

---

<sup>1</sup> Agreement Containing Consent Order 5.

<sup>2</sup> See 16 C.F.R. § 2.32 (“The agreement may state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.”) (emphasis added).

<sup>3</sup> 15 U.S.C. § 45(b) See *Johnson Prods. Co. v. FTC*, 549 F.2d 35, 387 (th Cir. 1977) (“The Commission, unlike a private litigant, must act in furtherance of the public interest.”) (explaining that the public interest mandates the Commission to reserve to itself the option of withdrawing its acceptance of a consent decree after the public comment period).

<sup>4</sup> See *FTC v. Circa Direct LLC*, 2012 U.S. Dist. EXIS 81878, \*3-\*6 (D.N.J. June 13, 2012) (expressing the concern that when being faced with a se

the SEC has adopted policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.<sup>6</sup> Importantly, the SEC also has concluded that “a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.”<sup>7</sup> I would encourage consideration of whether our authorization of language that a consent agreement “is for settlement purposes only and does not constitute an admission that the law has been violated” is tantamount to a denial and if so, whether the Commission should similarly embrace the “neither admits nor denies” model language.

Second, while I hope that the majority is correct in their assertion that the consent order covers the deceptive practices of Facebook as well as the applications (“apps”) that run on the Facebook platform, it is not clear to me that it does. In particular, I am concerned that the order may not unequivocally cover all representations made in the Facebook environment (while a user is “on Facebook”) relating to the deceptive information sharing practices of apps about which Facebook knows or should know. For example, a reporter from Forbes recently disclosed that while downloading an app on Facebook, a pop up screen informed users that “This app shares articles you read and more on Facebook with:” and then allowed users to choose between “public,” “friends,” or “only me.”<sup>8</sup> The reporter assumed – as most users would – that choosing “only me” meant that no one else would be able to see what one was reading when using that app. However, to the contrary, according to this report, choosing “only me” merely meant that your reading habits didn’t show up in your friends’ news feed or ticker on Facebook.<sup>9</sup> Users reading articles within the app would still see articles read by other users, even those users that had chosen the “only me” option. Apparently there is no way to turn off sharing within the app, except on an article-by-article basis.<sup>10</sup> I consider such inadequate disclosure to be deceptive

---

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Jeff Bercovid, Despite FTC Settlement, Facebook Still Playing Coy on Privacy, Forbes, Dec. 1, 2011, available at <http://www.forbes.com/sites/jeffbercovici/2011/12/01/despite-ftc-settlement-facebook-still-playing-coy-on-privacy/>.

<sup>9</sup> Subsequently, some changes have been made to the Washington Post Social Reader application download page. There is now a small question mark icon located next to the “who can see activity from this app on Facebook” language. When a user scrolls over the question mark icon, it says “This does not control who can see your activity within the app itself.”

<sup>10</sup> Users can learn about the app on the Washington Post website or on the Facebook website. The app is downloaded from the Facebook website itself and users access the application while on Facebook.

when it occurs in the Facebook environment, irrespective of whether that failure to fully disclose stems from the conduct of the app or Facebook itself. I would include language in the order to make that clear, lest Facebook argue subsequently that the Commission order only covers deceptive conduct engaged in by Facebook itself.