



Recommendation 80-1

Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act

(Adopted June 5-6, 1980)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. 93-637, established special procedures for the adoption of trade regulation rules by the Federal Trade Commission. The Act also created a program for the reimbursement of the expenses of participants in trade regulation rulemaking who qualify for funding under criteria set forth in that statute.

Recommendations 79-1 and 79-5, adopted by the Administrative Conference in June and December of 1979, respectively, dealt with the Federal Trade Commission's implementation of the statute through the hearing stage of the rulemaking proceeding, and with the Commission's administration of the expense-reimbursement program. This recommendation supplements the two previous recommendations and completes the Administrative Conference's report to the Congress required by section 202(d) of the Magnuson-Moss Act (as amended by Pub. L. 95-558).

This recommendation, and the reports on which it is based, address the following topics: (1) the procedures used by the Federal Trade Commission in the post-hearing stage of Magnuson-Moss rulemaking; (2) the value of Magnuson-Moss Act procedures generally, and (3) the effects of the expense-reimbursement program.

A. Post-hearing Procedures in Trade Regulation Rulemaking by the Federal Trade Commission

The post-hearing stage of Magnuson-Moss rulemaking is complex and involves the following steps: preparation of the presiding officer's report; preparation of the rulemaking staff's report, with recommendations for a rule; opportunity for public comment on those reports; Bureau of Consumer Protection review, including the revision of staff's recommendations for a rule and the preparation of a summary of the "post-record" comments; oral presentations to the Commission by rulemaking participants; consideration of a final rule by the Commission; preparation of the statement of basis and purpose to accompany the final rule; and, finally, publication of the final rule and statement of basis and purpose in the Federal Register.



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Under even the best of circumstances, this would be a lengthy process. However, in most proceedings studied, the FTC and interested persons had to contend, in addition, with massive, poorly organized records generated during earlier, unfocused prehearing and hearing stages. See the preamble to Recommendation 79-1 for a description of the conduct of those stages. Consequently, the post-hearing stage of Magnuson-Moss rulemaking has been protracted. In the eight proceedings to reach the Commission for final action by April of 1980, the average time from the end of the oral hearing to the first Commission meeting to consider the rule was more than 27 months. In the three proceedings ending with promulgation of a final rule, the average time from the first Commission meeting to consider the rule to publication in the Federal Register was an additional 8.5 months.

The massive, poorly organized records in most of the early Magnuson-Moss rulemakings are symptomatic of a basic problem observed in the FTC's trade regulation rulemaking proceedings: that is, the failure of the FTC to recognize that effective implementation of the Magnuson-Moss Act requires even more emphasis on procedural and substantive structuring than agencies have traditionally used for informal rulemaking under 5 U.S.C. 553. Instead, the appropriate substantive structuring—the focusing and narrowing of the issues—often did not take place until late in the post-hearing stage of the proceedings, and, in many instances, not until the very end of the administrative process. The FTC commissioners' general lack of involvement in the process until the very end, and the absence of any "feedback" from them to staff and interested persons during most of the process, further contributed to the problem of lack of structure. As a result, public input—by means of rebuttal, "post-record" comments and oral presentations—was not focused narrowly on issues or information of significance to the commissioners.

In addition to greater intermediate structuring or narrowing of the issues by the commissioners, there should also be more emphasis on structure at the end of the proceeding because the issues in most trade regulation rulemaking proceedings are likely to remain highly complex, and the records will probably continue to be large. Specifically, the commissioners should have procedures which assure that they systematically consider and respond to all significant comments submitted by interested persons during a rulemaking proceeding. It should be recognized that the commissioners will necessarily have to consult with the rulemaking staff, as well as other staff (*e.g.*, economists in the Bureau of Economics), in analyzing and evaluating the record of a proceeding.



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B. General Recommendations with Respect to the Procedures Required by the Magnuson-Moss Act

The Administrative Conference's study of the implementation of the Magnuson-Moss Act by the Federal Trade Commission provides compelling evidence that a statutory requirement for the mandatory use of the procedures contained in that act is not an effective means of controlling an agency's discretion in its exercise of a broad delegation of legislative power which has not acquired, in law, specific meaning. The Magnuson-Moss Act procedures can only be effective when the substantive decision-making process is structured, as in adjudication, by fairly detailed legal or technical standards which establish the boundaries on the inquiry and inform the participants what kinds of information are relevant and probative. This type of structure was lacking in trade regulation rulemaking by the FTC, and consequently, the combination of additional procedural requirements with informal notice-and-comment procedures caused delay and uncertainty in the rulemaking proceedings, and appears to have contributed to judicial reversal of final rulemaking actions. Although the Conference concludes that procedures in addition to section 553 procedures should not, as a general matter, be statutorily required, agencies may decide to use such procedures—or other procedures—in the light of the circumstances of particular proceedings. Such action by agencies would be consistent with past Conference recommendations. *See* ACUS Recommendations 72-5 and 76-3.

The Conference's study of Magnuson-Moss rulemaking also shows that imposition of novel procedural requirements, such as those in the Magnuson-Moss Act, is likely to have high transition costs if applied to pending proceedings. Even if applied only to new proceedings, however, sufficient lead time is required for the agency to develop the procedures and internal structure needed to implement the new procedures. Thus, for example, reasonable time must be provided for an agency to adopt specific rules of practice and procedure to govern the conduct of the proceedings; to develop the staff and structure needed to index, organize, and make available a useful rulemaking record; to make available and train presiding officers to conduct the proceedings; and to inform and instruct its staff with respect to the new procedural requirements.

C. Evaluation of the Magnuson-Moss Act's Expense-Reimbursement Program

In Recommendation 79-5, the Conference concluded that the expense-reimbursement program was being implemented faithfully and efficiently in accordance with the statute, and



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adopted a number of recommendations concerning the administration of the program. The Conference reserved action on larger questions relating to the value of the program.

Although the overall value of reimbursed participation is impossible to quantify, reimbursed participants in the Commission's proceedings have provided a variety of viewpoints and information on relevant issues that would not otherwise have been presented. Through briefs and oral argument, they helped to focus the Commission's attention on matters which had not been highlighted by other participants. In addition, they developed empirical data which was useful to the Commission; effectively cross-examined witnesses presented by other parties and by staff; and presented expert testimony. These contributions to the Commission's proceedings attest to the value of the program.

The proceedings under the Magnuson-Moss Act have frequently raised complex technical and legal issues which required expert legal representation and a capacity to deal with sophisticated scientific and analytic concepts. In this circumstance, the fact that a relatively small number of participants received substantial compensation in several proceedings does not demonstrate a defect in the design or implementation of the program.

Although reimbursed participants often agreed with staff to the extent of believing that a rule should issue, many significant differences between the positions of the reimbursed participants and the Commission staff emerged. General agreement as to the need for a rule did not prevent reimbursed participants from presenting vigorously critical analyses of staff positions in proceedings or from presenting independent data and viewpoints which enriched the record. Moreover, staff positions were altered during the course of several proceedings, so that agreement between staff and reimbursed participants at the outset disappeared during the proceeding.

Recommendation

A. Administration of the Magnuson-Moss Act by the Federal Trade Commission

In trade regulation rulemaking under the Magnuson-Moss Act:

1. It is essential that the Federal Trade Commission structure the rulemaking proceedings to narrow and focus the issues early in the proceeding and prior to the holding of the hearing required by section 18(c) of the Federal Trade Commission Act. It is highly desirable



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that the commissioners themselves participate in and approve the narrowing and focusing of the issues to be explored at that hearing.

2. In taking final action, the commissioners of the Federal Trade Commission should systematically consider and determine the agency response to all significant information and argument presented by interested persons during the rulemaking. Such presentations and the agency's response to them should be summarized in the statement of basis and purpose accompanying a final rule. The commissioners should have the assistance of the Bureau of Consumer Protection's rulemaking staff, as well as other Commission staff, during their analysis and evaluation of the record in the proceeding.

B. Procedures Required by the Magnuson-Moss Act

1. The procedures in the Magnuson-Moss Act have not proved to be effective in controlling the agency's discretion in its exercise of a broad delegation of legislative power, and it is recommended that Congress not rely on such procedures for such a purpose.

2. Moreover, because of the inherent difficulty of managing a proceeding and developing a coherent record where portions of the proceeding are to be conducted pursuant to the Section 553 model, and other portions according to additional procedures mandated by statute, often without a clear line of demarcation between the two portions, there is a high likelihood of delay and uncertainty and an increased risk of judicial reversal on procedural grounds. For this reason, Congress should not ordinarily require, for agency rulemaking, procedures in addition to those specified by §553 of the Administrative Procedure Act, although the agencies should have the discretion to utilize them.

3. Statutes which impose novel procedural requirements, like those contained in the Magnuson-Moss Act, on particular agency functions involve high transition costs if they are applied to pending agency proceedings. Consequently, the statutes should, by means of delayed effective dates or otherwise, provide significant lead time to enable the agency to develop the necessary procedural and administrative practices and structures before commencing proceedings under the new procedural requirements.

C. The Magnuson-Moss Act's Expense-Reimbursement Program

1. If the Magnuson-Moss Act's procedures remain in effect, the participant reimbursement program under the Magnuson-Moss Act should be continued without substantial modification.



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2. If a group appears to have the capacity to make a significant contribution to a proceeding and it meets the statutory criteria, it should be eligible for reimbursement. No limit should be placed on the number of proceedings for which a group can be reimbursed, and no arbitrary ceiling on the amount of reimbursement to any group in a particular proceeding or year should be imposed.

3. Mandatory cost-sharing requirements should not be imposed, since they might prevent presentation of valuable viewpoints and evidence. Fee schedules and overhead allocation formulas should be periodically reviewed to assure that participants are adequately reimbursed for expenses incurred.

4. Public participant reimbursement programs should not preclude reimbursement of participants who support or favor the position of the agency staff. In deciding how reimbursement funds should be disbursed among agencies and proceedings, decision-makers should take into account the fact that reimbursement programs are likely to be most valuable in agencies or proceedings where there is a substantial difference between the positions of the agency staff and groups seeking reimbursement. They should also consider the amount likely to be spent by other participants who are not relying on the reimbursement program.

Citations:

45 FR 46772 (July 11, 1980)

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Separate Statement of Kenneth Culp Davis

The main idea in Recommendation 80-1 is that Magnuson-Moss rulemaking procedures do not effectively limit the Commission's discretionary power. I fully agree.

But that idea is negative, and because it is negative it seems to me inadequate. Congress has directed the Administrative Conference to study Magnuson-Moss procedures and to report. My belief is that Congress seeks affirmative understanding that will help it determine



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what rulemaking procedures it should require. I am disappointed that the Conference, after spending more than \$600,000 on the study of the Commission's experience, fails to provide Congress with constructive suggestions of the kind that are much needed.

The Magnuson-Moss Act prescribes eleven items of procedure, ten of which have proved to be generally satisfactory—a notice stating with particularity the reasons for the proposed rule, public availability of all written submissions, a requirement that the rule be based on the rulemaking record, opportunity to submit rebuttal submissions in writing, findings and reasons that go beyond a statement of basis and purpose, oral argument, time limits, taking a transcript, public availability of the transcript, and a requirement of "substantial evidence in the rulemaking record." Congress may properly consider whether all or most of those ten requirements should be added to §553 of the Administrative Procedure Act.

Excessive cross-examination has been the central cause of the Commission's procedural failures, even though the statute is well designed to protect against it. The statute even authorizes the Commission to forbid all cross-examination by private parties, it limits cross-examination to "disputed issues of material fact it is necessary to resolve," and the Commission's rule properly requires designation of such issues before hearing. But the Commission moved away from both the statutory limitation and its rule.

The Conference should now face the vital problem of what should be the role, if any, of cross-examination in making rules of general applicability. I believe, as the Conference said in Recommendation 72-5, that "trial-type procedures should never be required for rulemaking except to resolve issues of specific fact," and I believe the Conference should now go further and should recommend to Congress that it should forbid cross-examination except on *disputed issues of specific fact it is necessary to resolve*, defining "disputed issues" as those on which procedures short of trial-type procedure have been sufficiently used without resolving issues, defining "specific fact" so narrowly that cross-examination by private parties when an agency is making rules of general applicability will be very rare and will not be allowed at all in most proceedings, and defining "issues ... it is necessary to resolve" as issues susceptible of proof with evidence and whose resolution is essential to the formulation of the rule.