PREPARED STATEMENT OF

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on

FTC Stakeholder Perspectives:

Reform Proposals to Improve Fairness, Innovation, and Consumer Welfare

Before the

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

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Summary

Thank you for inviting me to testify today. I am William MacLeod, a partner in the law firm Kelley Drye & Warren LLP. I will be speaking solely in my individual capacity today and not as an official representative of any organization.

It was my honor to serve as Chair of the Section of Antitrust Law of the American Bar Association for the 2016-2017 ABA year, and my privilege to join my predecessor, Roxann Henry, in appointing a Task Force to examine the state of antitrust and consumer protection in the United States and to make recommendations to improve enforcement. The Section's Presidential Transition Task Force issued a comprehensive Report,[1] which was published in the *Antitrust Source*[2] and is appended to this Statement. The views expressed in that Report are those of the Antitrust Section, and they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Therefore, unless otherwise noted, the Section's views expressed in the Report should not be construed as representing the position of the Association.

The Section of Antitrust law is the leading professional organization for the practice of laws pertaining to antitrust and competition, trade regulation, consumer protection and economics. Its members include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as

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[1] American Bar Association, Section of Antitrust Law, Presidential Transition Report: The State of Antitrust Enforcement (January 2017), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf [hereinafter "Report"].

[2] *Available at*: https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/jan17_full_source.authcheckdam.pdf

well as judges, professors and law students. The Section's objectives boil down to four words that appear on its logo: Promoting Competition / Protecting Consumers. These were the objectives that guided the work of the Task Force.

For the composition of the Task Force, we selected attorneys representing defendants and plaintiffs, a member of the federal judiciary, and law and economics scholars from the nation's leading universities. More than half of the members had served in leadership positions in the Antitrust Division of the Department of Justice or the Federal Trade Commission, including several former Assistant Attorneys General and Commissioners as well as officials from every administration over the last four decades.[3]

At the outset, it should be noted that the Task Force found that the agencies have been in good hands, and that enforcement should remain "firmly tethered" to the statutory basis of enforcement.[4] Recommending fidelity to the law might seem superfluous, but it was an important response to proposals for radical reorientation of enforcement policy. Prohibiting "unfair" and "deceptive" acts, practices and methods of competition is essential to consumer welfare, but the proscriptions do not have obvious definitions, which makes them tempting tools for tinkering with the outcomes of a competitive market. Clear and transparent enforcement policy is therefore key to distinguishing legal from illegal conduct. By the same token, judicious application of that policy in deciding when and where to prosecute is critical to obtaining the

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[3] Report at 1. The Task Force was co-chaired by Theodore Voorhees and Leah Brannon. Samantha Knox served as the Reporter and Organizer. Members included Roxane Busey, Mary Ellen Callahan, Dennis Carlton, Michael A. Carrier, Paul T. Denis, Douglas H. Ginsburg, Louis Kaplow, Donald C. Klawiter, William Kovacic, Jon Leibowitz, Abbott B. Lipsky, Jr., A. Douglas Melamed, Fiona Scott Morton, James H. Mutchnik, Richard Parker, Lydia Parnes, James Rill, and Joel Winston. Megan Browdie served as the ABA Young Lawyer Division's Representative to the Task Force.

[4] *Id*. at 2.

economic benefits of the Commission's interventions. The Report advises the agency to recognize the enormous impact a prosecution can have on a company, and to focus its "limited enforcement resources on cases involving significant consumer harm."[5] This is sound advice. Pursuing minor infractions and challenging economic activity outside its statutory authority not only can distract an agency from its mission, but can be hazardous to an agency itself.[6]

The Report's recommendations covered both competition and consumer protection, and many of the observations apply to both sides of Commission enforcement, but my testimony today will focus on the consumer side of the agency. For years, consumer protection has consumed more resources, generated more cases, and garnered more public attention than the competition mission.[7] In 2016, for example, consumer protection actions and orders outnumbered their competition counterparts by more than two to one.[8] Consumers lodged three million complaints last year with the Commission,[9] and they have registered over 226 million phone numbers on the Commission's Do Not Call Registry.[10] From care labels on clothes to

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[5] *Id*. at 27.

[6] In 1969, and again in 1980, the Commission faced intense criticism for straying from its mission. An ABA Report on the FTC in 1969 was instrumental in refocusing the Commission. AM. BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) (commissioned by President Nixon in response to a critique of the FTC by researchers assembled by Ralph Nader, COX, R. FELLMETH & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969). A decade later, President Carter intervened to rescue the Commission from Congressional repudiation. *See, e.g.,* MacLeod & Rogowsky, "Consumer Protection under the Reagan Administration," in Regulation and the Reagan Years, R. Meiners and B. Yandle, eds. (Holmes & Meier, New York, 1989)

[7] *See, e.g.,* Report at 24; FTC Annual Reports, collected at https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports.

[8] FTC, 2016 Annual Highlights, *available at* https://www.ftc.gov/node/1205233.

[9] *Id.*

[10] FTC, National Do Not Call Registry Data Book for Fiscal Year 2016, *available at* https://www.ftc.gov/news-events/press-releases/2016/12/ftc-issues-fy-2016-national-do-not-call-registry-data-book

disclosures in advertisements to privacy and security of personal information, consumers encounter the effects of FTC regulations, guidelines and enforcement decisions every day.

The Report covered a broad spectrum of consumer protection. Today I will focus on three areas that the Task Force highlighted in its Report. First, I will address a growing body of barnacles on the economy – aging and perpetual regulations in the form of orders and decrees that result from Commission enforcement. Second, I will discuss the need for guidance on Commission interpretations of advertising and the role of disclosures. Third, I will discuss the growing problem of different laws, different agencies and different policies governing the same conduct. Uncoordinated and inconsistent standards make consumer protection compliance more difficult, and can leave gaps in the very protection the rules are intended to provide.

A Rising Tide of Unreviewed Regulations

> [S]ince 1996—the past 20 years—the FTC has required companies signing administrative orders to agree to an order duration of 20 years (longer, if there are subsequent violations) and federal court orders that last in perpetuity. …Especially in areas where technology is rapidly evolving, order provisions that make sense when they are entered may no longer be appropriate in 10 years, let alone 20 years later, and may serve to chill innovative and useful corporate practices.[11]

The Commission obtains about 150 consumer protection orders a year against corporations and individuals.[12] Some of the orders keep common con artists away from consumers. But many of the defendants and respondents include the largest corporations in the world, and the orders they must observe can impose extensive regulations – obligations that go beyond injunctions against violations of the law. The Commission typically will seek ancillary

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[11] Report at 29 (footnotes omitted).

[12] FTC, Annual Reports, collected at https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports.

relief in the form of specific obligations that make it easier for future enforcers to prove that the company violated the terms of the order. For example, a company alleged to have made unsubstantiated claims about the efficacy of a dietary supplement may face an order that requires prescribed levels of substantiation for claims about the health benefits, efficacy, or performance of any food, drug, or dietary supplement.[13] Once under order, a company faces the peril of civil penalties or a contempt citation for a violation if the FTC alleges that a future advertisement made a covered claim, or that the substantiation did not meet the specific requirements – even if the claim was truthful and substantiated by the standards appropriate at the time it is made.

Recognizing the potential anticompetitive effects and regulatory burdens of perpetual orders, the Commission decided in 1995 to limit administrative orders – those entered in the course of the agency's internal adjudication – to twenty years duration.[14] But the agency declined to limit federal court orders, because it said those orders primarily addressed fraudulent activity.[15] To this day, most of those orders are perpetual, and they now account for two-thirds of the orders the FTC enters. Many of them come from cases that do not allege fraud. A failure of a company to produce what the Commission deems to be satisfactory substantiation for a claim can result in an order that stays on the books indefinitely. Every year, in the ordinary course of enforcement, the Commission adds another hundred perpetual regulations to the economy, without the periodic reviews typically applicable to federal regulations. It is up to the companies struggling with an order provision to do something. The only relief comes in the form of an expensive legal proceeding – a motion in court or a petition to the FTC – that a

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[13] Report at 30, n. 94, citing POM Wonderful v. FTC, 777 F.3d 478, 505 (D.C. Cir. 2015)."

[14] Report at 30, n. 93.

[15] *Id.*

company under the orders must commence. The burdens to do so are high. Respondents face serious obstacles when they seek to modify or terminate Commission orders.[16] As a result, the typical order will follow the company, and any other company that subsequently acquires it, for twenty years – or forever.

The Commission's insistence on twenty-year orders and permanent decrees stands in contrast to the practice of other agencies. The Antitrust Division of the Department of Justice traditionally has included ten-year terms in its civil orders, and now sometimes limits them to five years.[17] Indeed, the Commission's practice is inconsistent with its own application of the Regulatory Flexibility Act (or RFA), in which the agency reviews its guides and regulations every ten years.[18] A bipartisan Congressional mandate, the RFA has been a hallmark of responsible federal regulation for four decades. The purpose of the statute was stated eloquently by Acting Chairman Maureen Ohlhausen this year, "Regulations can be important tools in protecting consumers, but when they are outdated, excessive, or unnecessary, they can create significant burdens on the U.S. economy, with little benefit."[19] Unfortunately, regulations that come in the form of FTC orders and decrees are not included in RFA reviews, and these regulations now count in the thousands, amounting to tens of thousands of pages of specific requirements that can handicap a competitor. The mandates continue to accumulate with little or

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[16] *Id*. at 31.

[17] *See, e.g.,* U.S. v. Ebay, Case No. 12-CV-05869-EJD-PSG (2014), *available at* https://www.justice.gov/atr/case-document/file/494626/download.

[18] *See, e.g.*, FTC, Regulatory Review Schedule, 82 Fed Reg 29259 (June 28, 2017) (To ensure that its rules and industry guides remain relevant and are not unduly burdensome, the Commission reviews them on a ten-year schedule. Each year the Commission publishes its review schedule, with adjustments made in response to public input, changes in the marketplace, and resource demands.)

[19] FTC, Release, FTC Announces Regulatory Reform Measures Ranging from TVs and Textiles to Energy Labels and Email (June 28, 2017), available at https://www.ftc.gov/news-events/press-releases/2017/06/ftc-announces-regulatory-reform-measures-ranging-tvs-textiles.

no examination after their temporary reporting obligations are entered. There is no plan to revisit whether the orders' benefits justify their costs. It is time for the Commission to follow the lead of the Antitrust Division and other agencies that sunset such burdens.

Divining the Meaning of Messages and the Need for Disclosures

> The agencies have pursued failure to disclose theories and imposed "clear and conspicuous" disclosure requirements with increasing vigor in recent years. This has created considerable uncertainty for businesses in determining what information is sufficiently important (e.g., material and necessary to prevent unfairness or deception) that it must be disclosed and where the disclosures must appear (e.g., in advertising or at point of sale). The different opinions on claim interpretation and disclosure clarity at the Commission in POM Wonderful were not reconciled in the decision of the D.C. Circuit, leaving additional uncertainty as to whether and what kind of substantiation is needed for a claim, what claims trigger a disclosure, and how much information should be disclosed. [20]

What does an advertisement communicate? How much information must an advertisement disclose to prevent deception or injury? How should the medium in which an ad appears affect disclosures? These are questions that have preoccupied advertising authorities for decades, and the answers are more elusive today than they were when TV, radio, and print delivered most ads. As long ago as 1992, the Seventh Circuit Court of Appeals encouraged the Commission to explain how it interpreted advertisements.[21] As recently as *POM Wonderful*, the Commission was divided on which ads were deceptive. When the agency is unsure after years of investigation and adjudication, advertisers are hard-pressed to predict with confidence what they can say without running afoul of the law.

[20] Report at 33-34, citing POM Wonderful v. Federal Trade Commission, 777 F.3d 478 (D.C. Cir. 2015).

[21] Kraft, Inc. v. Federal Trade Commission, 970 F.2d 311 (7th Cir. 1992)

As the Task Force noted, "Especially in the case of short-form broadcast advertising, there simply is not sufficient space to include all of the information the agencies have deemed necessary in forms of advertising."[22] It is important that regulators demonstrate the need for additional or qualifying information, since the cost of the qualification could be the loss of other information or the loss of the advertisement itself. This is not just responsible regulation, but a constitutional mandate. As the courts regularly remind us, the First Amendment recognizes the value of commercial information and requires regulators to strike the right balance between burdens and benefits of communications.[23] Moreover, in any medium, increasing the amount of information that must be disclosed can obscure the most important messages, thus creating a tension with the "clear and conspicuous" objectives of the disclosure.

Not surprisingly, the Task Force also noted uncertainty among advertisers as to how the Commission would apply the "clear and conspicuous" standard in particular fact situations, and recommended that the agency look for additional opportunities to clarify its expectations in guidance and to give businesses an opportunity to come into compliance before the agencies start bringing enforcement actions. Citing cases in which the Commission pursued auto dealers for failure to disclose terms and conditions of their offers, and suggesting the Commission could have offered more warning of the policy it would pursue, the Report recommended an exploration of each element of disclosure policy – from the representation that could trigger a

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[22] *Id.*

[23] *See, e.g.*, AM. BEVERAGE ASS'N V. CITY & CTY. OF SAN FRANCISCO, No. 16-16073 (9th Cir., Sept.19, 2017) available at http://cdn.ca9.uscourts.gov/datastore/opinions/2017/09/19/16-16072.pdf.

disclosure to the clarity and prominence of the disclosure – and how those factors vary across media.[24]

A laudable example of the Commission's efforts to tailor its guidance to the advance of technology can be found in the Online Disclosure Guidelines (often called the Dot Com Disclosures) in which the agency has acknowledged that smaller screens can justify shorter disclosures. Nonetheless, the latest revision of the guidance contained an ominous warning:

> If a disclosure is needed to prevent an online ad claim from being deceptive or unfair, it must be clear and conspicuous. Under the new guidance, this means advertisers should ensure that the disclosure is clear and conspicuous on all devices and platforms that consumers may use to view the ad. The new guidance also explains that if an advertisement without a disclosure would be deceptive or unfair, or would otherwise violate a Commission rule, and the disclosure cannot be made clearly and conspicuously on a device or platform, then that device or platform should not be used.

The consequence the Commission contemplates for a disclosure that does not fit – disqualifying a medium for a message – emphasizes the importance of determining whether a disclosure is necessary in the first place (and if so how much is necessary) to cure deception, avoid unfairness, or comply with a rule. If a disclosure mandated for other media would fill an entire screen of a smartphone, it is worth asking whether all the required language is necessary to cure deception. That is what the Commission does when it investigates advertising restraints that trade associations and professional societies adopt. If a restraint is not necessary to cure deception or avoid injury, then the agency may prosecute it as an antitrust violation.[25] The Commission has traditionally taken a dim view of private restrictions based on speculative harm. Under Section 5 of the FTC Act, deception depends on a representation or omission, likely to mislead reasonable

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[24] Report at 35.

[25] *See, e.g.*, Release, Professional Associations Settle FTC Charges by Eliminating Rules That Restricted Competition Among Their Members, (December 16, 2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/12/professional-associations-settle-ftc-charges-eliminating-rules.

consumers, to their detriment,[26] and unfairness turns on the threat of substantial injury, not reasonably avoidable by consumers and not outweighed by benefits to consumers or competition.[27] Whether imposed by cases, guides or self-regulation, a thorough examination of an advertising restraint advances the mission of the Commission. The same analysis of a regulation or other mandate addresses the requirements in the First Amendment of the Constitution.[28]

Inconsistent Rules Undermine Consumer Protection

> This Report notes numerous initiatives of the FTC … that have enhanced protection of the nation's consumers. However, the overlapping jurisdictions of the FTC [and other agencies] give rise to risks of inconsistent regulatory approaches that cause confusion and complicate compliance, particularly with respect to privacy protection. Such inconsistencies could undermine the objectives the Agencies seek to advance.[29]

It is inevitable in an economy as complex as ours that companies will face multiple regulatory agencies, and that the standards those agencies apply to the same conduct will differ. Those differences can stifle economic activity and diminish consumer protection. The examples cited in the Report deal with approaches to privacy and definitions of unfair and abusive conduct. Inconsistent approaches to privacy have contributed not only to inconsistent standards that companies must try to follow, but also gaps in coverage that could leave loopholes for sectors of the economy without federal regulation at all. Such a prospect loomed when the Federal

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[26] Fed. Trade Comm'n, FTC Policy Statement on Deception (Oct. 14, 1983), *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[27] Fed. Trade Comm'n, FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness , codified at 15 U.S.C. § 45(n).

[28] *See* generally, William MacLeod, Elizabeth Brunins & Anna Kertesz, Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy, 72 Antitrust L.J. 943 (2005).

[29] Report at 3.

Communication Commission adopted its 2015 Open Internet Order and reclassified the provision of Internet broadband access as a "telecommunications service" under Title II of the Telecommunications Act. The Order would have deprived the FTC of jurisdiction over Internet Service Providers, potentially even for conduct that would not have been subject to FCC regulation.[30] The discordant policies had international repercussions. As the Task Force observed:

> Based in part on its negative perception of the U.S. sectoral approach to privacy, the European Court of Justice issued a decision in 2015 finding that the EU-U.S. Safe Harbor insufficiently protected EU residents' personal data….Reducing the ability for U.S. companies to transfer personal data effectively and appropriately could impact the U.S.'s competitive posture. Although the Section is not advocating for an umbrella privacy law at this time, it does observe that the inconsistent privacy approaches pose a risk of harm to U.S. companies and competition internationally. More consistency among the regulatory approaches would likely yield reduced compliance costs and promote competitiveness with resulting benefit to consumers.

History provides many examples of unintended consequences of regulations. The lawyers and economists at the FTC have long performed a valuable public service by calling attention to regulatory policies that may be at odds with the interests of consumers and competition. Indeed, the Commission has dedicated a staff, in the Office of Policy Planning, to the advocacy of reasonable regulation in the United States. Over the years, the Commission has brought attention to the value of nutritional claims on labels of foods,[31] consumer-friendly

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[30] Report at 25.

[31] *See, e.g.*, Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics and the Office of Policy Planning of the Federal Trade Commission In FDA's Request for Comments on Nutrient Content Claims (July 27, 2004), *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-nutrient-claims/v040020.pdf.

disclosures on financial documents,[32] and unnecessary restrictions in professions and trades.[33] It is important that the Commission continue this advocacy, and that agencies consider whether their policies conflict with other regulations that impose duties on businesses. A company that answers to multiple authorities, and which cannot satisfy one without offending another, is tempted to abandon the activity rather than risk prosecution. Consumers deprived of the goods and services that the company would have offered under a coordinated regulatory policy could suffer the type of injury that competition and consumer protection agencies try to prevent.

Progress on Transparency

> The Section recommends that the FTC adopt a number of reforms to help it deploy its limited enforcement resources in a manner that enhances the impact of its actions while, at the same time, treating target companies in a way that is fair and proportionate to the alleged offenses.[34]

At the outset of this testimony, I noted a 1969 ABA Report that was credited for sound suggestions on the future of FTC enforcement. The Commission heeded many of those suggestions and improved its protection of consumers as a result. I am gratified to see the current Commission taking the recommendations of our Task Force to heart. This spring, Acting Chairman Ohlhausen announced the formation of internal working groups to implement process reforms at the agency. The Commission revealed the first results of those efforts in July:

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[32] *See, e.g.*, Lacko & Pappalardo, Improving Consumer Mortgage Disclosures/Bureau of Economics Staff Report, June 2007, *available at* https://www.ftc.gov/sites/default/files/attachments/educational-materials/p025505mortgagedisclosurereport.pdf.

[33] *See, e.g.*, Ohlhausen, "Advancing Economic Liberty," Remarks at the George Mason Law Review's 20th Annual Antitrust Symposium, February 23, 2017, *available at* https://www.ftc.gov/system/files/documents/public_statements/1098513/ohlhausen_-_advancing_economic_liberty_2-23-17.pdf

[34] Report at 27.

The process reforms announced today address CIDs (Civil Investigative Demands) in consumer protection cases, and include:

- Providing plain language descriptions of the CID process and developing business education materials to help small businesses understand how to comply;
- Adding more detailed descriptions of the scope and purpose of investigations to give companies a better understanding of the information the agency seeks;
- Where appropriate, limiting the relevant time periods to minimize undue burden on companies;
- Where appropriate, significantly reducing the length and complexity of CID instructions for providing electronically stored data; and
- Where appropriate, increasing response times for CIDs (for example, often 21 days to 30 days for targets, and 14 days to 21 days for third parties) to improve the quality and timeliness of compliance by recipients.[35]

I look forward to the FTC building on this progress and adopting more of the recommendations in the Task Force's Report.

And of course, I would be happy to answer any questions the Committee might have.

[35] Release, Acting FTC Chairman Ohlhausen Announces Internal Process Reforms: Reducing Burdens and Improving Transparency in Agency Investigations, July 17, 2017, *available at* https://www.ftc.gov/news-events/press-releases/2017/07/acting-ftc-chairman-ohlhausen-announces-internal-process-reforms