your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at :// . . / / . . As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.

Part V of the proposed order requires respondent to pay $200,000 to the United States Treasury as disgorgement.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed complaint order or to modify in any way the proposed order's terms.

By direction of the Commission, Commissioner Ohlhausen voting ''yes,'' consistent with the views expressed in her partial dissent.

Donald S. Clark,

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Statement of Chairwoman Edith Ramirez, Commissioner Julie Brill, and Commissioner Terrell McSweeny

We write to express our strong support for the complaint and consent order in this case.

The Commission unanimously supports Count I of the complaint in this matter, which is of paramount importance, in light of TRUSTe's unique role in increasing consumer trust in the global marketplace and ensuring the effectiveness of relevant self-regulatory frameworks. TRUSTe operates privacy-related self-regulatory and oversight programs for businesses and offers certified privacy seals for program participants, including (1) COPPA/Children's Privacy, which certifies compliance with the Children's Online Privacy Protection Act and implementing regulations; (2) EU Safe Harbor, which certifies compliance with the U.S.-EU Safe Harbor Framework; (3) TRUSTed Apps, which certifies the privacy practices of mobile applications; and (4) APEC Privacy, which certifies compliance with the Asia-Pacific Economic Cooperation Cross-Border Privacy Rules System.[1]

In Count I, the Commission alleges that TRUSTe promised consumers it would annually recertify its self-regulatory program participants for compliance with TRUSTe's privacy program requirements, but that, in many instances, it failed to do so. Annual recertification is a cornerstone of the service TRUSTe provides. It helps ensure that companies (1) continue to follow TRUSTe's program requirements, (2) do not make material changes to their practices or policies without appropriate consent, and (3) periodically consider the impact of technology and marketplace developments in their privacy practices. TRUSTe did not fulfill its obligations; today's order helps to ensure that TRUSTe will do so in the future. Consumers who see the TRUSTe seal on a Web site or mobile app should be confident that a trusted third party has kept its promise to review and vouch for the privacy practices of that Web site or mobile app.

We also believe that Count II represents an appropriate use of ''means and instrumentalities'' liability. At the time TRUSTe provided model language for its clients' privacy policies stating that TRUSTe was a nonprofit entity, there is no question that the statement was true. However, after TRUSTe informed clients of its for-profit status in 2008, many clients neglected to update their policies and continued to represent that TRUSTe was a nonprofit entity. These ongoing representations by TRUSTe's clients clearly became deceptive once TRUSTe converted to a for-profit entity. Yet for five years, TRUSTe continued to recertify some companies that included this deceptive statement, that TRUSTe itself had disseminated, in their privacy policies. TRUSTe was well-positioned to rectify the misrepresentation about its own corporate status—it could have elected simply not to recertify the companies in question until the misrepresentation was cured. It failed to take this straightforward step and instead continued to bless the language at issue by giving the companies its seal of approval.

In and v. *P* , ., which Commissioner Ohlhausen cites in her statement, the Commission concluded that by providing customers with deceptive statements, the respondent furnished the means and instrumentalities for its clients to engage in deceptive acts or practices.[2] In this case, although TRUSTe disclosed to clients its change in status, it continued to recertify privacy policies using language TRUSTe had itself supplied about its corporate status that was no longer true. TRUSTe's recertification of these inaccurate privacy policies is the conduct we take aim at—it provided a stamp of approval of a false representation which TRUSTe's clients then passed along to consumers via their Web sites. As such, TRUSTe provided its clients with the means and instrumentalities to deceive others. The application of means and instrumentalities liability in this case is consistent with the principle underlying and *P* , namely, that one who places the means of deception in the hands of another is also liable for the deception under Section 5.[3] The inclusion of this count is particularly appropriate here, given TRUSTe's unique position in the privacy self-regulatory ecosystem. Companies that purport to hold their clients accountable to protect consumer privacy should themselves be held to an equally high standard.

[1] TRUSTe's APEC Privacy certification program was not the subject of the allegations in the complaint. TRUSTe became an ''Accountability Agent'' for the APEC Cross-Border Privacy Rules System in June 2013, and issued its first certification under that program in August 2013.

[2] ., 128 F.T.C. 749 (1999); v. *P* , ., No. 89–3818RSWL(GX), 1991 WL 90895 (C.D. Cal. Mar. 28, 1991), ' 9 F.3d 1551 (9th Cir. 1993).

[3] Commissioner Ohlhausen suggests that the allegations underlying Count II would be more appropriately viewed through the lens of secondary ''aiding and abetting'' liability. Regardless of whether one could construct alternative theories of liability, our concern is with TRUSTe's own actions. As discussed above, the deception here was the result of TRUSTe's own actions.

[1] ., FTC File No. 1323219, Statement of Chairwoman Edith Ramirez, Commissioner Julie

I disagree with this use of means and instrumentalities. To be liable of deception under means and instrumentalities requires that the party [illegible] must make a misrepresentation, as the Commission detailed in [illegible].[2] According to the majority in that case, ''[T]he means and instrumentalities doctrine is intended to apply in cases . . . where the originator of the **unlawful material** is not in privity with consumers'' and ''it is well settled law that the originator is liable if it passes on a **false or misleading representation** with knowledge or reason to expect that consumers may possibly be deceived as a result.''[3] For example, in [illegible] v. [illegible] *P* [illegible], *.*, the court found the defendant directly liable for providing the means and instrumentalities to violate Section 5 when it sold Salvador Dali prints with forged signatures to retail customers, who then sold the prints to consumers.[4]

Unlike [illegible] and [illegible] *P* [illegible],

Brill, and Commissioner Terrell McSweeny, at 2 (Nov. 17, 2014).

[2] [illegible] *.*, 128 F.T.C. 749 (1999).

[3] . at *10 (Public Statement of Chairman Pitofsky, Commissioner Anthony and Commissioner Thompson) (emphasis added). Similarly, Commissioner Orson Swindle's dissent stated that under FTC precedent, ''means and instrumentalities is a form of primary liability in which the respondent was using another party as the conduit for disseminating **the respondent's misrepresentations** to consumers.'' . at *14–15 (Dissenting Statement of Commissioner Orson Swindle) (emphasis added). Swindle's dissent likewise emphasized that a defendant ''may not be held primarily liable unless it has actually made a misrepresentation.'' . (quoting *P* . [illegible] *.*, 928 F. Supp. 1239, 1256 (S.D.N.Y. 1996)). [illegible] v. *P* [illegible], *.*, Civ. No. 89–3818RSWL(GX), 1991 WL 90895, at *14, (C.D. Cal. 1991), [illegible], 9 F.3d 1551 (9th Cir. 1993) (''One who places in the hands of another a means or instrumentality to be used by another to deceive the public in violation of the FTC Act is directly liable for violating the Act.'').

[4] *P* [illegible], *.*, 1991 WL 90895, at *17.

[5] ''[A] respondent who has provided assistance to another party that has made misrepresentations is at most secondarily liable—in particular, for aiding and abetting another's misrepresentations.'' [illegible] *.*, 128 F.T.C. 749, *15 (1999) (Swindle Dissent) (citing [illegible] v. [illegible] & *P*, 152 F.3d 169, 175 (2d Cir. 1998), [illegible], 119 S.Ct. 870 (1999); [illegible] v. [illegible]r, 123 F.3d 717, 720 (2d Cir. 1997); [illegible] v. [illegible] *P* *.*, 77 F.3d 1215, 1225 (10th Cir. 1996) (''the critical element separating primary from aiding and abetting violations is the existence of a representation, made by the defendant.'')).

[6] *P* [illegible], *.*, 1991 WL 90895, at *15.

[7] . at *14.

[8] [illegible], *.*, 511 U.S. 164 (1994).

[9] [illegible] *.*, 128 F.T.C. 749, *19 (Swindle Dissent).