
File Nos. 1623079, 1623080, 1623081, & 1623082

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

FEDERAL TRADE COMMISSION

Concerning

**PROPOSED CONSENT AGREEMENTS AND
REQUEST FOR PUBLIC COMMENTS IN ZERO-
VOC PAINT CLAIMS CASES**

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT 82 FED. REG. 32,818 (July 18, 2017)

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Submitted Electronically

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Room CC-5610 (Annex D)
Washington, DC 20580

**Re: Proposed Consent Agreements and Request for Public Comments in
Zero-VOC Paint Claims Cases**

Dear Commissioners:

As set forth below, the Washington Legal Foundation (“WLF”) strongly objects to the Federal Trade Commission’s (the “FTC,” the “Commission”) proposed efforts to re-open and “harmonize” the consent orders issued in the PPG Architectural Finishes, Inc. (Docket No. C-4385) and The Sherwin-Williams Company (Docket No. C-4386) cases, with the consent orders the FTC recently entered into with Benjamin Moore & Co, Inc. (File No. 1623079), ICP Construction, Inc. (File No. 1623081), Imperial Paints (File No. 1623080), and YOLO Colorhouse (File No. 1623082), which the FTC published on July 11, 2017 (“New Orders”).

WLF believes that the proposed New Orders and related harmonization proposal run a grave risk of sacrificing many of the benefits derived from the previously consensus-based Green Guides, whereby the agency exhibited regulatory humility and filled gaps in its knowledge and expertise by working with industry and consumers. WLF believes that “[t]hose regulated by an administrative agency are entitled to ‘know the rules by which the game will be played.’”¹ Accordingly, modifying the Green Guides with respect to emissions and VOC-free claims, in WLF’s view, requires further notice-and-comment proceedings. The Green Guides create what are essentially substantive rules, requiring that they be amended directly only through a notice-and-comment process.² Changing the Green Guides outside of the notice-and-comment process erodes

¹ *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (citations omitted).

² See *infra* notes 43-46 and accompanying text.

the FTC's effectiveness and undermines its ability to successfully defend its use of agency discretion.³

Even if such notice-and-comment proceedings are not required, such proceedings would be a better way to avoid disrupting the settled expectations of the industry. Notice-and-comment proceedings would also serve to rein in critics' perceptions that the Commission has overstepped its bounds through the sweeping embrace of a new "common law" of negotiated settlements, especially in this particular case where the latest proceedings, if approved by the Commission, would have the effect of changing substantive law without explanation.

WLF submits this comment to the FTC with respect to all of the above-referenced proposed New Orders published on July 11, 2017.

I. Interests of WLF

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly appears before federal administrative agencies, including the FTC, to ensure adherence to the rule of law.⁴ Likewise, WLF has participated as *amicus curiae* in litigation challenging the scope of the FTC's regulatory authority under the FTC Act.⁵ In addition, WLF's Legal Studies

³ *Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199, 1209 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) ("[T]he APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'"). See also Elizabeth McGill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 875 (2009).

⁴ See, e.g., *In re: FTC's Proposed Information Requests to Patent Assertion Entities and Other Entities Asserting Patents in the Wireless Communications Sector*, Project No. P131203 (Dec. 16, 2013) (responding to the FTC's decision to investigate Patent Assertion Entities and contending that the proposed information requests were consistent with the requirements of the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*).

⁵ See, e.g., *Ross v. FTC*, 135 S. Ct. 92 (2014) (challenging FTC's authority to obtain monetary restitution under § 13(b) of the FTC Act); *FTC v. Wyndham Worldwide*

Division, the publishing arm of WLF, frequently produces articles and hosts discussions on a wide array of legal issues related to FTC activities.⁶

These proceedings raise issues that sweep much more broadly than the FTC's efforts to regulate paint manufacturers' VOC-free claims for architectural coatings. The central challenge of administrative law over the past several decades has been to "narrow[w] the category of actions considered to be so discretionary as to be exempted from review."⁷ As the size of the administrative state continues to expand, it is more imperative than ever that agencies play by the rules—especially the rule of fair notice—and that affected stakeholders continue to have a meaningful opportunity to participate in the operation of their government. Courts have criticized the increasing use of agency-created legislative rules whereby "[l]aw is made, without notice and comment, without public participation, and without publication in the Federal Register of the Code of Federal Regulations."⁸ The FTC's recent actions in the zero-VOC paint-claims cases implicate these core concerns.

II. Background

A. The FTC's Statutory Authority

Section 5 of the FTC Act authorizes the Commission to take steps to prevent businesses and individuals (with certain limited exceptions) from using "unfair or deceptive acts or practices in or affecting commerce."⁹ The FTC may use formal rulemaking procedures to issue binding rules that regulate unfair or deceptive acts or practices.¹⁰ The FTC may act less formally by publishing guidance, enforcement policies,

Corp., 799 F.3d 236 (3d Cir. 2015) (challenging the FTC's authority to regulate cybersecurity breaches under the "unfairness" prong of § 5 of the FTC Act).

⁶ See, e.g., Kurt Wimmer, *et al.*, *Data Security Best Practices Derived from FTC §5 Enforcement Actions*, WLF WORKING PAPER (January 2017); John G. Greiner & Zoraida M. Vale, *FTC Intensifies Scrutiny of "Native Advertising,"* WLF LEGAL OPINION LETTER (April 15, 2016); Christopher Cole, Jerry Schwartz, & Natalia Medley, *Sustainable "Green Advertising": Implications of FTC's Guidelines for Public, Private, & Self-Regulation*, WLF WEBINAR (February 21, 2013).

⁷ Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1489 n.11 (1983).

⁸ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

⁹ 15 U.S.C. § 45(a)(2).

¹⁰ 15 U.S.C. § 57a.

and other public statements to further its statutory objectives. Alternatively, the FTC may investigate, commence civil actions against, and obtain agreement to consent orders with businesses and individuals that allegedly engage in unfair or deceptive acts or practices.¹¹

B. The FTC's Efforts to Regulate VOC-Free Claims for Architectural Coatings

The FTC Issues the Green Guides. In 1992, the FTC issued the “Guides for the Use of Environmental Marketing Claims,”¹² which later became known as the “Green Guides.” The Green Guides represented the FTC’s best understanding of how § 5 of the FTC Act applied to environmental advertising and marketing practices. The FTC updated the Green Guides in 1996, 1998, and 2012. As a basis for originally issuing and later directly amending the Green Guides, the FTC held public hearings and workshops, completed a consumer perception study, and followed notice-and-comment procedures.

The FTC Agrees to Consent Orders and Issues Green Guides Enforcement Policy. On March 6, 2013, the FTC approved consent orders with PPG Architectural Finishes, Inc. (“PPG”) and The Sherwin-Williams Company (“Sherwin-Williams”) to settle alleged violations of § 5 for marketing “zero VOC” paints.¹³ At the same time, the FTC published the “Enforcement Policy Statement Regarding VOC-Free Claims for Architectural Coatings” (“Enforcement Policy”) without an opportunity for the public and industry to weigh in as it had with the guides themselves.¹⁴ The Enforcement Policy stated that the Commission was replacing the definition of “trace amounts of a substance” in the Green Guides with a new definition that applied specifically to VOC-free claims for architectural coatings. The Enforcement Policy also introduced the element of human safety as a factor in the advertising claim analysis. The announced Enforcement Policy signaled to the remainder of the architectural coatings industry the Commission’s policy going forward.

¹¹ 15 U.S.C. §§ 45(b), 57b.

¹² 16 C.F.R. Part 260.

¹³ Fed. Trade Comm’n, Press Release, *FTC Approves Final Orders Settling Charges Against The Sherwin-Williams Co. and PPG Architectural Finishes, Inc.; Issues Enforcement Policy Statement on "Zero VOC" Paint Claims* (Mar. 6, 2013), <https://www.ftc.gov/news-events/press-releases/2013/03/ftc-approves-final-orders-settling-charges-against-sherwin>.

¹⁴ Fed. Trade Comm’n, *Enforcement Policy Statement Regarding VOC-Free Claims for Architectural Coatings* (Mar. 6, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/03/130306ppgpolicystatement.pdf>.

The FTC Agrees to Additional Consent Orders and Proposes to “Harmonize” All Consent Orders. On July 11, 2017, the FTC issued complaints and the New Orders with four more companies in the architectural coatings industry.¹⁵ The New Orders added yet another definition of “trace amounts” (now three) for the purposes of assessing “free-of” claims for architectural coatings. The FTC also stated that it will “propose harmonizing” these four New Orders with the PPG and Sherwin-Williams consent orders: “Specifically, the Commission plans to issue orders to show cause why those [PPG and Sherwin-Williams] matters should not be modified pursuant to Section 3.72(b) of the Commission Rules of Practice, 16 CFR 3.72(b).”¹⁶ WLF is aware of no consumer-perception studies (FTC-commissioned or otherwise) that justify the Commission’s new positions in the consent orders or the Enforcement Policy.

III. To Provide Clarity and Address Due Process and Equal Protection Concerns, the FTC Should Treat the Green Guides as Substantive Rules

The FTC Published the Green Guides Using a Rulemaking Process. The FTC published the Green Guides using a process very similar to the substantive rulemaking procedure prescribed by the Administrative Procedure Act (“APA”).¹⁷ For example, the FTC’s Green Guide-related activity included performing research on consumer understanding and perceptions, undertaking a notice-and-comment process, submitting the resulting guidance for approval by the full Commission, and—most significantly—publishing the final Green Guides in the Code of Federal Regulations.¹⁸ The FTC’s decision to formally publish the Green Guides in the Code of Federal Regulations should not be overlooked or ignored, given that the Code of Federal Regulations is “the codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government.”¹⁹ Although the Commission lacks

¹⁵ Fed. Trade Comm’n, Press Release, *Paint Companies Settle FTC Charges That They Misled Consumers; Claimed Products Are Emission- and VOC-free and Safe for Babies and other Sensitive Populations*, <https://www.ftc.gov/news-events/press-releases/2017/07/paint-companies-settle-ftc-charges-they-misled-consumers-claimed>.

¹⁶ See, e.g., Benjamin Moore & Co., Inc.; Analysis to Aid Public Comment, 82 Fed. Reg. 32818, 32820 (July 18, 2017), https://www.ftc.gov/system/files/documents/cases/benjamin_moore_analysis.pdf.

¹⁷ 5 U.S.C § 553.

¹⁸ 16 C.F.R. Part 260.

¹⁹ U.S. Gov’t Publishing Office, Code of Federal Regulations (Annual Edition), <https://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>. 44 U.S.C.

traditional APA notice-and-comment rulemaking authority, by using a process that in many respects resembled typical APA rulemaking, the Commission exercised significant regulatory humility in issuing the Green Guides, a characteristic notably absent in other areas of recent FTC activity (*e.g.*, privacy and data security enforcement).²⁰

Industry Relies on the Green Guides as an Authoritative Rule. Although the Green Guides bear all of the hallmarks of an APA rulemaking, including publication in the Code of Federal Regulations, the FTC also suggests that the Green Guides have no substantive effect and attempts to disavow their legislative nature: “[The Green Guides] do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act [only] if a marketer makes an environmental claim inconsistent with the guides.”²¹ But surely the Commission cannot have it both ways. Interpretive guidance by an agency can and often does become binding.²² While the FTC’s reserving prosecutorial discretion and exercising self-restraint through the Green Guides is admirable, stakeholders have come to rely upon the guides as authoritative and binding. The danger this incoherent approach presents was not lost

§ 1510 (a) limits publication in that code to rules “having general applicability and legal effect.” *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir.1986) (Scalia, J.).

²⁰ *See* Brief of Petitioner, LabMD, Inc., at 38-43, *LabMD, Inc. v. FTC*, No. 16-16270 (11th Cir. Dec. 27, 2016) (arguing “as a matter of law consent decrees cannot provide parties with fair notice, for Due Process Clause purposes, of an agency’s interpretation of its governing statute or one of its regulations.”); *Amicus Curiae* Brief of Washington Legal Foundation, at 7, *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. Oct. 6, 2014) (arguing that “the FTC’s ‘catch-as-catch-can’ approach to regulatory enforcement under § 5 is not only deeply unfair to the business community, but it also fails far short of satisfying the legal standard for fair notice”); Appellant’s Opening Brief and Joint Appendix Vol. 1, pp JA1-55, at 41, *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. Oct. 6, 2014) (arguing that because a complaint or a consent decree “is not a decision on the merits and therefore does not adjudicate the legality of any action by any party thereto, it does not and cannot provide fair notice of what the law either requires or proscribes.”). The House of Representative Committee on Oversight and Government reform also held hearings to hear testimony on the FTC’s use of consent decrees in the privacy and data security space. Access to video of the hearings is available at <https://oversight.house.gov/hearing/federal-trade-commission-section-5-authority-prosecutor-judge-jury-2/>.

²¹ 16 C.F.R. § 260.1.

²² *See infra* note 43 and accompanying text.

on then-FTC Commissioner Azcuenaga, who dissented based on the Commission's efforts to mask these substantive provisions as "guidance."²³

The FTC cannot maintain that the Green Guides, Enforcement Policy, and even its consent orders are not substantive, while simultaneously insisting that they provide constitutionally sufficient fair notice to those entities regulated by them how to comport with the law. While the Commission frequently seeks to provide guidance, it consistently equivocates on what are best practices and what are legal requirements.²⁴ Here, in the event of a challenge, the Commission is almost certain to point to the Green Guides as

²³ Commissioner Azcuenaga stated, "As the guides expressly state, the majority of the Commission does not view its guides as having the force and effect of law but as explanations of existing statutory terms and obligations. . . . I cannot agree. By stating definitively, for example, that a particular act 'is deceptive' or that particular conduct 'would be deceptive,' or that under specified circumstances, firms 'must' or 'should' act in a particular way, language that appears throughout the document, I believe that the document has 'defined with specificity' a deceptive act or practice as set forth in section 18(a)(1)(B) [requiring Magnuson-Moss rulemaking]." Dissenting Statement of Commissioner Mary L. Azcuenaga Concerning Issuance of Commission Guides on Environmental Marketing Claims, 57 Fed. Reg. 36363, 36368 (Aug. 13, 1992).

²⁴ See, e.g., FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS, at vii (2012), <http://ftc.gov/os/2012/03/120326privacyreport.pdf> ("The final privacy framework is intended to articulate best practices for companies that collect and use consumer data. These best practices can be useful to companies as they develop and maintain processes and systems to operationalize privacy and data security practices within their businesses. The final privacy framework contained in this report is also intended to assist Congress as it considers privacy legislation. To the extent the framework goes beyond existing legal requirements, the framework is not intended to serve as a template for law enforcement actions or regulations under laws currently enforced by the FTC."); FED. TRADE COMM'N, FACING FACTS: BEST PRACTICES FOR COMMON USES OF FACIAL RECOGNITION TECHNOLOGIES, at iii (2012), https://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies/121022facial_techrpt.pdf ("The recommended best practices contained in this report are intended to provide guidance to commercial entities that are using or plan to use facial recognition technologies in their products and services. However, to the extent the recommended best practices go beyond existing legal requirements, they are not intended to serve as a template for law enforcement actions or regulations under laws currently enforced by the FTC.")

authoritative sources of notice for due-process purposes.²⁵ While the Green Guides do an admirable job at addressing due-process considerations related to notice, recent efforts to modify them through enforcement proceedings create serious jurisprudential and policy concerns. On the one hand, the guides are authoritative and serve important due-process functions. On the other hand, the FTC's effort to disavow the binding nature of the guidance, which would provide some protection to regulated entities, leaves industry and the public guessing as to what the law may require at any given moment in time. As the Supreme Court has emphasized, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."²⁶

The Green Guides Lose Authoritativeness When Amended by Consent Orders. Amending the Green Guides through means other than directly via the previously used notice-and-comment process diminishes their authoritativeness, which may negatively impact the deference courts give them and leaves them more susceptible to attack if the Commission attempts to use them as a basis for an enforcement action. Agency deference by courts is based, in part, on an agency's formality, thoroughness in its consideration, and consistency of its statements.²⁷ These factors may not be met when

²⁵ Whether FTC guidance can provide authoritative notice that satisfies constitutional fair-notice requirements remains unanswered. In a case against LabMD, Inc., the FTC has asserted that its guidance "Protecting Personal Information: A Guide for Business" provided the defendant with notice of reasonable security standards. *See* Brief of the Federal Trade Commission at 50-52, *LabMD, Inc. v. FTC*, No. 16-16270 (11th Cir. Feb. 9, 2017) (referencing the Guide for Business, complaints, and consent decrees related to data security, and published guides by other federal agencies). In the FTC's case against Wyndham, the district court held that the FTC is not required to promulgate formal rules before enforcing § 5, and noted that some of the other publications by the FTC (including complaints and consent orders) provide some guidance. *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 617-21 (D.N.J. 2014). On appeal, the Third Circuit also did not reach the question of whether the FTC's guidance provides authoritative notice of the FTC's interpretation of "reasonable security." *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015). The appellate opinion in the LabMD case may provide greater clarity.

²⁶ *Christopher v. SmithKline Beecham Corp.*, 576 U.S. 142, 158-59 (2012).

²⁷ "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the

settlement agreements with private parties repeatedly change the substantive legal requirements and interpretations without justifying departing from the formal notice-and-comment process, as is the case here. By reducing the formality used when changing substantive rules and failing to use a process that incorporates industry and consumer input, the FTC has undermined the likelihood that courts will accord the agency deference when evaluating environmental-marketing decisions under the arbitrary and capricious standard.²⁸

The Green Guides' Effectiveness Is Diminished When They Are Amended Outside of the Notice-and-Comment Process. Amending the Green Guides without justification or explication through negotiated consent decrees via enforcement investigations rather than using the previously established notice-and-comment process also reduces the guides' effectiveness as interpretive guidance for regulated businesses, thereby undercutting the Commission's goal in publishing them in the first place. Instead of looking solely to the Green Guides, businesses must now look to the Green Guides, the Enforcement Policy, and myriad settlement agreements negotiated without the participation of all relevant industry stakeholders to try to ascertain the FTC's expectations. Accordingly, businesses wishing to make environmental-marketing claims arguably do not have fair notice of the law. Moreover, they face the risk of arbitrary regulatory enforcement because the FTC could change its mind at any time. In contrast, treating the Green Guides like an agency rule would allow businesses and entities to know that changes will not be made without the opportunity to participate in an open and transparent process that provides a full opportunity to be heard.

persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (internal citations omitted); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²⁸ *Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199, 1209 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) ("[T]he APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'").

The Green Guides are imperfect, but at least they are relatively clear, authoritative statements developed with industry and consumer participation—and fundamentally they derive from efforts to understand precisely how consumers view and interpret certain types of environmental claims. Such participation is the foundation of both due process and regulatory humility. Assuming the FTC wants the Green Guides to be authoritative and followed by businesses and individuals, the Commission should treat them as authoritative statements, thereby reassuring the public that the Green Guides will be updated in a transparent, predictable, and participatory manner.

IV. Case-By-Case Legislation by Consent Decree Is Inappropriate

The FTC Can Choose Between Rulemaking and Adjudication to Execute Congressionally Delegated Powers. Generally, federal agencies have discretion to choose between rulemaking and enforcement to execute their statutory responsibilities.²⁹ The FTC’s rulemaking authority is specifically circumscribed by Congress. To use its rulemaking authority, the FTC must follow additional requirements that are more cumbersome than the routine APA process.³⁰ Congress has imposed additional requirements on the Commission because of its “grossly overreaching proposal” to regulate advertising to children in the 1970s.³¹ Unfortunately, history may be repeating itself with the Commission’s increasing commitment to legislation-by-negotiated-consent-decree. The FTC’s use of its adjudicatory authority generally is understandable. But here, where the Commission has seemingly abandoned—without explanation—use of an interpretive process that was working well, it leaves much to be desired.

The FTC Has Abandoned Its Rulemaking Procedures in Favor of Guidance and Adjudication. The inefficient and time-consuming process Congress imposed through the Magnuson-Moss Act has led the FTC to all but abandon even its statutorily prescribed rulemaking authority.³² Instead, the Commission appears in recent years to

²⁹ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Congress may limit or provide rulemaking and/or enforcement authority. *Id.* at 196, 207.

³⁰ See Lydia B. Parnes & Carol J. Jennings, *Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989, 995 (1997).

³¹ Fed. Trade Comm’n, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 8 (Mar 2, 2004), [https:// www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf).

³² *Prepared Statement of the Federal Trade Commission on Data Security: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on*

have begun legislating through consent decree (*e.g.*, in the area of data privacy and security)³³ or using a quasi-rulemaking process such as the one previously used to issue and directly amend the Green Guides. After the FTC's rulemaking authority was so substantially restricted by Congress, the Commission undermines whatever authority it retains by overreaching in its use of enforcement-action settlements as a substitute for substantive and binding lawmaking processes like those used to publish the Green Guides.

The FTC's Guidance and Adjudication Process Has Taken the Place of Rulemaking. The FTC's recent Green Guides enforcement activity against the architectural coatings industry appears to be an end-around the rigorous rulemaking procedures that Congress assigned to the FTC. Until these latest order-related changes to the rules, the FTC utilized a "guide-making" process that closely resembles the APA's notice-and-consent rulemaking process to issue and directly amend the Green Guides. This process provides clear due process, equal protection, and related policy benefits, including the kind of broad-based participation and transparency that bolsters the Commission's stature as the premier consumer-protection law enforcement agency. But the FTC's subsequent Enforcement Policy and two sets of consent orders dramatically change the Green Guides without those same procedural safeguards and policy benefits. Inexplicably, the FTC now seeks to "harmonize" all of the consent orders to require six members of the architectural coatings industry to comply with consistent "rules" on emissions and VOC-free claims. This is *de facto* legislation through consent orders and, under FTC's proposed process, no effective negotiation is available among and by the public, non-parties, and arguably even parties to the prior orders whose settled expectations will now be upended.

The FTC's Regulatory Approach to the Architectural Coatings Industry Raises Practical Challenges. The FTC has not indicated what it will do with the seemingly obsolete Enforcement Policy. Under the FTC's recently proposed order-related changes, anticipating precisely what the law is for architectural coatings emissions and VOC-free claims seems virtually impossible. The PPG and Sherwin-Williams orders and Enforcement Policy differ markedly from the Green Guides, in that they introduce the concept of protecting human health to change how the VOC-level would be measured.

Energy and Commerce, 112th Cong. 11 (2011) (statement of Edith Ramirez, Comm'r, Federal Trade Commission) ("[E]ffective consumer protection requires that the Commission be able to promulgate these rules in a more timely and efficient manner.").

³³ Solove & Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUMBIA L. REV. 583 (2014).

And because the New Orders drastically expand the scope of coverage from only VOCs to *any* emissions, they are inconsistent with the PPG and Sherwin-Williams orders and Enforcement Policy—hence the FTC’s stated desire to obtain “harmonization.”

The FTC’s approach also creates competition-policy concerns triggered by the FTC’s having closed-door meetings with some industry participants during consent-order negotiations and providing them with informal guidance not provided to other industry participants. As a result, architectural coatings businesses have a confusing array of FTC regulatory guidance, enforcement policies, consent orders, and other informal guidance to decipher. Moreover, the Environmental Protection Agency (“EPA”) also regulates the architectural coatings industry, potentially creating conflicting obligations.³⁴ Thus, the Commission’s proposed labeling requirements regarding the VOC content and emissions of architectural coatings have the potential to create the very problems that it sought to avoid by treading carefully when it released the Green Guides. WLF urges the Commission to reconsider the wisdom of regulating so specifically in an area already squarely addressed by EPA regulations. In sum, the situation strongly suggests that regulators, businesses, and consumers would all be better off using a notice-and-comment process that involves all affected stakeholders.

The FTC’s Guidance and Adjudication Process in the Architectural Coatings Industry Raises Constitutional Questions. FTC’s preference for using individually negotiated settlement agreements to amend and clarify broad and often very precise and specific formal guidance raises serious due process and equal protection questions.³⁵ Constitutional due process and equal protection requirements and basic administrative-law principles require adequate and fair notice of laws and regulations before agency enforcement occurs. As the D.C. Circuit has said, “Those regulated by an administrative agency are entitled to ‘know the rules by which the game will be played.’”³⁶ An agency’s

³⁴ The EPA has addressed VOC emissions from architectural coatings in a final published rule, 40 C.F.R. Part 59 Subpart D (“National Volatile Organic Compound Emission Standards for Architectural Coatings”).

³⁵ The Green Guides state that certain terminology related to “free-of” claims may be tailored on a case-by-case basis. 16 C.F.R. § 260.9 (“‘Trace contaminant’ and ‘background level’ are imprecise terms, although allowable manufacturing ‘trace contaminants’ may be defined according to the product area concerned. What constitutes a trace amount or background level depends on the substance at issue, and requires a case-by-case analysis.”). But mere notice that a change *may* occur is not fair notice of what that change will be.

³⁶ *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (citations omitted).

reliance upon negotiated FTC settlements to provide such notice and signal agency interpretations has been seriously questioned and is currently being actively litigated.³⁷ How should businesses not under an FTC order decipher the inconsistencies of the Green Guides, Enforcement Policy, and consent orders not directly applicable to them?

Such an inscrutable approach to regulatory enforcement is not only deeply unfair to affected industry stakeholders, but it falls far short of satisfying the legal standard for fair notice. To begin with, it is widely understood that a consent decree binds only the parties to the agreement.³⁸ Such private settlements in no way constrain the FTC's future enforcement decisions; unlike formal rulemaking, they do not even purport to lay out general enforcement principles. "Nor is a consent decree a controlling precedent for later Commission action."³⁹ Rather, the "function of filling in the interstices of [a statute] should be performed, as much as possible, through quasi-legislative promulgation of rules to be applied in the future."⁴⁰

Only one of the Commission's actions—issuing and directly updating the Green Guides—involved a multi-year effort with numerous revisions that directly and specifically addressed consumer and industry input in commentary accompanying the guides when they were published in the Federal Register. To meet due process and fair notice obligations, the proposed changes to the Green Guides through the harmonization of the New Orders seem *at least* as deserving of public participation and commentary.⁴¹ Otherwise, there can be little faith that the FTC's action is anything other than arbitrary.

³⁷ *LabMD, Inc. v. Federal Trade Commission*, No. 16-16270 (11th Cir.), is currently pending decision before the Eleventh Circuit following oral argument. The appellant argues that the FTC did not provide fair notice of the data security standards that were allegedly violated. *See, e.g.,* Stegmaier & Bartnick, *Physics, Russian Roulette, and Data Security: The FTC's Hidden Data-Security Requirements*, 20 GEO. MASON L. REV. 673, 719 (2013) ("Entities have not been given proper notice of what data-security practices are 'reasonable' and 'adequate'" through the FTC's use of enforcement actions rather than rulemaking).

³⁸ *See, e.g., Altria Group, inc. v. Good*, 555 U.S. 70, 89 n.13 (2008) (acknowledging that a "FTC consent order is . . . only binding on the parties to the agreement").

³⁹ *Beatrice Foods, Co. v. FTC*, 540 F.2d 303, 312 (7th Cir. 1976).

⁴⁰ *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

⁴¹ Inviting comment on this consent order is not the same as undertaking the notice-and-comment process previously used to amend the Green Guides, because the consent decree itself is non-binding precedent to everyone but the party agreeing to it, and this comment is only intended to highlight the procedural infirmity of seeking to change the law when an authoritative interpretation *already* exists.

As a result, the FTC seriously risks losing any judicial deference when it alters or, more generously, “discovers” new specific requirements in formal guidance that no reasonable party could have reason to know existed.⁴²

V. The Commission Should Update the Green Guides Using the Notice-and-Comment Process

Given the pragmatic and constitutional concerns with ad hoc legislation-by-consent-decree, the Commission should directly amend the Green Guides to incorporate its latest interpretations of § 5 of the FTC Act as applied to environmental marketing claims.

The FTC Should Treat the Green Guides as a Substantive Rule and Use the Notice-and-Comment Process to Update It. The FTC should enforce the Green Guides as written until it takes appropriate steps to directly amend and otherwise explain and justify the Commission’s changes. Given the strong similarities between the issuance of the Green Guides and the issuance of substantive rules under the APA, the FTC should consider how courts have viewed agency changes to substantive rules implemented under the APA. An agency is bound by its regulations until it changes them via a process that is reasonable, non-arbitrary, and supported by the record.⁴³ To change a substantive rule issued through notice-and-comment procedures, an agency must repeat those notice-and-comment process.⁴⁴ Agencies cannot avoid the notice-and-comment process by simply

⁴² See Kristine Cordier Karnezis, Annotation, *Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2d 25, 39 (2005); 2 AM. JUR. 2D ADMINISTRATIVE LAW § 77 (2002).

⁴³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41 (1983) (holding that the rescission or modification of a rule promulgated using the APA notice-and-comment process must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”); *United States v. Nixon*, 418 U.S. 683, 696 (1974) (“So long as this regulation remains in force the Executive Branch is bound by it.”); *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) (“[T]he Secretary [of the Interior] here . . . was bound by the regulations which he himself had promulgated for dealing with such cases”); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (“[The Secretary of State] could not, so long as the Regulations remained unchanged, proceed without regard to them.”); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (“As long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.”).

⁴⁴ 5 U.S.C § 551(5). See e.g., *Perez v. Mortgage Bankers Assoc.*, 135 S.Ct. 1199, 1206 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (The APA mandates “that agencies use the same procedures when they amend or repeal a rule

couching a change as a new interpretation.⁴⁵ Of course, post-hoc explanations for changes to substantive rules that did not go through a notice-and-comment process (such as through consent orders with private parties) are especially vulnerable to attack through the courts because there is no record by which to rationalize the changes.⁴⁶

Because the Green Guides were created like a substantive rule, directly amended like a substantive rule, and enforced like a substantive rule, the FTC should continue to directly amend the Green Guides as an agency would any substantive rule under the APA—through the notice-and-comment process. The FTC describes the Green Guides as interpretive guidance, but they constitute a substantive rule because they provide a specific and definite interpretation of the FTC’s broad scope of authority under § 5 of the FTC Act, they were issued through the notice-and-comment process, and they were published in the Code of Federal Regulations. Once the FTC determined to use these processes to promulgate the Green Guides, its choice was not without consequence. Here, because the Commission has undertaken such rigorous procedures to promulgate the Green Guides, its decision to change them without resort to those same procedural safeguards seems arbitrary and capricious. Addressing these concerns would help permit the FTC to retain the clear authoritative nature of the Green Guides and likely receive the deference from courts it desires. Such a process would also afford businesses with a

as they used to issue the rule in the first instance.”); *Nat’l Family Planning and Reprod. Health Assoc. v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992) (requiring the use of notice-and-comment rulemaking to issue a “directive” significantly altering the meaning of a regulation originally issued through notice-and-comment rulemaking).

⁴⁵ E.g., *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) (“Interior’s new policy is a substantive rule for purposes of the APA, and Interior was required to submit their new rule for notice and comment.”); *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (“It is well-established that an agency may not escape the notice-and-comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”).

⁴⁶ E.g., *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, (2012) (explaining that deference is “unwarranted” when “the agency’s interpretation conflicts with a prior interpretation or when it appears that the interpretation is nothing more than a convenient litigating position or a ‘post-hoc rationalization’ advanced by an agency seeking to defend past agency action against attack”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) (“The courts may not accept appellate counsel’s post hoc rationalizations for agency action.”).

crucial opportunity to provide expert input into the regulatory process and receive fair notice of obligations under the law.⁴⁷

VI. Conclusion

The Commission should conform the New Orders to the previously established requirements and not otherwise amend the Green Guides without using a notice-and-comment process that takes into account the specific considerations present in the architectural coatings industry. Pending the completion of such a process, the FTC should, at least with respect to non-parties to the consent orders or other parties, hold its enforcement authority in abeyance. Rather than seeking to bootstrap the updated requirements from the New Orders immediately onto certain other businesses in the industry, the FTC should consider using regulatory self-restraint to seek to provide the public, including consumers and other agencies whose regulations may overlap or even conflict, with an opportunity to comment upon and participate in an open and public discussion. This process will permit affected constituencies to have appropriate time and opportunity to seek clarification on the requirements without the threat of immediate fines (for those already under order) and investigation (for the remainder of the industry). This approach addresses practical considerations, constitutional due-process concerns, and competition policy concerns with some parties having more information than others about the FTC's compliance expectations for the Green Guides.

Respectfully submitted,

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⁴⁷ The FTC may consider working with the EPA on studies relevant to VOC-related claims and labels. Recently, the FTC and U.S. Department of Agriculture completed a joint consumer perception study of “recycled content” and “organic” claims. FED. TRADE COMM’N, *Consumer Perception of “Recycled Content” and “Organic” Claims* (Aug. 10, 2016), https://www.ftc.gov/system/files/documents/reports/consumer-perception-recycled-content-organic-claims-joint-staff-report-federal-trade-commission/consumer_perception_of_recycled_content_and_organic_2016-08-10.pdf.