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Submitted via regulations.gov
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Petition to Clarify Final Amplifier Rule (R407003)

Chair Khan and Commissioners:

Washington Legal Foundation (WLF) submits this comment in support of the Consumer Technology Association's petition for rulemaking that the Federal Trade Commission clarify its application of the amended Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products (the "Amplifier Rule") or amend the Amplifier Rule to apply only prospectively (R407003).

I. WLF's Interest

WLF is a nonprofit, public-interest law firm and policy center that promotes free enterprise, limited government, and the rule of law. WLF often submits comments on proposed FTC actions.[1] WLF also has participated as amicus curiae in court cases involving regulated entities' right to fair notice and the retroactive application of statutes or regulations.[2]

[1] *See, e.g.,* WLF Comment, *In re Non-Compete Clause Rule* (Mar. 17, 2023); WLF Comment, *In re Trade Regulation Rule on Commercial Surveillance and Data Security* (Oct. 14, 2022).

[2] *See, e.g., Federal Trade Commission v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015); *Yates v. United States*, 574 U.S. 528 (2015); *Quarty v. United States*, 170 F.3d 961 (9th Cir. 1999).

II. The FTC must stay enforcement of the Amplifier Rule and clarify its prospective application

The FTC's Amplifier Rule, originally adopted in 1974, imposes requirements on home sound amplification equipment manufacturers that make marketing claims about their products' power output. Fifty years later, after a notice-and-comment process that began in 2022, FTC published a final rule on July 12, 2024.[3] Most relevant to this comment, the amended Rule eliminates the testing flexibility that manufacturers had sometimes enjoyed under the original Rule in favor of a set of uniform testing criteria. Thus, some equipment that earlier satisfied manufacturer-defined criteria would violate the amended Rule.

Such retroactive non-compliance ordinarily should not have concerned manufacturers. As this comment will explain below, retroactivity "is not favored in the law."[4] Yet an FTC Bureau of Consumer Protection attorney informed CTA *via an email* that the amendments do not exclude "covered products that were manufactured prior to [August 12, 2024, the rule's effective date] or are already on the shelves by that date."[5]

The FTC must stay enforcement of the Amplifier Rule and adopt the amendment CTA proposes in its petition. Basic notions of fair notice reflected in the Fifth Amendment's Due Process Clause and Article I's Ex Post Facto Clauses, as well as Supreme Court jurisprudence on retroactivity, compel that action.

A presumption against retroactivity has a strong foundation in Anglo-American legal principles; citizens of a free society require predictability to order their affairs. William Blackstone wrote that retroactive laws are procedurally "more unreasonable" than those of "Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up on

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[3] 16 C.F.R. §§ 432.1–432.6; *see Trade Regulation Rule Relating to Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, 89 Fed. Reg. 49797 (rel. June 12, 2024).

[4] *Bowen v Georgetown Hospital*, 488 U.S. 204, 208 (1988).

[5] CTA Petition for Rulemaking re Amendments to 16 CFR Part 432, Oct. 2, 2024, at 4, quoting Email from Hong Park, Attorney, Bureau of Consumer Protection, FTC, to David Grossman, Vice President, Policy & Regulatory Affairs, CTA (July 16, 2024).

high pillars, the more effectively to ensnare the people."[6] James Madison stated that restrictions on retroactivity in the U.S. Constitution "will banish speculation on public measures, inspire a general prudence and industry, and give a regular course to the business of society."[7] Friedrich A. Von Hayek connected limits on retroactivity to the Rule of Law, writing "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand . . . rules which make it possible to foresee with fair certainty how the authority will use its coercive powers."[8]

After decades of waffling on the propriety of retroactive lawmaking,[9] the U.S. Supreme Court held in 1988 that an administrative agency can only engage in retroactive rulemaking if the relevant statute expressly authorizes such an action.[10] In 1994, the Court further held that if a statute is silent on whether it applies to conduct prior to its enactment, courts must decide whether the statute has retroactive effect, "*i.e.*, whether it would impair rights a party possessed when he acted . . . or impose new duties with respect to transactions already completed."[11]

A violation of the Amplifier Rule constitutes an "unfair method of competition and an unfair or deceptive act or practice" under Section 5 of the Federal Trade Commission Act.[12] Section 5 provides no express authority for retroactive rules or enforcement. Neither the text of the Rule nor the rulemaking process reveal the Commission's intention to apply the Rule retroactively. CTA's petition explains that the Rule describes the "disclosures and uniform test conditions in the future tense," and "the FTC never raised the issue of retroactivity in the rulemaking."[13]

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[6] W. Blackstone, 1 *Commentaries on the Laws of England* 46 (1765).

[7] *The Federalist* No. 44 at 128-29 (R. Fairfield 2d ed. 1966).

[8] F.A. von Hayek, *The Road to Serfdom* 72 (1944).

[9] *See* Daniel E. Troy, *Retroactive Legislation*, The AEI Press (1998), pp. 32-43.

[10] *Bowen*, 488 U.S. at 208.

[11] *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)

[12] 16 C.F.R. §§ 432.1(c).

[13] CTA Petition for Rulemaking at 4.

The FTC also insisted that "the amended Rule does not increase costs for affected manufacturers."[14] If the FTC meant for the Rule to apply retroactively, the Commission's statement on cost is a non sequitur. A formal comment by Masimo Consumer, manufacturer of audio components under brands such as Marantz, Polk, and Boston Acoustics, details how a retroactive Rule would impose "significant costs on manufacturers" because "all products in the U.S. market today that bare an amplifier power rating would need to be replaced with products that have a corrected label. This would effectively require manufacturers to rework millions of products that could require reverse logistics from some retailers, reworking inventories in transit when they arrive and reworking all inventory currently in their warehouses."[15]

Under *Landgraf*'s reasoning, imposing the amended Rule's requirements on products manufactured before August 12, 2024 would both impair rights manufacturers possessed when they acted and impose new duties on transactions already completed. The manufacturers invested significant resources on amplification devices and testing to allow them to make power-output claims relying on the original Rule. FTC's announcement that it will apply the amended Rule retroactively upsets expectations that manufacturers could earn a return on those investments without further testing or other actions. The severe financial losses manufacturers would suffer if required to remove amplification devices from store shelves for retesting and re-labeling in the middle of holiday shopping must also be considered.

Though not a part of the legal analysis, FTC should also consider how retroactively imposing the amended Rule impacts consumers, the Rule's intended beneficiaries. Manufacturers' removal of pre-August 12 amplification devices will deprive consumers of purchasing choices. The new testing and the layers of changes to printed materials to bring existing devices into compliance with the amended Rule will add costs that manufacturers will pass on to consumers. And as CTA notes in its petition, "retroactive changes to existing specifications can lead to significant confusion both among customers and retail partners."[16]

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[14] *Supra* note 3, 89 Fed. Reg. at 49799.

[15] Comment from Masimo Consumer, Nov. 4, 2024, https://shorturl.at/aS8cv.

[16] CTA Petition for Rulemaking at 6.

CTA's proposed amendment offers a simple, reasonable solution. Its adoption would benefit consumers, provide clarity for an important sector of the manufacturing economy, and forestall a likely legal challenge that FTC would almost certainly lose. WLF urges the FTC to uphold its constitutional duty for fair notice and amend the Amplifier Rule.

Respectfully submitted,

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