Lessons in Missing the Point

The MLM Industry is Now Expressly Targeted by the FTC For Deceptive Income and Product Claims

By Kevin Grimes

In October 2020, FTC Commissioner Rohit Chopra and (now) Acting Director of the Bureau of Consumer Protection Samuel Levine, authored an article in the University of Pennsylvania Law Review entitled, *The Case for Resurrecting the FTC Act's Penalty Offense Authority* (hereinafter *The Case for Resurrecting*).

It seems that the article escaped the attention of the MLM industry.

But last week, the Penalty Offense Authority was resurrected and became a reality.

On July 1, 2021 the FTC issued a press release (attached as Appendix A) entitled, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct – New Rules Will Unlock Civil Penalties and Damages for Violators.*

In a statement authored by Commissioner Rebecca Kelly Slaughter (and joined by FTC Chair Lina Khan and Commissioner Rohit Chopra), the Commission explained:

> These changes show the FTC is turning the page on decades of self-imposed red-tape and returning to the participatory and dynamic process for issuing Section 18 rules that Congress envisioned. Clear rules help honest businesses comply with the law and better protect consumers and workers against bad actors. ***They will also lead to substantial market-wide deterrence due to significant civil penalties for rulebreakers.*** Streamlined procedures for Section 18 rulemaking means that the Commission will have the ability to issue timely rules on issues ranging from data abuses to dark patterns to other unfair and deceptive practices widespread in our economy."

This begs the question - What do "market-wide deterrence and significant civil penalties" mean?

The answer is – the Penalty Offense Authority.

The FTC's Penalty Offense Authority

The Penalty Offense Authority is found in Section 5(m)(1)(B) of the FTC Act, which was added to the FTC Act in 1975. In the late sixties and early seventies, there was widespread criticism of the FTC for pursuing essentially "no money cease and desist orders", which Congress and the FTC eventually recognized were not adequate to deter law breaking and return money to consumers.

Consequently, one of the tools Congress gave the FTC in 1975 was the Penalty Offense Authority, Section 5(m)(1)(B). Section 5(m)(1)(B) provides:

> **(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure**
>
> (1) (A) . . .
>
> (B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—
>
> (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
>
> (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.
>
> In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.
>
> (C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior

> such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Section 5(m)(1)(B) states is that if the FTC finds that a practice is unfair or deceptive in a litigated administrative order, or in any order that is not a settlement (such as a consent order), and thereafter, a third party engages in that same practice with knowledge that the FTC previously condemned it, that third party can face civil penalties.

Very large civil penalties.

A Brief History

After the FTC received the Penalty Offense Authority ("POA") from Congress in 1975, it was used widely for several years. The Commission sent what were essentially warning letters (which the FTC called a "synopsis") to thousands of companies in various industries across the United States. The letters warned the companies that the FTC had found a variety of acts to be deceptive, which initiated a nationwide program to curb these practices. At the time, most of the FTC commissioners were very enthusiastic about the POA program. One Commissioner, Patricia Bailey, said that the POA had resulted in a high level of voluntary compliance achieved quickly and at a low cost.

Nevertheless, the POA program was largely abandoned in the 1980s and has been used extremely seldom in the decades since.

Why Did the FTC Abandon the Penalty Offense Authority?

The short answer to this question is that a subsequent FTC Chairman changed the emphasis of the agency to individual companies and concomitantly moved away from addressing industry-wide problems. As a result, the FTC moved away from using the POA and moved toward another authority – Section 13(b).

In the decades that followed, Section 13(b) became the FTC's primary enforcement mechanism.

Until April 2021.

But There Was a Problem with Section 13(b)

The first problem with Section 13(b) was that it was very limited in the amount of "disincentive" it provided to wrongdoers.

Section 13(b) allows the FTC to seek preliminary and permanent injunctions in federal court. The FTC convinced the federal courts to extend the authority of 13(b) with the logic that because courts can order permanent injunctions they also have the power to order "equitable relief". This meant that the courts could order: (1) money to be returned to consumers; (2) ill-gotten gains to be disgorged; and (3) asset freezes on fraud.

The FTC relied on Section 13(b) very heavily for decades. Mr. Levine estimated that the percentage of cases brought in federal court under 13(b) was between 80 to 85 percent.

Here is how equitable relief worked in practice – If a company deceived a consumer of $100, the most the FTC could recover in a 13(b) action was $100. The FTC realized that the vast majority of violators would not be caught and eventually concluded that $100 was not enough of a deterrent.

Because 13(b) would not allow the FTC to recover more than the amount of money wrongfully obtained, in their October 2020 article, Commissioner Chopra and Mr. Levine argued that the FTC should seek civil penalties. The bottom line is - if you break the law, you pay a penalty. Although there are different factors that go into the calculation of a penalty, the penalties can reach up to $43,000 *per violation*.

Messrs. Chopra and Levine contended that if the FTC is going to actually deter wrongdoing, it needs to recover ***more than*** companies earned from their wrongdoing (a penalty). If the FTC wants to recover more than a company earns from wrongdoing, it cannot rely on 13(b). It must look to other authorities like the POA under Section 5(m)(1)(B).

The second problem with Section 13(b) was that on April 22 of this year, the FTC's abilities to seek consumer redress (refunds to consumers) and disgorgement of profits were demolished by the U.S. Supreme Court when it lost the case of *AMG Capital Management, LLC v. FTC*. In the AMG case, the Supreme Court unanimously held that Section 13(b) does not authorize equitable monetary relief.

As you can imagine, that decision sent the FTC reeling and quickly looking for a way to put some teeth back into its mouth.

Less than three months later, the FTC announced updated rulemaking procedures and the "unlocking" of civil penalties.

Hence, the Penalty Offense Authority.

How Does the Penalty Offense Authority Operate?

The FTC can bring enforcement actions in federal court or in its own in-house administrative court. If the FTC brings a case in its administrative court and the Commission itself makes a determination that a practice is unfair or deceptive, if other companies engage in that same practice, ***knowing that the FTC made that determination that the practice is unlawful***, they can face civil penalties.

This begs the question - How can the FTC show that a company had actual knowledge that the Commission condemned a practice? Part of the agency's response is that many industries (like the direct selling industry) follow the FTC very closely. Because of this, the FTC may be able to impute knowledge. Nevertheless, the dominant approach the FTC has taken when using the POA is to prepare a "synopsis" (which is essentially a warning letter) of its relevant findings and sending such synopsis to all the companies of a particular industry.

One of the examples Messrs. Chopra and Levine cited in their article was for-profit colleges. The Commission could prepare a synopsis of FTC findings and mail it to for-profit colleges. As an example, it would likely explain that: (1) the FTC has found that it deceptive to mislead students about how much money they will earn upon graduation; and (2) it is deceptive to mislead students about the likelihood that they will get a good job. Sending the letter puts the companies on the hook for civil penalties of up to $43,000 per violation if they engage in the same practice. By sending that letter, the FTC can then show that these companies had actual knowledge that the practices in which they engage are illegal.

Be aware that there is no requirement in Section 5(m)(1)(B) that the FTC mail a synopsis. It often does so because it is simply the most practical way to show knowledge.

An Example of the Penalty Offense Authority in Action

About 10 or 11 years ago the FTC targeted the bamboo fabric industry. Myriad consumers looked for (and continue to look for) bamboo products because they were seen as more environmentally sustainable than synthetic fabrics. However, many companies at that time marketed rayon products as bamboo.

The FTC entered some "no money orders" against a handful of companies to prevent them from making false claims. Nevertheless, the practice continued. As a result, the FTC engaged in a much broader campaign to send a synopsis of the FTC's findings on bamboo to some of the largest companies in the bamboo space. It warned them that if they continued to market rayon as bamboo, they could face significant civil penalties.

The Commission actually brought several actions to recover civil penalties from companies that continued to engage in the deceptive practice. Within the FTC, it is widely held that this strategy was very successful and today there is much better compliance in the bamboo fabric industry than existed ten years ago.

As Mr. Levine explained:

> This illustrates the power of the POA authority, to move beyond kind of Whac-A-Mole cases where we find a target, stop the practice, and then move on, to market-wide interventions that actually clean up whole markets. That's what we did for bamboo. And what Commissioner Chopra and I lay out in the article [*The Case for Resurrecting*] is how we can do this in other industries for other harms to consumers and fair competition.

From the FTC's Perspective Why Would It Want to Use the Penalty Offense Authority?

The FTC Does Not Believe that its Current Litigation Strategy of Suing Individual Companies is Effective

In *The Case for Resurrecting*, Messrs. Chopra and Levine wrote:

> Determining whether a multilevel marketing operation qualifies as an illegal pyramid scheme requires resource-intensive investigations that can last years. During this time, more victims will suffer, while owners and top distributors can dissipate assets. Furthermore, the structure and size of a multilevel marketing operation can change considerably during this period, which can complicate litigation should the FTC decide to sue. Finally, if the FTC does sue, litigation can drag on for years, as experts battle over whether the structure of the business is illegal. Altogether, it is not clear that the Commission's current enforcement approach is adequately deterring the most pernicious pyramid schemes, which continue to emerge year after year in spite of decades of FTC warnings.

In addition, the FTC concluded that its rulemaking efforts regarding business opportunities in 2006 did not work.

> In the past, the FTC considered a different approach to this problem, but decided not to pursue it. In 2006, the Commission proposed to expand the coverage of its existing Business Opportunity Rule to require multilevel marketers to provide accurate earnings disclosures to potential recruits,

or face civil penalties for their failure to do so. In its *Notice of Proposed Rulemaking*, the Commission observed that false earnings claims are "not uncommon," are key to recruiting distributors, and have been challenged in more than twenty FTC actions from 1990 to 2006. However, the MLM industry fiercely objected to being bound by this rule, and the FTC agreed to generally exclude multilevel marketers from its coverage.

While it is reasonable to debate whether rules requiring specific disclosures will reduce the harmful consequences of deception, there is no debate that the problem those disclosures were designed to correct – false earnings claims – is widespread and illegal. Yet this problem persists year after year. For example, early in the COVID-19 pandemic, the Commission sent warning letters to nine multilevel marketing firms allegedly making false earnings claims.[1]

These warnings could be significantly more effective if they included notice of penalty offenses. There are numerous final, litigated orders in which the Commission has determined that deceptive practices by multilevel marketing companies are unlawful under Section 5. If these orders were served on major multilevel marketers today, they would be on notice that they face substantial civil penalties for engaging in any of the prohibited conduct.

The FTC *IS* Targeting the MLM Industry

In his discussion with The Capitol Forum in February 2021, Mr. Levine identified the five top areas or industries in which the FTC is interested in targeting for use of the POA. They are:

1. The for-profit college industry;
2. Privacy cases;
3. Targeted marketing (under the Fair Credit Reporting Act, there are myriad prohibitions on the use of reports prepared about Americans, and the FTC believes that Facebook and other tech platforms

[1] Press Release, Fed. Trade Comm'n, *FTC Sends Warning Letters to Multi-Level Marketers Regarding Health and Earnings Claims They or Their Participants are Making Related to Coronavirus* (Apr. 24, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sends-warning-letters-multi-level-marketers-regarding-health.

increasingly resemble big credit bureaus in allowing third parties to target consumers based on certain characteristics)

4. Fake reviews and online misinformation; and

Wait for it . . .

5. Multilevel marketing.

Yes, Mr. Levine specifically indicated that MLM is one of the top five areas that the FTC is targeting for the POA.

In *The Case for Resurrecting*, Chopra and Levine wrote:

> Opportunity schemes involve the sale of money-making opportunities, as opposed to products or services. For example, in certain multilevel marketing (MLM) programs, would-be participants are promised large incomes if they enlist as salespeople. If these promises prove hollow, their losses can go far beyond what they paid into the scheme, especially if they pursued the opportunity full time, or took out loans to finance product purchases.

Four months later in his conference call with The Capitol Forum, Mr. Levine discussed *The Case for Resurrecting the FTC Act's Penalty Offense Authority*. He said:

> The fourth area that we talked about using the Penalty Offense Authority is business opportunities, in particular MLMs, Multilevel Marketers, gig economy, and in some cases franchises too. The one we kind of focus on in the article is multilevel marketing, and I'll just share a little bit about the FTC's current enforcement approach. Under the status quo, we bring cases against multilevel marketers that we allege are operating as illegal pyramids. But it's important to stress again that we can only recover how much these companies earn, and only after lengthy litigation. By which time their assets may be dissipated and by which time a lot of the harm has already been done.
>
> So Commissioner Chopra and I proposed with respect to multilevel marketers that are operating as illegal pyramids or multilevel marketers generally is to target some of the worst practices in the industry around misleading prospective recruits about how much they expect to earn. The FTC has repeatedly found in administrative orders, that it's a deceptive practice to promise someone, "join my MLM and you're going to be able to retire by the end of the year." Yet, we see practices like this year after year after year, especially during economic downturns like we're going through right now.

What we argue is that we should protect consumers more proactively and earlier by targeting those income misrepresentations and ensuring companies have to pay a real penalty if they continue to engage in them. If we want to bring a full-blown litigation about whether an MLM constitutes a pyramid scheme, we can do so. But what the Penalty Offense Authority allows us to do is move quickly to shut down some of the most pernicious practices in this industry.

So I do think there's a sense that the FTC doesn't have the same bite as other enforcers, and that we've not been as aggressive . . . but my view, and I know Commissioner Chopra's view, is that the FTC needs to step up and actually think about deterrence and think about market-wide impact, if we're going to continue to be a strong digital regulator for the 21st century.

We are a national regulator. We are a national law enforcer. Every case we bring requires taxpayer resources and should have an impact on achieving market-wide compliance. And if we're going to move into that framework where we're working to achieve market-wide compliance, instead of individual resolutions in cases, it's going to require a more diverse toolkit, including restatement rulemaking and including Penalty Offense Authority.

Conclusion

The FTC Has Spoken

MLM companies, their owners and their executives can heed the agency's words, or they can ignore them at their risk.

The MLM industry has had a long and rich tradition of ignoring what I call "regulatory climate change". A superb example of this was illustrated in an article I wrote 18 months ago about the MLM industry's 25 year history of ignoring the increasingly shrill language from the FTC and the federal courts that the majority of company-wide compensation paid to distributors must be derived from sales to Customers.

As I mentioned in *Lessons in Missing the Point - Why Do MLM Companies Keep Getting for the Same Things as Other Companies Have Been Sued for Decades?* I was reminded of one of the greatest and simplest truths I have ever heard.

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"Those who neglect history are doomed to repeat it."

George Santayana

What is astounding to me is that many of the people who lead MLM companies are absolutely brilliant . . .

but

. . . epically poor students (or non-students) of MLM history.

As such, they supply the unfortunate first ingredient of Mr. Santayana's quote. Consequently, we have seen the second part of Mr. Santayana's quote continue to unfold for the MLM industry during last three decades.

Being a poor student (or an unteachable student) of MLM history has the potential for a devastating effect.

The FTC Will Now Target Specific Industries - It Has Targeted MLM

The FTC is moving past the targeting of individual companies. It had its primary weapon taken away by the Supreme Court three months ago in the *AMG Capital* case. Moreover, it has concluded that enforcement actions against individual companies were not adequately effective to deter industry-wide malfeasance.

The FTC has spoken clearly that:

- it intends to use a new strategy (the POA) to deal with widespread offenses of the FTC Act;
- it intends to target income claims;
- it intends to target income claims within the MLM industry; and
- one of the top five industries on its hit list is multilevel marketing.

Income claims and unsubstantiated product claims are the easiest possible low hanging fruit for the FTC.

Please hear what I am saying.

First, all income claims (with one small exception) without being accompanied by a proper Income Disclosure Statement are deceptive, and thus, violations of the FTC Act.[2]

Second, consider the number of income claims that are made for an individual company. Every time a distributor shares an income testimonial or shows a check, and every time a company website, video or marketing resource (without a proper IDS) is viewed by a prospect that makes income, it constitutes one violation of the FTC Act - with a possible maximum civil penalty of $42,000 per violation. Let us assume that a moderate size company and its distributors make 1,000 income claims per day. That is a maximum daily penalty of $42,000,000. Multiple that by 365 days, and you understand the potential penalty exposure a company can have.

Income claims and unsubstantiated product claims are incredibly easy and massive targets for the FTC. They are like paper targets that are each 50 feet wide and the FTC is standing 5 feet away with its gun.

It simply cannot miss these targets.

The good news is that the FTC is abandoning (or has been forced to abandon by the Supreme Court) its "silver bullet, one-shot, judicial assassination, let's kill the company before it is even aware that it is dead litigation strategy" in which it covertly investigates a company, files a lawsuit and contemporaneously files a motion for a temporary restraining order to shut the company down, seize all corporate assets, seize the assets of the principal individuals involved (top corporate executives and top field leaders) and appoint a receive over the corporate and individual estates.

Instead, the FTC is going to impose easily and rapidly deployed, massive and potentially company-closing penalties on violators.

Mr. Levine commented that the FTC needs to "step up" its operations and tactics.

So do the MLM industry, MLM executives and MLM leaders.

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[2]The one category of income claim that is not deceptive is - a statement of average earnings of ***all*** distributors. By the word "all" I mean (and the FTC and federal courts mean) each and every individual who, or entity that, is carried on the company's books as a distributor, irrespective or whether he, she or it is considered "active" under the compensation plan.

What Do Companies Need to Do?

As a preface, please allow me to encourage you not to get wrapped around the axle exclusively about income claims. TINA, the FTC and Messrs. Chopra and Levine are equally concerned about improper product claims. Having practiced in the FTC/FDA arena for 29 years, I can tell you that the overarching issue in all FTC product-related enforcement actions is lack of adequate substantiation. I can also tell you that the substantial majority of MLM companies do not have adequate substantiation in their possession when the claim is first made (☜ which is required by the FTC and federal courts) for their product claims.

The subtleties of product claims substantiation are beyond the scope of this article. However, I will be addressing them in a future *Lessons in Missing the Point* article. With that said, let us return to income claims.

Most MLM companies need to make sweeping and significant changes in the ways they handle income claims.

The problem is – the vast majority of MLM companies are unimaginably smug in their erroneous beliefs regarding the propriety of their and their distributors' income claims.

As of July 1, such smugness will potentially be devastatingly expensive.

So let us return to the question - What do MLM companies need to do?

First, companies and their distributors need to realize that all income claims (with the one minuscule exception I mentioned above) are deceptive. How can companies help their distributors understand this? It is called distributor compliance education and training. *(This massively important "bet the farm proposition" will be the subject of an upcoming Lessons in Missing the Point article. In the interim, I encourage you to visit www.mlmcompliancevt.com for an example of a superb online distributor compliance training program.)*

Second, each company must develop a ***proper*** Income Disclosure Statement ("IDS"). The word "proper" means that the IDS contains each and every element that has been articulated by the federal courts and the FTC over the last 35 years (which will be discussed in a future *Lessons in Missing the Point* article).

Third, each company must regularly update its IDS. The FTC requires that all data in a disclosure must be "timely". This means that it must be updated not less than annually.

Fourth, companies must understand that they ***cannot*** "position," "spin", play fast and loose or get cute with the IDS. The IDS is one of the rare instances in which the "legal tail" ***must*** "wag the business dog". ("Must" means this is not optional.) The IDS is not a marketing exercise. It is purely and exclusive a legal and regulatory exercise. There is no room for sales and marketing in the IDS. As Detective Friday said in the 1960's TV show *Dragnet*, "Just the facts ma'am." An IDS contains "just the facts" – and ***all*** of the facts.

Fifth, each company must insure that all corporate resources containing any type of income claim also includes the IDS as well as "pointers" to the IDS. A "pointer" is an indicator made in immediate proximity to an income claim that alerts a reader or viewer to the fact that the resource will provide complete information (the full IDS) regarding the company's income opportunity at the end of the resource. The disclaimer "results may vary" has been completely disregarded by the FTC and the federal courts since 2009. So do not even *think* about using it.

Sixth, each company must thoroughly articulate in its *Policies and Procedures* the proper use of the IDS by distributors. A company can develop the best IDS in the world, but if its distributors fail to utilize it properly, the FTC and courts will treat the IDS as if it does not exist.

Seventh, companies ***must*** provide adequate distributor compliance education and training to all distributors. Relying on distributors to read the *Policies and Procedures* will not work. Providing flyers or other printed resources on distributor compliance issues will not work. Distributor compliance breakout sessions at company events will not work. Over the last 10 years, the FTC and certain states have started to mandate that companies provide online distributor compliance training with randomized test questions to ***all*** distributors. In some cases, companies have been prohibited from allowing their distributors to: (1) enroll customers; (2) enroll distributors; or (3) get paid, unless and until they successfully complete the compliance training courses and tests. I absolutely believe that distributor compliance training and testing will be the next significant battle ground in the FTC/MLM arena. MLM companies need to get in front and stay in front of this freight train before it runs them over. As I mentioned above, I encourage you to check out www.mlmcompliancevt.com.

Eighth, MLM companies must implement an effective distributor compliance program. An effective distributor compliance program includes seven elements: (1) a rock-solid legal/regulatory/contractual foundation with the company's distributors [i.e., the Distributor Agreement and Policies and Procedures]; (2) comprehensive compliance education and testing for distributors on the topics that have resulted in regulatory enforcement actions and civil lawsuits; (3) properly trained and effective corporate compliance personnel; (4) thorough and comprehensive Standard Operative Procedures ("SOPs") for your compliance personnel that address all potentially foreseeable compliance issues; (5) proactive monitoring of distributor activities by the company [e.g. regular web surfing, "Secret Shoppers" at meetings and trainings, on conference calls, etc.]; (6) effective correction of

non-compliant activities by the company; and (7) detailed documentation/record keeping of the company's compliance efforts.

Seventeen years ago, I got a rare insight into the thinking of the FTC at a 2004 DSA conference. James Kohm, was at that time the Acting Director of the FTC's Bureau of Consumer Protection spoke. He was discussing the infamous case of *Webster v. Omnitrition,* the Advisory Memorandum that the FTC had issued in response to the DSA's questions to it about "internal consumption" and the FTC's "silver bullet, one-shot, judicial assassination, let's kill the company before it is even aware that it is dead litigation strategy".

In discussing the FTC's litigation strategy, Mr. Kohm said, "We want to put bad actors out of business as quickly as possible with a minimal outlay of federal resources."

Ladies and gentlemen, I doubt that this thinking has changed within the FTC.

And so . . .

Let's do it right!

Kevin D. Grimes
Thompson Burton, PLLC
Redefining the Art of Law
Direct Dial – (208) 524-1008 Email – kgrimes@thompsonburton.com Web – www.thompsonburton.com

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct

July 1, 2021

New Rules Will Unlock Civil Penalties and Damages for Violators

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The Federal Trade Commission approved changes to its Rules of Practice to modernize the way it issues Trade Regulation Rules under Section 18 of the FTC Act, which will provide a roadmap for businesses, stop widespread consumer harm, and promote robust competition.

These changes bring agency procedures back in line with the 1975 statute that granted the agency Section 18 rulemaking authority, and they build on the agency's announcement earlier this year of a Rulemaking Group within the office of the General Counsel. Commissioner Rebecca Kelly Slaughter was joined by FTC Chair Lina Khan and Commissioner Rohit Chopra in a statement, noting the changes will reinvigorate the FTC's rulemaking procedures and vastly improve the Commission's work on behalf of consumers and small businesses.

"These changes show the FTC is turning the page on decades of self-imposed red-tape and returning to the participatory and dynamic process for issuing Section 18 rules that Congress envisioned. Clear rules help honest businesses comply with the law and better protect consumers and workers against bad actors. They will also lead to substantial market-wide deterrence due to significant civil penalties for rulebreakers," said Commissioner Slaughter. "Streamlined procedures for Section 18 rulemaking means that the Commission will have the ability to issue timely rules on issues ranging from data abuses to dark patterns to other unfair and deceptive practices widespread in our economy."

Recently, the Supreme Court ruled that courts can no longer award refunds to consumers in FTC cases brought under Section 13(b) of the FTC Act, reversing four decades of case law that the Commission has used to provide billions of

dollars of refunds to harmed consumers. In light of that decision, pursuing violations of Trade Regulation Rules – also referred to as the Magnuson-Moss Rules – will allow the Commission to seek redress, damages, penalties, and other relief from wrongdoers.

The amendments make changes to the Commission's procedure for initiating rulemaking proceedings, and the process by which members of the public can seek an informal hearing in a rulemaking. For example, under the revised rules, informal hearing procedures make it easier for stakeholders to participate. Other changes include elimination of requirements in the current rules that are not mandated by the FTC Act, including publication of a staff report containing an analysis of the rulemaking record and recommendations as to the form of the final rule for public comment. The rulemaking procedures build in extensive opportunities for public input, far in excess of the opportunities for public comment under the Administrative Procedure Act.

In addition, the notice clarifies the roles of several FTC offices to reflect the agency's current operations including the Office of General Counsel, Office of International Affairs, and the FTC's regional offices.

The Commission voted 3-2 in an open Commission meeting to approve the changes and publish the notice in the Federal Register. The changes will go into effect when the notice is published in the Federal Register. Chair Khan and Commissioners Chopra and Slaughter voted yes, and Commissioners Noah Joshua Phillips and Christine S. Wilson voted no. Commissioner Wilson issued a dissenting statement.

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Contact Information

MEDIA CONTACT:
Juliana Gruenwald Henderson
Office of Public Affairs
202-326-2924

ftc.gov