15 See Crane, *supra* note 2, at 119.

16 See MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT* 69-70 (1982).

17 For an overview of the literature on ossification, see Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1704-11 (2008). For the classic articles, see, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). But see Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. 767, 767 (2008) (finding that "it did not take EPA much longer to finalize rules subject to the most stringent procedural requirements imposed by the Executive Branch and Congress than it took to finalize rules not subject to those procedures").

Magnuson-Moss Procedures.<sup>18</sup> While there is still a lively debate over whether ossification exists in rulemaking,<sup>19</sup> I have a much more modest goal here: to show simply that ossification (or perhaps more appropriately, “Mossification”) certainly does afflict the FTC’s rulemaking under the Magnuson-Moss Procedures.

This Essay begins with a brief overview of the Magnuson-Moss Procedures (still in effect today) in Part I. Then, Part II examines FTC rulemakings, both prior to and under the Magnuson-Moss Act. Part III examines FTC rulemakings after 1980, when the Commission stopped issuing new Magnuson-Moss rules other than amendments to existing rules, and when (starting in 1992) it began to receive occasional statutory authorizations to use APA rulemaking procedures to issue specific rules. This Essay analyzes these rulemakings by examining the duration of time from proposal to final promulgation of rules under the different regimes of rulemaking.

## I. THE FTC’S MAGNUSON-MOSS RULEMAKING PROCEDURES

The FTC’s rulemaking procedures go far beyond the relatively streamlined notice-and-comment procedures mandated in Section 553 of the APA to which most agencies are subject.<sup>20</sup> They include:

- A mandatory advance notice of proposed rulemaking (“ANPRM”), preceding the notice of proposed rulemaking (“NPRM”), which shall be published in the Federal Register and submitted to several congressional committees.<sup>21</sup>
- An NPRM, which must “stat[e] with particularity the text of the rule, including any alternatives, which the Commission

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<sup>18</sup> 15 U.S.C. § 57a (2012); *see also supra* notes 7–8 and accompanying text.

<sup>19</sup> *See generally* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012).

<sup>20</sup> 5 U.S.C. § 553 (2012). *See generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed. 2012).

<sup>21</sup> 15 U.S.C. § 57a(b)(2)(A). This ANPRM must:

- (i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and
- (ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

*Id.* The named committees are the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce. *Id.* § 57a(b)(2)(B).

proposes to promulgate, and the reason for the proposed rule.”<sup>22</sup>

- Advance notice of the NPRM to the named congressional committees thirty days before issuance.<sup>23</sup>
- A preliminary regulatory analysis relating to the proposed rule, containing:
  - (A) a concise statement of the need for, and the objectives of, the proposed rule;
  - (B) a description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law; and
  - (C) for the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.<sup>24</sup>
- A mandatory oral hearing, if any person requests one, presided over by an independent hearing officer.<sup>25</sup>
- Designation of disputed issues of material fact with opportunities for cross-examination by affected persons or group representatives, with special judicial review available later on for Commission denials of this opportunity.<sup>26</sup>
- Taking of a verbatim transcript of any oral presentation and cross-examination in the hearing.<sup>27</sup>
- Preparation of a staff report and recommendations to the Commission on the rulemaking record.<sup>28</sup>
- A hearing officer’s “recommended decision” to the Commission after the hearing, taking into account the staff report and recommendations.<sup>29</sup>
- Publication of a Federal Register notice seeking comments for at least sixty days on the staff report and on the hearing officer’s report.<sup>30</sup>
- Notice of meetings with outside parties must be included on the FTC’s weekly calendar, and “a verbatim record or summary of any such meeting, or of any communication re-

<sup>22</sup> *Id.* § 57a(b)(1).

<sup>23</sup> *Id.* § 57a(b)(2)(C).

<sup>24</sup> *Id.* § 57b-3(b)(1).

<sup>25</sup> *Id.* §§ 57a(b)(1)(C), 57a(c).

<sup>26</sup> *Id.* §§ 57a(c)(2)(B), 57a(c)(4), 57a(e)(3)(B).

<sup>27</sup> *Id.* § 57a(c)(5).

<sup>28</sup> 16 C.F.R. § 1.13(f) (2015).

<sup>29</sup> 15 U.S.C. § 57a(c)(1)(B).

<sup>30</sup> 16 C.F.R. § 1.13(h).

lating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.”<sup>31</sup>

- Communications between officers, employees, and agents of the FTC—“with any investigative responsibility . . . relating to any rulemaking proceeding within any operating bureau of the Commission”—and Commissioners or their personal staff must be “made available to the public and . . . included in the rulemaking record.”<sup>32</sup>

- A final regulatory analysis relating to the final rule, containing:

- (A) a concise statement of the need for, and the objectives of, the final rule;

- (B) a description of any alternatives to the final rule which were considered by the Commission;

- (C) an analysis of the projected benefits and any adverse economic effects and any other effects of the final rule;

- (D) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and

- (E) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.<sup>33</sup>

- A statement of basis and purpose accompanying the final rule, including:

- (A) a statement as to the prevalence of the acts or practices treated by the rule;

- (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and

- (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.<sup>34</sup>

- Special judicial review provisions that allow parties to apply to the court for leave to make additional oral submissions or written presentations and that apply the substantial evidence test to the rule instead of the normal arbitrary-and-capricious test.<sup>35</sup>

<sup>31</sup> 15 U.S.C. § 57a(i).

<sup>32</sup> *Id.* § 57a(j).

<sup>33</sup> *Id.* § 57b-3(b)(2).

<sup>34</sup> *Id.* § 57a(d)(1).

<sup>35</sup> *Id.* at §§ 57a(e)(2), 57a(e)(3)(A).

The Magnuson-Moss Act also mandated a study of the procedure by the Administrative Conference of the United States ("ACUS").<sup>36</sup> The resulting study took a very dim view of the process, saying it was "not an effective means of controlling an agency's discretion," and reiterating that rulemaking "procedures in addition to Section 553 procedures should not, as a general matter, be statutorily required."<sup>37</sup>

In the end, the FTC has been able to issue only a small number of "trade regulation rules." The FTC's codified rules at 16 C.F.R. Subchapter D<sup>38</sup> lists sixteen such rules,<sup>39</sup> but many of them were issued before the effective date of the Magnuson-Moss Act in 1975, or were far enough along in the process to not be subject to the Act.<sup>40</sup>

## II. RULEMAKINGS BEFORE AND UNDER THE MAGNUSON-MOSS ACT

Of the sixteen rules listed in 16 C.F.R. Subchapter D, ten were issued before the Magnuson-Moss Procedures kicked in. For comparison's sake, this Essay examines the number of days it took to issue those rules, using the dates of Federal Register publication (not the official action dates), to compare rulemaking under the various regimes. Although the FTC issued other trade regulations rules prior to the Magnuson-Moss Act, this Essay only examines the rules that survive today.

- Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking (1964): 163 days (0.45 year).<sup>41</sup>
- Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (1966): 556 days (1.52 years).<sup>42</sup>

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<sup>36</sup> Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202(d), 88 Stat. 2183, 2198 (1975).

<sup>37</sup> ACUS Recommendation 80-1, Trade Regulation Rulemaking Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 1 C.F.R. § 305.80-1(B) (1988).

<sup>38</sup> Trade Regulation Rules, 16 C.F.R. pts. 408–460 (2015).

<sup>39</sup> 16 C.F.R. pts. 408, 410, 423–425, 429, 432, 433, 435–437, 444, 453, 455, 456, 460.

<sup>40</sup> See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, § 202(c)(1) (providing that a pending rule would not be subject to the new procedures if the "presentation of data, views, and arguments was substantially completed before" enactment of the Act).

<sup>41</sup> Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 16 C.F.R. pt. 408; see also Advertising and Labeling of Cigarettes, 29 Fed. Reg. 530 (proposed Jan. 22, 1964) (to be codified at 16 C.F.R. pt. 408); Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964) (codified at 16 C.F.R. pt. 408).

<sup>42</sup> Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving

- Care Labeling of Textile Wearing Apparel and Certain Piece Goods (1971): 773 days (2.12 years).<sup>43</sup>
- Retail Food Store Advertising and Marketing Practices (1971): 546 days (1.54 years).<sup>44</sup>
- Use of Prenotification Negative Option Plans (1973): 1017 days (2.78 years).<sup>45</sup>
- Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (1972): 759 days (2.11 years).<sup>46</sup>
- Power Output Claims for Amplifiers Utilized in Home Entertainment Products (1974): 1208 days (3.31 years).<sup>47</sup>
- Preservation of Consumers' Claims and Defenses (1975): 1758 days (4.81 years).<sup>48</sup>
- Mail, Internet, or Telephone Order Merchandise (1975): 1486 days (4.07 years).<sup>49</sup>

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Sets, 16 C.F.R. pt. 410; *see also* Deception as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 29 Fed. Reg. 12,088 (proposed Aug. 25, 1964) (to be codified at 16 C.F.R. pt. 410); Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 31 Fed. Reg. 3342 (Mar. 3, 1966) (codified at 16 C.F.R. pt. 410).

<sup>43</sup> Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended, 16 C.F.R. pt. 423; *see also* Care Labeling of Textile Products, 34 Fed. Reg. 17,776 (proposed Nov. 4, 1969) (to be codified at 16 C.F.R. pt. 423); Care Labeling of Textile Wearing Apparel, 36 Fed. Reg. 23,883 (Dec. 16, 1971) (codified at 16 C.F.R. pt. 423).

<sup>44</sup> Retail Food Store Advertising and Marketing Practices, 16 C.F.R. pt. 424; *see also* Retail Food Store Advertising and Marketing Practices, 34 Fed. Reg. 18,252 (proposed Nov. 14, 1969) (to be codified at 16 C.F.R. pt. 424); Retail Food Store Advertising and Marketing Practices, 36 Fed. Reg. 8777 (May 13, 1971) (codified at 16 C.F.R. pt. 424).

<sup>45</sup> Use of Prenotification Negative Option Plans, 16 C.F.R. pt. 425; *see* Use of Negative Option Plans by Sellers in Commerce, 35 Fed. Reg. 7437 (proposed May 13, 1970) (to be codified at 16 C.F.R. pt. 425); Use of Negative Option Plans by Sellers in Commerce, 38 Fed. Reg. 4896 (Feb. 22, 1973) (codified at 16 C.F.R. pt. 425).

<sup>46</sup> Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. pt. 429; *see also* Cooling Off Period for Door-to-Door Sales, 35 Fed. Reg. 15,164 (proposed Sept. 29, 1970) (to be codified at 16 C.F.R. pt. 429); Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22,934 (Oct. 26, 1972) (codified at 16 C.F.R. pt. 429).

<sup>47</sup> Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 C.F.R. pt. 432; *see also* Power Output of Amplifiers Utilized for Home Entertainment Products, 36 Fed. Reg. 379 (proposed Jan. 12, 1971) (to be codified at 16 C.F.R. pt. 432); Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 39 Fed. Reg. 15,387 (May 3, 1974) (codified at 16 C.F.R. pt. 432).

<sup>48</sup> Preservation of Consumers' Claims and Defenses, 16 C.F.R. pt. 433; *see also* Preservation of Buyers' Claims and Defenses in Consumer Installment Sales, 36 Fed. Reg. 1211 (proposed Jan. 26, 1971) (to be codified at 16 C.F.R. pt. 433); Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,506 (Nov. 18, 1975) (codified at 16 C.F.R. pt. 433).

<sup>49</sup> Mail, Internet, or Telephone Order Merchandise, 16 C.F.R. pt. 435; *see also* Undelivered Mail Order Merchandise and Services, 36 Fed. Reg. 19,092 (proposed Sept. 28, 1971) (to be codified at 16 C.F.R. pt. 435); Mail Order Merchandise, 40 Fed. Reg. 49,492 (Oct. 22, 1975) (codified at 16 C.F.R. pt. 435).



- Disclosure Requirements and Prohibitions Concerning Franchising ("Franchise Rule") (1978): 2598 days (7.11 years).<sup>50</sup>

The average number of days it took to issue these pre-Magnuson-Moss Act rules is 1086 days, or 2.94 years.<sup>51</sup>

The other six rules listed in 16 C.F.R. Subchapter D<sup>52</sup> were promulgated according to the Magnuson-Moss Act's procedures.<sup>53</sup> Two were issued before the FTC Improvements Act of 1980. The Ophthalmic Practice Rule (Eyeglass Rule)<sup>54</sup> was the first rule issued after the effective date of the Magnuson-Moss Act and was issued in a relatively expeditious 868 days (2.37 years).<sup>55</sup> In similar fashion, the Labeling and Advertising of Home Insulation rule<sup>56</sup> was issued in 647 days (1.77 years).<sup>57</sup> The Vocational Schools Rule<sup>58</sup> (later vacated by

<sup>50</sup> Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. pt. 436; *see also* Disclosure Requirements and Prohibitions Concerning Franchising, 36 Fed. Reg. 21,607 (proposed Nov. 11, 1971) (to be codified at 16 C.F.R. pt. 436); Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59,614 (Dec. 21, 1978) (codified at 16 C.F.R. pt. 436). Note that although this rule was issued long after the Magnuson-Moss Act, the proceedings included public hearings that were held, and a supplemental NPRM that was issued, before 1975. *See* Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. at 59,614.

<sup>51</sup> *See supra* notes 41–50 and accompanying text.

<sup>52</sup> *See* 16 C.F.R. pts. 437, 444, 453, 455, 456, 460.

<sup>53</sup> *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers—Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. 29 (2010) (statement of Dee Pridgen, Associate Dean and Professor of Law, University of Wyoming College of Law) (noting that pts. 444, 453, and 455 were passed after the Magnuson-Moss rules went into effect); *id.* at 52 (statement of Hon. Timothy J. Muris, Foundation Professor, George Mason University School of Law, and Of Counsel, O'Melveny & Myers LLP) (explaining that rulemaking for pt. 437 proceeded under the Magnuson Moss procedure); *id.* at 87 (Response to Written Questions Submitted by Hon. Roger F. Wicker to Hon. J. Thomas Rosch) (noting that pts. 444, 453, 455, 456, and 460 were proposed and finalized under the Magnuson-Moss rulemaking procedures).

<sup>54</sup> Ophthalmic Practice Rules (Eyeglass Rule), 16 C.F.R. pt. 456.

<sup>55</sup> *Id.*; *see also* Advertising of Ophthalmic Goods and Services, 41 Fed. Reg. 2399 (proposed Jan. 16, 1976) (to be codified at 16 C.F.R. pt. 456); Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23,992 (Jun. 2, 1978) (codified at 16 C.F.R. pt. 456). The U.S. Court of Appeals for the D.C. Circuit remanded all but one of the sections of the rule. *Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 898 (D.C. Cir. 1980). The FTC subsequently amended the rule several times. *See* 69 Fed. Reg. 40,510–11 (July 2, 2004); 57 Fed. Reg. 18,822–23 (May 1, 1992).

<sup>56</sup> Labeling and Advertising of Home Insulation, 16 C.F.R. pt. 460.

<sup>57</sup> *Id.*; *see also* Labeling and Advertising of Residential Thermal Insulation Materials, 42 Fed. Reg. 59,678 (proposed Nov. 18, 1977) (to be codified at 16 C.F.R. pt. 460); Trade Regulation Rules; Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50,218 (Aug. 27, 1979) (codified at 16 C.F.R. pt. 460). It was later amended several times. *See* 61 Fed. Reg. 54,548 (Oct. 21, 1996); 61 Fed. Reg. 13,659 (Mar. 28, 1996).

<sup>58</sup> Proprietary Vocational and Home Study Schools, 43 Fed. Reg. 60,796 (Dec. 28, 1978) (to be codified at 16 C.F.R. pt. 438).

the D.C. Circuit) was issued in 1596 days (4.37 years).<sup>59</sup> The other rules, which were issued after the 1980 Act, took much longer—almost as long as the Food and Drug Administration’s infamous Peanut Butter Rule, which was promulgated through the now discredited practice of formal rulemaking.<sup>60</sup> These include the FTC’s Credit Practices Rule<sup>61</sup> and the Used Motor Vehicle Trade Regulation Rule,<sup>62</sup> each of which took almost nine years,<sup>63</sup> and the Funeral Industry Practices Rule<sup>64</sup>, which took more than seven years.<sup>65</sup> In addition, the Business Opportunity Rule,<sup>66</sup> which amended the 1978 Franchise Rule,<sup>67</sup> was issued in December 2011 after being proposed in April 2006.<sup>68</sup> These seven post-Magnuson-Moss Act rules (counting both the Voca-

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<sup>59</sup> See Advertising, Disclosure, Cooling Off and Refund Requirements Concerning Proprietary Vocational and Home Study Schools, 39 Fed. Reg. 29,385 (proposed Aug. 15, 1974) (to be codified at 16 C.F.R. pt. 438); Proprietary Vocational and Home Study Schools, 43 Fed. Reg. at 60,796. In 1979, prior to its effective date, the rule was set aside and remanded to the Commission for further proceedings. *Katharine Gibbs Sch., Inc. v. FTC*, 612 F.2d 658, 662 (2d Cir. 1979). On August 5, 1988, the Commission terminated the rulemaking. See 53 Fed. Reg. 29,482 (Aug. 5, 1988).

<sup>60</sup> See Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1143–45 (1972) (describing the nine-year FDA proceeding to establish a food standard for peanut butter); see also ACUS Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 1 C.F.R. § 305.72-5 (1993) (recommending that Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact, and that the FDA statutory provision that led to the formal rulemaking in the Peanut Butter Rulemaking should be amended).

<sup>61</sup> Credit Practices, 16 C.F.R. pt. 444. This rule took almost nine years to issue. See Credit Practices, 40 Fed. Reg. 16,347 (proposed Apr. 11, 1975) (to be codified at 16 C.F.R. pt. 444); Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7740 (Mar. 1, 1984) (codified at 16 C.F.R. pt. 444); Mark E. Budnitz, *The FTC’s Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 422 (1997) (stating that “[d]uring eight years of investigation and research, the staff compiled a record consisting of approximately 500,000 pages” for this rule).

<sup>62</sup> Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. pt. 455. This rule took almost nine years to issue. See Sale of Used Motor Vehicles, 41 Fed. Reg. 1089 (proposed Jan. 6, 1976) (to be codified at 16 C.F.R. pt. 455); Trade Regulation Rule; Sale of Used Motor Vehicles, 49 Fed. Reg. 45,692 (Nov. 19, 1984) (codified at 16 C.F.R. pt. 455).

<sup>63</sup> The Credit Practices Rule was issued in 3247 days (8.89 years); the Used Motor Vehicle Rule was issued in 3240 days (8.87 years). See *supra* notes 61–62.

<sup>64</sup> Funeral Industry Practices, 16 C.F.R. pt. 453.

<sup>65</sup> The Funeral Industry Practices Rule was issued in 2583 days (7.07 years). See *id.*; see also Funeral Industry Practices, 40 Fed. Reg. 39,901 (proposed Aug. 29, 1975) (to be codified at 16 C.F.R. pt. 453); Trade Regulation Rule; Funeral Industry Practices, 47 Fed. Reg. 42,260 (Sept. 24, 1982) (codified at 16 C.F.R. pt. 453).

<sup>66</sup> Business Opportunity Rule, 16 C.F.R. pt. 437.

<sup>67</sup> *Supra* note 50.

<sup>68</sup> The Business Opportunity Rule was issued in 2066 days (5.66 years). See Business Opportunity Rule, 71 Fed. Reg. 19,054 (proposed Apr. 12, 2006); Business Opportunity Rule, 76 Fed. Reg. 76,816 (Dec. 8, 2011) (codified at 16 C.F.R. pt. 437).

tional Schools rule and the Business Opportunity rule) averaged 2035 days or 5.57 years.<sup>69</sup>

There were also several other rulemakings that did not ultimately result in rules but nonetheless went on for many years. These include: Mobile Home Sales and Service (at least 6 years),<sup>70</sup> Hearing Aid Industry (over 10 years),<sup>71</sup> Health Spas (approximately 10 years),<sup>72</sup> Advertising and Labeling of Protein Supplements (almost 9 years),<sup>73</sup> Advertising for Over-the-Counter Antacids (8.5 years),<sup>74</sup> and Food Advertising (8.5 years).<sup>75</sup> Because the date of the formal termination of these rulemakings is often not clear, the average of 8.66 years for these unsuccessful rulemakings is probably an underestimate.

### III. RULEMAKINGS AFTER 1980—AMENDMENTS TO MAGNUSON-MOSS RULES AND APA RULEMAKINGS

What is even more telling is that other than the one spin-off rule mentioned above, no *new* rulemakings under the Magnuson-Moss Procedures have been initiated since 1980, when the procedures were made more complex by that year's FTC Improvements Act.<sup>76</sup> Since

<sup>69</sup> See *supra* notes 54–68 and accompanying text.

<sup>70</sup> See Mobile Home Sales and Services, 40 Fed. Reg. 23,334 (proposed May 29, 1975) (to be codified at 16 C.F.R. pt. 441); Extension of Comment Period, 45 Fed. Reg. 80,307 (Dec. 4, 1980) (extending the post-record comment period for filing comments on the Presiding Officer's Report and the Final Staff Report to February 13, 1981). Apparently, the rulemaking then died—no notice of termination appeared in the Federal Register.

<sup>71</sup> See Hearing Aid Industry, 40 Fed. Reg. 26,646 (proposed Jun. 24, 1975) (to be codified at 16 C.F.R. pt. 440); Request for Comments, 50 Fed. Reg. 32,088 (Aug. 8, 1985) ("Following the close of the comment period, the Commission will determine whether or not to promulgate the rule."). Apparently, the rulemaking then died—no notice of termination appeared in the Federal Register.

<sup>72</sup> See Health Spas, 40 Fed. Reg. 34,615 (proposed Aug. 18, 1975) (to be codified at 16 C.F.R. pt. 443); Extension of Comment Period, 50 Fed. Reg. 21,454 (May 24, 1985). Apparently, the rulemaking then died—no notice of termination appeared in the Federal Register.

<sup>73</sup> See Advertising and Labeling of Protein Supplements, 40 Fed. Reg. 41,144 (proposed Sept. 5, 1975) (to be codified at 16 C.F.R. pt. 454); Scheduling of Oral Presentation, 49 Fed. Reg. 32,857 (Aug. 17, 1984) ("[The FTC] is reviewing the rulemaking record . . . to determine what form of rule, if any, if should promulgate. . . . As part of this review process, the Commission has invited five prior participants to make oral presentations at an open meeting of the Commission."). The oral argument was scheduled for September 18, 1984. Scheduling of Oral Presentation, 49 Fed. Reg. at 32,857. Apparently, the rulemaking then died—no notice of termination appeared in the Federal Register.

<sup>74</sup> See Advertising for Over-the-Counter Antacids, 41 Fed. Reg. 14,534 (proposed Apr. 6, 1976) (to be codified at 16 C.F.R. pt. 451); Termination of Proposed Rulemaking Proceeding, 49 Fed. Reg. 46,156 (Nov. 23, 1984).

<sup>75</sup> See Food Advertising, 39 Fed. Reg. 39,842 (proposed Nov. 11, 1974) (to be codified at 16 C.F.R. pt. 437); Termination of Rulemaking Proceeding, 48 Fed. Reg. 23,270 (May 24, 1983).

<sup>76</sup> See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §§ 7–12,

then, the FTC has resorted to non-binding guides in most areas.<sup>77</sup> The FTC has done *some* rulemakings since 1980, however, and these fall into two general types of categories. First, the FTC has amended some of its original trade regulation rules (including rules pre-dating the Magnuson-Moss Act) after conducting periodic reviews of their effectiveness.<sup>78</sup> These substantive amendments, of course, must follow the Magnuson-Moss Procedures. Second, Congress has given the FTC specific legislative authority to perform regular APA rulemaking on particular topics.<sup>79</sup>

These two categories of rulemaking provide an interesting basis for comparison. The Magnuson-Moss rule amendments, and the durations between the initial proposals to amend the rule and the final proposed amendments, provide a baseline for a comparative analysis with the APA rulemaking procedure used for other rules in roughly the same time period:

- Care Labeling of Textile Wearing Apparel and Certain Piece Goods (1983): 2671 days (7.31 years).<sup>80</sup>
- Retail Food Store Advertising and Marketing Practices (1989): 1722 days (4.71 years).<sup>81</sup>
- Ophthalmic Practice Rules (Eyeglasses II) (1989): 1529 days (4.19 years).<sup>82</sup>
- Mail or Telephone Order Merchandise Amendment 1 (1993): 1393 days (3.81 years).<sup>83</sup>

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15, 21, 94 Stat. 374, 376–80, 388–90, 393–96; Jon Leibowitz, Chairman, Fed. Trade Comm'n, Remarks at the Association of National Advertisers Advertising Law and Public Policy Conference (Mar. 18, 2010), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/association-national-advertisers-advertising-law-and-public-policy-conference-prepared-delivery/100318nationaladvertisers.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/association-national-advertisers-advertising-law-and-public-policy-conference-prepared-delivery/100318nationaladvertisers.pdf) (“The requirements to promulgate a rule under [the Magnuson-Moss Act] are so onerous that the agency has not proposed a new [Magnuson-Moss Act] rule in 32 years.”).

<sup>77</sup> See Application of Guides in Preventing Unlawful Practices, 16 C.F.R. pt. 17 (2015).

<sup>78</sup> See *infra* notes 80–89.

<sup>79</sup> See *infra* notes 90–140.

<sup>80</sup> See Care Labeling of Textile Products and Leather Wearing Apparel, 41 Fed. Reg. 3747 (proposed Jan. 26, 1976) (to amend 16 C.F.R. pt. 423); Amendment to Trade Regulation Rule Concerning Care Labeling of Textile Wearing Apparel and Certain Piece Goods, 48 Fed. Reg. 22,733 (May 20, 1983) (amending 16 C.F.R. pt. 423).

<sup>81</sup> See Advance Notice of Proposed Rulemaking, 49 Fed. Reg. 48,059 (Dec. 10, 1984); Retail Food Store Advertising and Marketing Practices; Proposed Amendment of Trade Regulation Rule, 50 Fed. Reg. 43,224 (proposed Oct. 24, 1985) (to amend 16 C.F.R. pt. 424); Amendments to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 Fed. Reg. 35,456 (Aug. 28, 1989) (amending 16 C.F.R. pt. 424).

<sup>82</sup> See Ophthalmic Practice Rules; Proposed Trade Regulation Rule, 50 Fed. Reg. 598 (proposed Jan. 4, 1985) (to amend 16 C.F.R. pt. 456); Trade Regulation Rule; Ophthalmic Practice Rules, 54 Fed. Reg. 10,285 (Mar. 13, 1989) (amending 16 C.F.R. pt. 456).

<sup>83</sup> See Mail Order Merchandise Trade Regulation Rule; Notice of Proposed Rulemaking,

- Mail or Telephone Order Merchandise Amendment 2 (2014): 1083 days (2.97 years).<sup>84</sup>
- Funeral Industry Practices (1994): 2225 days (6.09 years).<sup>85</sup>
- Power Output Claims for Amplifiers Utilized in Home Entertainment Products (2000): 897 days (2.46 years).<sup>86</sup>
- Labeling and Advertising of Home Insulation (2005): 2099 days (5.75 years).<sup>87</sup>
- Disclosure Requirements and Prohibitions Concerning Franchising (2007): 3682 days (10.08 years).<sup>88</sup>

The average length of the Magnuson-Moss Procedure for these nine rule amendments was just over 1922 days or 5.26 years.<sup>89</sup> Contrast this with the APA rulemakings that Congress has asked the FTC to conduct. In each of those cases, the statutes specifically exempted the rulemakings from the Magnuson-Moss Procedures:

- A rule issued pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992.<sup>90</sup> The Commission pub-

54 Fed. Reg. 49,060 (proposed Nov. 28, 1989) (to amend 16 C.F.R. pt. 435); Trade Regulation Rule; Mail or Telephone Order Merchandise, 58 Fed. Reg. 49,096 (Sept. 21, 1993) (amending 16 C.F.R. pt. 435).

<sup>84</sup> See Mail or Telephone Order Merchandise Rule, 76 Fed. Reg. 60,765 (proposed Sept. 30, 2011) (to amend 16 C.F.R. pt. 435); Mail or Telephone Order Merchandise Rule, 79 Fed. Reg. 55,615 (Sept. 17, 2014) (amending 16 C.F.R. pt. 435).

<sup>85</sup> See Advance Notice of Proposed Rulemaking, 52 Fed. Reg. 46,706 (Dec. 9, 1987); Funeral Industry Practices Trade Regulation Rule, 53 Fed. Reg. 19,864 (proposed May 31, 1988) (to amend 16 C.F.R. pt. 453); Funeral Industry Practices Trade Regulation Rule, 59 Fed. Reg. 1592 (Jan. 11, 1994) (amending 16 C.F.R. pt. 453).

<sup>86</sup> See Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 37,238 (July 9, 1998); Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 64 Fed. Reg. 38,610 (proposed July 19, 1999) (to amend 16 C.F.R. pt. 432); Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 65 Fed. Reg. 81,232 (Dec. 22, 2000) (amending 16 C.F.R. pt. 432). No hearing was requested in this rulemaking. Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 65 Fed. Reg. at 81,233.

<sup>87</sup> See Advance Notice of Proposed Rulemaking, 64 Fed. Reg. 48,024 (Sept. 1, 1999); Labeling and Advertising of Home Insulation: Trade Regulation Rule, 68 Fed. Reg. 41,872 (July 15, 2003) (to amend 16 C.F.R. pt. 460); Labeling and Advertising of Home Insulation: Trade Regulation Rule, 70 Fed. Reg. 31,258 (May 31, 2005) (amending 16 C.F.R. pt. 460).

<sup>88</sup> See Advance Notice of Proposed Rulemaking, 62 Fed. Reg. 9115 (Feb. 28, 1997); Franchise Rule, 64 Fed. Reg. 57,294 (proposed Oct. 22, 1999) (to amend 16 C.F.R. pt. 436); Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444 (Mar. 30, 2007) (amending 16 C.F.R. pts. 436, 437).

<sup>89</sup> See *supra* notes 80–88 and accompanying text.

<sup>90</sup> Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. §§ 5711–5714, 5721–5724 (2012); Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. pt. 308 (2015).

lished an NPRM in March 1993.<sup>91</sup> Ninety-nine comments were received.<sup>92</sup> The final rule was issued in August 1993—152 days later.<sup>93</sup>

- A rule issued pursuant to the Children’s Online Privacy Protection Act of 1998.<sup>94</sup> The Commission published a proposed rule in April 1999,<sup>95</sup> and published its final rule in November 1999—190 days later.<sup>96</sup> The Commission received 132 comments and conducted a public workshop on that issue in which thirty-two panelists participated.<sup>97</sup>

- A rule issued pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act.<sup>98</sup> The rule was issued in 1995, 190 days after the notice of proposed rulemaking.<sup>99</sup> The Commission received over 350 comments.<sup>100</sup>

- In 2002, the FTC announced proposed changes to the above-mentioned Telemarketing Sales Rule to take into account the USA PATRIOT Act.<sup>101</sup> The FTC received 64,000 comments, held a public forum, and issued a revised rule 364 days later.<sup>102</sup>

- Section 406(a) of the Energy Policy Act of 1992<sup>103</sup> directed the FTC to establish uniform labeling requirements, to the

<sup>91</sup> Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 58 Fed. Reg. 13,370 (proposed Mar. 10, 1993) (to be codified at 16 C.F.R. pt. 308).

<sup>92</sup> Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 58 Fed. Reg. 42,364, 42,364 (Aug. 9, 1993) (codified at 16 C.F.R. pt. 308).

<sup>93</sup> *Id.* A hearing was held on April 22–23, 1993. *Id.* at 42,365.

<sup>94</sup> Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2012); Children’s Online Privacy Protection Rule, 16 C.F.R. pt. 312.

<sup>95</sup> Children’s Online Privacy Protection Rule, 64 Fed. Reg. 22,750 (proposed Apr. 27, 1999) (to be codified at 16 C.F.R. pt. 312).

<sup>96</sup> Children’s Online Privacy Protection Rule, 64 Fed. Reg. 59,888 (Nov. 3, 1999) (codified at 16 C.F.R. pt. 312).

<sup>97</sup> The workshop was held on July 20, 1999. *Id.* at 59,888.

<sup>98</sup> Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108 (2012); Telemarketing Sales Rule, 16 C.F.R. pt. 310.

<sup>99</sup> *See* Telemarketing Sales Rule, 60 Fed. Reg. 8313 (proposed Feb. 14, 1995) (to be codified at 16 C.F.R. pt. 310); Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995) (codified at 16 C.F.R. pt. 310). A workshop was held on April 18–20, 1995, and a revised notice of proposed rulemaking was issued on June 8, 1995. *See* Telemarketing Sales Rule, 60 Fed. Reg. at 43,842.

<sup>100</sup> Telemarketing Sales Rule, 60 Fed. Reg. at 43,842.

<sup>101</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>102</sup> *See* Telemarketing Sales Rule, 67 Fed. Reg. 4492 (proposed Jan. 30, 2002) (to amend 16 C.F.R. pt. 310); Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4580, 4582 (Jan. 29, 2003) (amending 16 C.F.R. pt. 310). A workshop was held on June 5–7, 2002. Telemarketing Sales Rule, 68 Fed. Reg. at 4582.

<sup>103</sup> Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

greatest extent practicable, for alternative fuels and alternative fueled vehicles.<sup>104</sup> After issuing an ANPRM, it issued an NPRM in May 1994.<sup>105</sup> The Act required the Commission, in formulating its labeling requirements, to obtain the views of affected private parties and government agencies.<sup>106</sup> The Act also required the Commission to consult with other agencies, such as the Department of Energy, prior to issuing the NPRM.<sup>107</sup> After conducting a public workshop, the Commission issued a supplemental NPRM.<sup>108</sup> The Commission received numerous comments at each stage, but was still able to issue a final rule 375 days after its NPRM.<sup>109</sup>

- Section 383 of the Energy Policy and Conservation Act of 1975<sup>110</sup> directed the FTC to promulgate a rule prescribing test procedures and labeling standards for recycled oil.<sup>111</sup> The Commission responded with a proposed rule in August 1995.<sup>112</sup> The final rule was issued sixty-four days later.<sup>113</sup>

- In 2000, in accordance with section 504(a) of the Gramm-Leach-Bliley Act,<sup>114</sup> the FTC published the Privacy of Consumer Financial Information rule.<sup>115</sup> Section 504 of the Act requires the Commission and other federal regulatory agencies to issue regulations as may be necessary to implement notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers to nonaffiliated third parties.<sup>116</sup> The Commission issued its NPRM on March 1, 2000,<sup>117</sup> and after re-

104 *Id.* § 406, 106 Stat. at 2880-81 (codified at 42 U.S.C. § 13232 (2012)).

105 Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles, 59 Fed. Reg. 24,014 (proposed May 9, 1994) (to be codified at 16 C.F.R. pt. 309). The ANPRM was issued on December 10, 1993 and received twenty-eight comments. *Id.* at 24,015.

106 *Id.* at 24,014.

107 Energy Policy Act of 1992 § 406, 106 Stat. at 2880-81.

108 Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles, 60 Fed. Reg. 26,926, 26,927 (May 19, 1995) (codified at 16 C.F.R. pt. 309).

109 *See id.*

110 Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975).

111 *Id.* § 383, 89 Stat. at 940-41 (codified as amended at 42 U.S.C. § 6363 (2012)).

112 Test Procedures and Labeling Standards for Recycled Oil, 60 Fed. Reg. 44,712 (proposed Aug. 28, 1995) (to be codified at 16 C.F.R. pt. 311).

113 Test Procedures and Labeling Standards for Recycled Oil, 60 Fed. Reg. 55,414 (Oct. 31, 1995) (codified at 16 C.F.R. pt. 311).

114 Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

115 Privacy of Consumer Financial Information, 65 Fed. Reg. 33,646 (May 24, 2000) (codified at 16 C.F.R. pt. 313).

116 Gramm-Leach-Bliley Act § 504, 113 Stat. at 1439 (codified as amended at 15 U.S.C. § 6804 (2012)).

117 Privacy of Consumer Financial Information, 65 Fed. Reg. 11,174 (proposed Mar. 1, 2000) (to be codified at 16 C.F.R. pt. 313).

ceiving 640 comments, issued its final rule eighty-four days later.<sup>118</sup>

- The FTC undertook another rulemaking mandated by the Gramm-Leach-Bliley Act a year later—this time a Standards for Safeguarding Customer Information rule,<sup>119</sup> as required by section 501(b) of the Act, to establish standards relating to administrative, technical, and physical information safeguards for financial institutions subject to the Commission’s jurisdiction.<sup>120</sup> In this rulemaking, after issuing an ANPRM the Commission issued an NPRM in August 2001.<sup>121</sup> Having received forty-four comments, it issued a final rule in May 2002—289 days later.<sup>122</sup>

- In 2004, the FTC issued the Contact Lens Rule,<sup>123</sup> which implements the Fairness to Contact Lens Consumers Act.<sup>124</sup> The Commission published a notice of proposed rulemaking in February 2004<sup>125</sup> and received more than 7000 comments.<sup>126</sup> The final rule was issued in July 2004—149 days later.<sup>127</sup>

- Section 7711(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”),<sup>128</sup> gives the FTC discretionary authority to issue implementing regulations.<sup>129</sup> After an ANPRM, the FTC

118 Privacy of Consumer Financial Information, 65 Fed. Reg. at 33,646. Note that later the FTC and seven other agencies had to jointly issue an amendment to this rule to add a model privacy form. Final Model Privacy Form Under the Gramm-Leach-Bliley Act, 74 Fed. Reg. 62,890 (Dec. 1, 2009). It took 979 days for this amendment to be jointly issued, after the SEC reopened the matter two years after the NPRM. *Id.* at 62,891. Because of the joint nature of this rulemaking, the statistics for this amendment are not included in the totals for FTC rulemakings.

119 Standards for Safeguarding Customer Information, 67 Fed. Reg. 36,484 (May 23, 2002).

120 Gramm-Leach-Bliley Act § 501, 113 Stat. at 1436 (codified as amended at 15 U.S.C. § 6801 (2012)).

121 Standards for Safeguarding Customer Information, 66 Fed. Reg. 41,162 (proposed Aug. 7, 2001) (to be codified at 16 C.F.R. pt. 314). The ANPRM was issued on September 7, 2000. Advance Notice of Proposed Rulemaking, 65 Fed. Reg. 54,186 (Sept. 7, 2000).

122 Standards for Safeguarding Customer Information, 67 Fed. Reg. at 36,484.

123 Contact Lens Rule, 69 Fed. Reg. 40,482 (July 2, 2004) (codified at 16 C.F.R. pt. 315 and amending 16 C.F.R. pt. 456).

124 Fairness to Contact Lens Consumers Act, 15 U.S.C. §§ 7601–7610.

125 Contact Lens Rule; Ophthalmic Practice Rules, 69 Fed. Reg. 5440 (proposed Feb. 4, 2004).

126 Contact Lens Rule, 69 Fed. Reg. at 40,482.

127 *Id.*

128 Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701–7713 (2012).

129 *Id.* § 7711(a).



issued its proposed rules in May 2005.<sup>130</sup> The FTC issued the final rule in May 2008—1105 days (3.03 years) later.<sup>131</sup>

- Section 811 of the Energy Independence and Security Act of 2007<sup>132</sup> authorized the FTC to issue a rule prohibiting any person involved in the purchase or sale of oil related products from engaging in fraud, misleading conduct, or market manipulation.<sup>133</sup> After issuing an ANPRM, the Commission issued its NPRM in August 2008, held a workshop in November 2008, issued a revised NPRM in April 2009, and issued its final rule in August 2009—358 days after the NPRM.<sup>134</sup>

- The FTC's most recent rulemaking,<sup>135</sup> the Health Breach Notification Rule,<sup>136</sup> was pursuant to a mandate in the American Recovery and Reinvestment Act of 2009.<sup>137</sup> The rule requires vendors of personal health records and related entities to notify consumers when the security of their individually identifiable health information has been breached.<sup>138</sup> The FTC issued its NPRM in April 2009 and its final rule in August 2009—127 days later.<sup>139</sup>

To sum up, the above twelve rules were issued according to the APA's basic rulemaking procedures, and averaged 287.25 days—less than one year—from NPRM to final rule.<sup>140</sup> The median time was

<sup>130</sup> Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25,426 (proposed May 12, 2005) (to be codified at 16 C.F.R. pt. 316). The ANPRM was issued on March 11, 2004. Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 11,776 (Mar. 11, 2004).

<sup>131</sup> Definitions and Implementation Under the CAN-SPAM Act, 73 Fed. Reg. 29,654 (May 21, 2008) (codified at 16 C.F.R. pt. 316).

<sup>132</sup> Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492.

<sup>133</sup> *Id.* § 811 (codified at 42 U.S.C. § 17301 (2012)).

<sup>134</sup> Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of the Energy Independence and Security Act of 2007, 73 Fed. Reg. 48,317 (proposed Aug. 19, 2008) (to be codified at 16 C.F.R. pt. 317). The ANPRM was issued on May 7, 2008. Advance Notice of Proposed Rulemaking, 73 Fed. Reg. 25,614 (May 7, 2008). The workshop was on November 6, 2008, the revised NPRM was issued on April 22, 2009, and the final rule was issued on August 12, 2009. Prohibitions on Market Manipulation, 74 Fed. Reg. 40,686, 40,686–87 (Aug. 12, 2009) (codified at 16 C.F.R. pt. 317).

<sup>135</sup> The FTC did rescind a number of rules that were transferred to the jurisdiction of the Consumer Finance Protection Bureau on April 13, 2012, but did so without notice and comment, pursuant to the APA's good cause exemption. *See* Rescission of Rules, 77 Fed. Reg. 22,200, 22,200, 22,202 (Apr. 13, 2012).

<sup>136</sup> Health Breach Notification Rule, 74 Fed. Reg. 42,962 (Aug. 25, 2009) (codified at 16 C.F.R. pt. 318).

<sup>137</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

<sup>138</sup> *See* Health Breach Notification Rule, 16 C.F.R. pt. 318 (2015).

<sup>139</sup> *See* Health Breach Notification Rule, 74 Fed. Reg. 17,914 (proposed Apr. 20, 2009) (to be codified at 16 C.F.R. pt. 318); Health Breach Notification Rule, 74 Fed. Reg. at 42,962.

<sup>140</sup> *See supra* notes 90–139 and accompanying text.

even shorter—190 days.<sup>141</sup> The contrast with the Magnuson-Moss Procedures is clear—rules and amendments to rules issued under those procedures took over five years. Moreover, the FTC has often voluntarily used additional procedural safeguards and allowed additional opportunities for public input in these APA rulemakings. It sometimes uses ANPRMs,<sup>142</sup> often uses public workshops and forums,<sup>143</sup> has undertaken special outreach to affected industries and other stakeholders,<sup>144</sup> and it has an ongoing program of reviewing all of its rules periodically, seeking public comment on them, and revising or repealing them as appropriate.<sup>145</sup> Thus, the legal requirements of the APA, enhanced where appropriate by these additional FTC practices, have allowed the FTC to accomplish its rulemaking goals without the cumbersome and time-consuming Magnuson-Moss Procedures, which have built-in time lags and a myriad of opportunities to slow down a proceeding.

Finally, we should recognize that the rulemaking landscape has changed considerably since 1975 when the Magnuson-Moss Act was enacted. These changes include enactment of the Regulatory Flexibility Act,<sup>146</sup> Paperwork Reduction Act,<sup>147</sup> and the Small Business Regulatory Enforcement Fairness Act<sup>148</sup> (which includes the Congressional Review Act),<sup>149</sup> and changes at the FTC itself including refinements in the deception and unfairness standards (including the Commission's policy statement defining "deceptive" acts and practices,<sup>150</sup> and a statutory definition of "unfair" practices added by the FTC Act Amend-

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141 I note that for these APA rulemakings I calculated the time from the NPRM to the final rule and did not count the time added by the voluntary ANPRMs used in some of these rulemakings. On the other hand, in Magnuson-Moss rulemakings, the ANPRM is required by statute, so I counted that time.

142 See *supra* notes 105, 121, 130, 134 and accompanying text.

143 See *supra* notes 93, 97, 99, 102, 134 and accompanying text.

144 See *supra* notes 106–07 and accompanying text.

145 See *supra* notes 91, 92, 100, 102, 109, 118, 122, 126 and accompanying text.

146 Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601–612 (2012)).

147 Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3520 (2012)).

148 Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, 110 Stat. 847, 857 (codified as amended at 5 U.S.C. §§ 601–612, 801–808 (2012)).

149 Congressional Review Act, Pub. L. No. 104-121, tit. II, subtitle E, 110 Stat. 847, 868 (1996) (codified at 5 U.S.C. §§ 801–808 (2012)).

150 Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to John D. Dingell, Chairman, Comm. on Energy & Commerce (Oct. 14, 1983), *reprinted in* Cliffdale Assocs., Inc., 103 F.T.C. 110, 175–98 (1984). A copy of the Deception Statement can also be found on the FTC's website. *FTC Policy Statement on Deception*, FED. TRADE COMM'N, <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> (last visited Oct. 27, 2015).

ments of 1994)<sup>151</sup> and the practice of conducting preliminary and final regulatory analyses for FTC Act rules.<sup>152</sup>

## CONCLUSION

The statistics provide a clear lesson. Before the Magnuson-Moss Procedures, the FTC was able to issue trade regulation rules in 2.94 years, on average.<sup>153</sup> After the Magnuson-Moss Procedures were enacted, it took the agency 5.57 years, on average, to issue the seven rules it managed to issue using these formalized procedures, and the agency terminated other rulemakings subject to those procedures after even longer periods.<sup>154</sup> Nine amendments of existing rules, using the Magnuson-Moss Procedures, also took, on average, about the same time (5.26 years) per rule.<sup>155</sup> But when given the chance to use

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<sup>151</sup> Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695. The amendments added the following as subsection (n) to 15 U.S.C. § 45:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

*Id.*

<sup>152</sup> See 16 C.F.R. § 1.11(b) (2015).

*Preliminary regulatory analysis.* Except as otherwise provided by statute, the Commission shall, when commencing a rulemaking proceeding, issue a preliminary regulatory analysis which shall contain:

- (1) A concise statement of the need for, and the objectives of, the proposed rule;
- (2) A description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law;
- (3) For the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule; and
- (4) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601–612, and the Paperwork Reduction Act, 44 U.S.C. 3501–3520, if applicable.

*Id.*

<sup>153</sup> See *supra* notes 41–51 and accompanying text.

<sup>154</sup> See *supra* notes 54–69 and accompanying text.

<sup>155</sup> See *supra* notes 80–89 and accompanying text.

regular APA procedures to issue a dozen rules between 1993 and 2009, the FTC was able to do so in an average of 287.25 days.<sup>156</sup>

I'll close by invoking the name of my late mentor and expert on the FTC, Professor Ernest Gellhorn. Ernie yielded to no one in complaining about what he considered overregulation, and he was highly critical of some of the FTC initiatives in the 1970s that helped bring about the Magnuson-Moss strictures. He even wrote an article for *Regulation Magazine* called *The Wages of Zealotry: the FTC Under Siege*.<sup>157</sup> But that same Ernest Gellhorn was also the principal drafter of ACUS Recommendation 93-4, which strongly reaffirmed the principle that agencies should not be statutorily required to use procedures in addition to notice and comment but should be able to decide for themselves when to do so.<sup>158</sup> And as this Essay demonstrates, the FTC's inability to issue (or even to amend) trade regulation rules under the Magnuson-Moss rulemaking procedures, when contrasted with its expeditious rulemaking under "regular" APA procedures, provides strong evidence that ACUS and Professor Gellhorn were correct.

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<sup>156</sup> See *supra* notes 90–140 and accompanying text.

<sup>157</sup> Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, REG. MAG., Jan./Feb. 1980, at 33, <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1980/1/v4n1-6.pdf>.

<sup>158</sup> ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670, 4673 (Feb. 1, 1994), corrected at 59 Fed. Reg. 8507 (Feb. 22, 1994). In providing recommendations to improve the environment for rulemaking, the ACUS Recommendation states:

Section 553 of title 5, United States Code, which established the framework for legislative rulemaking, has operated most efficiently when not encumbered by additional procedural requirements. Congress generally should refrain from creating program-specific rulemaking procedures or analytical requirements beyond those required by the APA. When Congress determines additional procedures beyond those required by section 553 are justified by the nature of a particular program, such procedures should be focused on identified problems and, where possible, adopted incrementally or after experimentation. In addition, Congress should repeal formal ("on-the-record") or other adjudicative fact-finding procedures in rulemaking in any existing statutes mandating such procedures.

*Id.* (footnotes omitted).