

**Partial Dissent of Commissioner Maureen K. Ohlhausen
In the Matter of True Ultimate Standards Everywhere, Inc. (“TRUSTe”)
November 17, 2014**

I support Count I of the complaint in this matter because of TRUSTe’s unique position of consumer trust as a third party certifier. However, I do not support the use of “means and instrumentalities” liability in Count II of the complaint and dissent as to that Count.

TRUSTe was initially organized in 1997 as a non-profit. Before July 2008, TRUSTe required every certified client website to include in its privacy policy a description of TRUSTe stating in part, “TRUSTe is [a] non-profit organization.” On July 3, 2008, TRUSTe changed its corporate form from non-profit to for-profit. The company announced the change to its clients and requested that all clients update the relevant privacy policy language on their websites. Some clients did not update their websites. When TRUSTe recertified such websites, TRUSTe would typically request, but not require, that the client update their privacy policy to reflect the change to for-profit status.

Count II of our complaint alleges that by recertifying websites containing privacy policies that inaccurately describe TRUSTe as a non-profit, TRUSTe provided the means and instrumentalities to its clients to misrepresent that TRUSTe was a non-profit corporation. Specifically, the majority’s statement argues that “TRUSTe’s recertification of these inaccurate privacy policies ... provided its clients with the means and instrumentalities to deceive others.”¹

I disagree with this use of means and instrumentalities. To be liable of deception under means and instrumentalities requires that the party *itself* must make a misrepresentation, as the Commission detailed in *Shell Oil Company*.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 *FTC v. Magui Publishers, Inc.*, 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 *Shell* and *Magui Publishers*, the statement that TRUSTe provided to its clients was indisputably truthful at the time. During the period in which TRUSTe required client

¹ *In the Matter of True Ultimate Standards Everywhere, Inc. (“TRUSTe”)*, FTC File No. 1323219, Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, at 2 (Nov. 17, 2014).

² *In the Matter of Shell Oil Co.*, 128 F.T.C. 749 (1999).

³ *Id.* 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.” *Id.* at *14-15 (Dissenting Statement of Commissioner Orson Swindle) (emphasis added). *FTC v. Magui Publishers, Inc.*, Civ. No. 89-3818RSWL(GX), 1991 WL 90895, at *14, (C.D. Cal. 1991), *aff’d*, 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 *Magui Publishers, Inc.*, 1991 WL 90895, at *17.

privacy policies to state that TRUSTe was a non-profit, TRUSTe was, in fact, a non-profit. Once