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**VIA ELECTRONIC FILING**

April J. Tabor, Esq.  
Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Suite CC-5610 (Annex C)  
Washington, D.C. 20580

**Re: Hearings on Competition and Consumer Protection in the 21st Century (Project Number 181201)**

Dear Acting Secretary Tabor:

Please accept the attached comments on behalf of the U.S. Chamber Institute for Legal Reform.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Harold Kim".

Harold Kim  
Chief Operating Officer  
U.S. Chamber Institute for Legal Reform

cc: Ted Hassi  
Paul D. Rubin  
Leah Martin  
Debevoise & Plimpton LLP

**Comments Submitted to the Federal Trade Commission in Connection with  
Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century**

*Considerations on the Federal Trade Commission's Use of Consent Orders in FTC  
Act Section 5 Enforcement Matters*

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The U.S. Chamber Institute for Legal Reform (“ILR”) is pleased to submit this response to the Federal Trade Commission’s (“FTC” or “the Commission”) public notice seeking comments regarding its hearings concerning Competition and Consumer Protection in the 21<sup>st</sup> Century, Project Number P181201.

ILR is an affiliate of the U.S. Chamber of Commerce, which is the world’s largest business federation, representing the interests of more than three million companies across different sectors and regions, as well as state and local chambers and industry associations. ILR is dedicated to making our nation’s civil legal system simpler, faster, and fairer for all participants.

ILR applauds the FTC for engaging in a substantial examination of whether changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy.

ILR particularly appreciates the questions raised in the April 2019 hearings regarding the FTC’s legal framework for privacy and the tradeoffs between *ex ante* regulatory and *ex post* enforcement approaches for privacy protection.

ILR encourages the FTC to consider the shortcomings of its current use of consent orders not merely for privacy protection, but all FTC Act Section 5 enforcement. Although a consent order may be a useful tool for resolving an individual case, the Commission’s current consent order use does little to provide fair notice of the Commission’s interpretation of the laws it enforces.

## I. INTRODUCTION

According to the FTC, “Congress chose not to define the specific acts and practices that constitute unfair methods of competition in violation of Section 5 [of the FTC Act.] . . . Instead, it left the development of Section 5 to the Federal Trade Commission as an expert administrative body, which would apply the statute on a flexible case-by-case basis, subject to judicial review.”<sup>1</sup> Congress made the same choice regarding the Section 5-prohibited deceptive and unfair practices.<sup>2</sup> But in recent years, and in contrast to what Congress envisioned, the FTC increasingly has been issuing consent orders that are neither flexibly applied nor subject to judicial review<sup>3</sup> in its enforcement of Section 5.<sup>4</sup>

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<sup>1</sup> Donald S. Clark, Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf).

<sup>2</sup> Jessica Rich, Director, Bureau of Consumer Protection, Fed. Trade Comm’n, Built to Last: Section 5 and the Changing Marketplace (Feb. 26, 2015), at 2, available at [https://www.ftc.gov/system/files/documents/public\\_statements/626841/150226section5symposium.pdf](https://www.ftc.gov/system/files/documents/public_statements/626841/150226section5symposium.pdf) (“Congress recognized that enumerating a list of deceptive and unfair practices was an impossible task, and instead drafted language that would give the Commission the flexibility it needed to respond to changing times.”).

<sup>3</sup> For a case already filed in federal court, the consent order may require court approval.

<sup>4</sup> The U.S. Department of Justice Antitrust Division recently has reevaluated its use of consent decrees, endeavoring to ensure that claims only are settled “where we have a high degree of confidence that the remedy does not usurp regulatory functions for law enforcement, and fully protects American consumers and the competitive process.” See Makan Delrahim, Assistant Attorney Gen., Dep’t of Justice, Keynote Address at American Bar Association’s Antitrust

A consent order is a vehicle through which the FTC and a company agree to settle in lieu of a litigated outcome. Through a consent order, a company waives its right to judicial review.<sup>5</sup> In addition, although a company agreeing to a consent order typically does not admit liability or the truth of the allegations against it,<sup>6</sup> the company nonetheless must agree to implement Commission-ordered prospective relief (and in consumer protection actions, often must also agree to make a monetary payment, known as “consumer redress”).<sup>7</sup> Companies typically only have a limited ability to negotiate over the consent order’s terms, and the FTC deems certain terms to be nonnegotiable. Accordingly, the Commission largely has embraced a cookie-cutter approach, resulting in strikingly similar consent orders that are neither flexible nor case-specific in most areas.

The FTC nonetheless deems it appropriate to “regulate by consent” despite at least two overarching issues that should lead the Commission to reconsider its decision to embrace the widespread use of consent orders to enforce and implement policy. First, “regulating by consent” often fails to provide companies with fair notice of the standards to which they are expected to conform, particularly in the privacy context, which in return fails to adequately protect consumers. Second, the FTC’s use of cookie-cutter consent orders risks inappropriate or ineffectual enforcement while also exacerbating the fair notice problems.

The FTC’s mission is “[p]rotecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”<sup>8</sup> But the FTC, with its overreliance on consent orders in its Section 5 enforcement, may be falling short of this mission. ILR recognizes that there are significant judicial, economic, and administrative benefits when parties settle their claims rather than litigate. But these benefits may be coming at a very high cost—failing to protect consumers *ex ante* and penalizing innocuous conduct.

## **II. Consent Orders Often Do Not Provide Companies With Sufficient Guidance on Section 5 Compliance, Resulting in Limited *Ex Ante* Protection for Consumers.**

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”<sup>9</sup> This principle, also known as the fair notice doctrine, extends to criminal statutes, civil statutes, and regulations.<sup>10</sup> Fair notice requires, at a minimum, that the legal standard applied is not “so vague as to be ‘no rule or standard

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Fall Forum (Nov. 16, 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar>.

<sup>5</sup> See 16 C.F.R. § 1605.13(a)(2).

<sup>6</sup> See 16 C.F.R. § 1605.13(a)(3).

<sup>7</sup> See 16 C.F.R. §§ 1605.13(a)(7)-(8).

<sup>8</sup> About the FTC, Federal Trade Commission, <https://www.ftc.gov/about-ftc> (last visited Jun. 26, 2019).

<sup>9</sup> *Fed. Commc’n Comm’n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

<sup>10</sup> *Gen. Elec. Co. v. Envtl. Prot. Agency*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

at all.”<sup>11</sup> A company must be able to “reasonably foresee that a court could construe its conduct as falling within the meaning of the statute.”<sup>12</sup>

A higher standard governs when an agency seeks to enforce its interpretation of a governing statute or the agency’s regulations.<sup>13</sup> Under this more demanding standard, a company, acting in good faith, must be able to discern with “ascertainable certainty” what the agency’s interpretation required at the time the company committed the alleged violation.<sup>14</sup> Fair notice is not satisfied if a company cannot do so by “reviewing the regulations and other public statements issued by the agency.”<sup>15</sup>

The Commission cites to its consent orders, along with its guides and other public statements, when claiming that it has provided fair notice of what Section 5 requires.<sup>16</sup> However, these consent orders often do not provide adequate fair notice, particularly but not exclusively in areas where the law is developing and the standards are amorphous. Equally importantly, these consent orders are inadequate from a public policy perspective for they do not maximize the *ex ante* protection for consumers that would follow from further clarity in the law.

Consent orders’ failure to provide companies with sufficient guidance regarding legal compliance under Section 5 arises for at least the following three reasons.<sup>17</sup>

First, a consent order’s focus is almost entirely on prospective relief, rather than a legal analysis applying the law to the facts at issue. Facts matter, particularly in cases subject to Section 5. If Section 5 is to be a flexible tool allowing an expert agency to determine when and how to apply it to specific facts and circumstances, the public is entitled to notice that provides the Commission’s view as to which facts mattered and how Section 5 applied to those facts.

Second, a consent order does not constitute an admission of liability or the truth of the facts alleged in the administrative complaint, but rather only that the Commission has “reason to believe” that a Section 5 violation occurred.<sup>18</sup>

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<sup>11</sup> *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 631-32 (3d Cir. 2013) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)); *Fed. Trade Comm’n v. Wyndham Worldwide Corp.*, 799 F.3d 236, 250 (3d Cir. 2015).

<sup>12</sup> *Wyndham*, 799 F.3d at 256.

<sup>13</sup> *Wyndham*, 799 F.3d at 250-51; see also *Gates & Fox Co., Inc. v. O.S.H.R.C.*, 790 F.2d 154, 156 (D.C. Cir. 1986) (“[T]he due process clause prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”).

<sup>14</sup> *Wyndham*, 799 F.3d at 251-52 (emphases removed).

<sup>15</sup> *Howmet Corp. v. E.P.A.*, 614 F.3d 544, 553-54 (D.C. Cir. 2010).

<sup>16</sup> See, e.g., Brief for the Federal Trade Commission at 45-52, *Fed. Trade Comm’n v. Wyndham Worldwide Corp.*, No. 14-3514 (3d Cir.).

<sup>17</sup> ILR recognizes that the Commission also files a complaint in federal court and a brief Analysis of Proposed Consent Order to Aid Public Comment. But such documents in practice often add little additional guidance.

<sup>18</sup> See 16 C.F.R. § 1605.13(a)(3) (“A consent order agreement shall contain . . . [a] statement that the agreement is in settlement of the staff’s charges and does not constitute an admission by the Consenting Party that the law has been violated”); see also *In re BJ’s Wholesale Club, Inc.*, FTC File No. 042-3160, 2005 WL 2395788, at \*2 (Sept. 20, 2005).

Third, the broad remedial relief ordered in a consent order does not define what acts or practices Section 5 requires; indeed, relief often goes above and beyond what is required.<sup>19</sup> Consent orders often contain “fencing-in” provisions designed to address future conduct that is both broader than the alleged illegal conduct and need not be proscribed by Section 5. As a consent order does not demarcate fencing-in relief, a company reviewing it cannot determine what relief applied to the actual facts, nor what conduct Section 5 prohibits. Therefore, apart from the unlikely scenario that circumstances identical to those in a prior consent order arise, consent orders provide companies little guidance on how to behave. And even if a company were to mold its behavior to be consistent with every consent order, that likely would have a chilling effect on the economy by penalizing behavior that a court may have found to be lawful, innocuous conduct and by requiring companies to take actions that may not be necessary or required.

The FTC’s reliance on consent orders in its enforcement of Section 5 accordingly has resulted in a makeshift collection of settlements that provides companies with no certainty regarding the scope of the law. The Third Circuit in *FTC v. Wyndham Worldwide Corp.* agreed, finding that consent orders are of “little use to [companies] in trying to understand the specific requirements imposed by [Section 5].”<sup>20</sup> What a consent order reflects is a company’s individual determination that the costs and risks associated with litigating against the Commission outweigh the potential benefit. This determination may shed light on that company’s risk aversion, but it tells other companies nothing about whether the allegations, if true, would be legally sufficient to establish a violation of Section 5 of the FTC Act.

Unless companies know how to comply with Section 5, consumers will not be protected by Section 5 *ex ante*. Without clear guidance or standards, companies may be unnecessarily burdened, wasting their resources on unnecessary or suboptimal measures in their attempts to comply with Section 5. In particular, small companies—that may lack the resources necessary to discern Section 5’s requirements or properly assess their risk of liability—are particularly vulnerable to unintentionally violating Section 5 due to a lack clear guidance from the FTC. Small companies may also lack the resources necessary to litigate against the FTC, positioning the Commission to extract judicially unreviewable settlements that prohibit conduct that a court may have otherwise deemed lawful.

### **III. The FTC’s Cookie-Cutter Approach to Consent Orders is Inappropriate and Ineffectual, and Exacerbates the Fair Notice Problems.**

The FTC has been alarmingly inflexible in the manner by which it enters into consent orders, embracing a cookie-cutter approach. The FTC often models new consent orders after the last consent order that addressed an arguably analogous practice or violation, without first conducting a rigorous analysis weighing the economic harms and benefits of the specific business practice against the proposed remedy to ensure that the law is being applied in a manner that does

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<sup>19</sup> See, e.g., *Fed. Trade Comm’n v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (“The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.”); *In re Thompson Med. Co.*, 104 F.T.C. 648, 832-33 (1984), *appeal denied*, 791 F.2d 189 (D.C. Cir. 1986) (“The Commission has wide latitude in fashioning orders to prevent . . . respondents from pursuing a course of conduct similar to that found to have been unfair or deceptive in the past.”).

<sup>20</sup> 799 F.3d at 257 n. 22.

not condemn a business practice that makes consumers better off overall.<sup>21</sup> While the FTC enjoys administrative benefits from employing template consent orders, these benefits may be outweighed by the harm that may result from the failure to consider the underlying circumstances of the alleged violation. And to the limited extent that the FTC’s templates change, they almost always increase the requirements imposed on companies, but without considering the underlying facts and in the absence of an evaluation the last consent order’s effectiveness.

The FTC’s cookie-cutter approach further compounds the problems associated with consent orders and fair notice. Few companies have the resources or appetite to litigate against the Commission—and even those that do and ultimately win on appeal might be forced to go out of business due to the costs associated with years of litigation.<sup>22</sup> With companies increasingly leveraged into accepting the FTC’s consent orders, the problem is not just the consent orders’ ubiquity, but that the consent orders are often nearly identical and therefore do not enable companies to obtain appropriate guidance to distinguish compliant from noncompliant practices.

#### **IV. If the FTC Will Not Change Its Practice of Regulating by Consent, It Can Take Additional Steps To Protect Consumers.**

To the extent that the FTC continues to employ regulation by consent in its Section 5 enforcement, the FTC can do more to maximize consumer protection.

First, the FTC can provide guidance to companies on what specific practices the Commission has concluded are likely to be “anticompetitive,” “unfair” or “deceptive”<sup>23</sup> and provide the legal analysis supporting its conclusions. That legal analysis should include an analysis of the deception and/or unfairness factors for each practice identified. The FTC can provide this additional guidance via: (a) its rule-making authority; (b) Section 5 guidelines; (c) practice- or industry-specific guidelines; (d) other informal guidance to be published on the FTC’s website, such as Frequently Asked Questions; or (e) more in-depth Analyses of Proposed Consent Order to Aid Public Comment. ILR’s preferred approach is that the FTC exercises its rule-making authority or litigates cases and subjects the Commission’s views to judicial review. ILR agrees with the Department of Justice’s position on the impropriety of issuing guidance documents that purport to create rights or obligations binding private parties.<sup>24</sup> ILR further takes no position on whether any

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<sup>21</sup> Cf. Joshua D. Wright, Commissioner, Fed. Trade Comm’n, The Economics of Digital Consumer Protection: One Commissioner’s View (Jul. 31, 2014), available at [https://www.ftc.gov/system/files/documents/public\\_statements/573061/010731techfreedom.pdf](https://www.ftc.gov/system/files/documents/public_statements/573061/010731techfreedom.pdf) (“I dissented from the Commission’s issuance of an administrative complaint and consent order because I felt that the Commission did not adequately weigh the costs and benefits of Apple’s business decisions prior to bringing a case alleging that Apple unfairly failed to obtain express informed consent on its billing platform.”).

<sup>22</sup> See, e.g., Dune Lawrence, *A Leak Wounded the Company. Fighting the Feds Finished It Off*, Bloomberg (Apr. 25, 2016), <https://www.bloomberg.com/features/2016-labmd-ftc-tiversa/>.

<sup>23</sup> As the Third Circuit in *Wyndham* recognized, guidelines that fail to state the particular acts or practices that Section 5 prohibits or requires cannot, in and of themselves, provide ascertainable certainty. 799 F.3d 236, 256 & n.21.

<sup>24</sup> Memorandum from Jefferson Sessions, Attorney Gen., U.S. Dep’t of Justice, on Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>; see also *Kisor v. Wilkie*, 588 U.S. \_\_\_, slip. op. at 23 (2019) (“An interpretive rule itself [should] never form[] ‘the basis for an enforcement action’—because . . . such a rule does not impose any ‘legally binding requirements’ on private parties. An

of these suggestions would be sufficient to satisfy fair notice. But as a matter of policy and practicality, any additional clarity would represent an improvement for both companies and consumers.

Second, the FTC can be more rigorously analytical and flexible in crafting consent orders. Before presenting a company with a proposed consent order, the FTC first should weigh the costs and benefits of a particular business decision to determine if overall consumer welfare would be increased. As Former Commissioner Joshua Wright explained, “[m]any business practices that improve consumer welfare overall are also well understood to harm some consumers” and Section 5 “does not provide the Commission the authority to deem a business practice unfair [or deceptive, or anticompetitive] merely because some consumers are injured or because the Commission can imagine an alternative business method or product design that might make some consumers better off.”<sup>25</sup> The FTC also should examine whether the consent order template it is using is appropriate under the specific facts and circumstances. And the FTC can be more open to input from companies that are subject to an FTC investigation when seeking to resolve an investigation.

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ILR respectfully offers these thoughts and recommendations for consideration. The FTC’s recently concluded hearings provide an important opportunity to examine and adjust the Commission’s regulatory approach to Section 5 enforcement to be more in line with its mission: protecting consumers from anticompetitive, deceptive, or unfair business practices while not unduly burdening legitimate business activity. ILR welcomes the opportunity to engage with the Commission and other interested parties on these topics.

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enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment.” (citation omitted)).

<sup>25</sup> Joshua D. Wright, Commissioner, Fed. Trade Comm’n, The Economics of Digital Consumer Protection: One Commissioner’s View (Jul. 31, 2014), at 13, *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/573061/010731techfreedom.pdf](https://www.ftc.gov/system/files/documents/public_statements/573061/010731techfreedom.pdf).