Critical Legal Issues: **WORKING PAPER SERIES**

Washington Legal Foundation
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FTC CONSUMER PROTECTION ORDERS: THE CASE FOR A NEW SUNSET POLICY

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Washington Legal Foundation
Critical Legal Issues WORKING PAPER Series

Number 235
May 2025

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The authors thank William C. MacLeod, Timothy J. Muris, Howard Beales III, Laura Riposo VanDruff, Donnelly McDowell, and Ioana Gorecki for their contributions and comments to this *Working Paper*.

EXECUTIVE SUMMARY

In contemplating the creation of the Federal Trade Commission ("FTC" or the "Commission"), President Woodrow Wilson declared that the era of "antagonism between business and government is over" and described an agency that would serve as an advisor to businesses regarding anti-competitive conduct.[1] In line with this vision, Congress signed the Federal Trade Commission Act of 1914, granting the newly formed FTC broad substantive authority to define anti-competitive practices, but only one way to enforce that authority: an administrative cease-and-desist order that businesses could effectively violate without penalty.

Since then, the FTC—along with its substantive regulatory and enforcement authority—has evolved and expanded significantly. The FTC can now seek consumer redress, impose penalties for order violations, and create rules that provide a path for monetary relief. Moreover, in the past 20-30 years, the FTC has increasingly resolved disputes not through cease-and-desist orders but through consent order agreements obtained either administratively or judicially, which allow businesses to settle charges without admitting liability.

There are many reasons why a company might sign a consent order: to avoid the potentially negative publicity associated with litigating against the FTC, to evade a costly and prolonged lawsuit, or to combat internal disruptions to its operations, among other reasons. But settling with the Commission comes with its own costs. Consent orders contain several prescriptive and proscriptive requirements, such as provisions requiring monetary payment, injunctive relief barring the allegedly unlawful conduct, supplemental relief prohibiting conduct different from (but related to) the unlawful conduct (i.e., fencing-in relief), and other affirmative obligations, including customer notice, recordkeeping, and compliance reporting provisions. Complying with such provisions is often expensive, time consuming, and resource intensive.

From 1914 to 1995, FTC consent orders—whether entered administratively by the Commission or judicially by federal courts—had no expiration dates, remaining in effect indefinitely. In 1995, however, the FTC announced via policy statement that its administrative orders would no longer last in perpetuity and would instead "sunset" after 20 years, while federal court orders would continue to permanently bind companies.

Although this policy shift was a step in the right direction, 20-year and indefinite order terms are simply not sensible or desirable. Specifically, long-term orders are (i) incongruous with the FTC's evolution, resulting in order terms that are not necessary to deter recidivism; (ii) inconsistent with, and far longer than, the

[1] Woodrow Wilson, President of the United States, An Address on Antitrust Legislation to a Joint Session of Congress (Jan. 20, 1914), https://perma.cc/9TTM-RDAY.

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order terms used by other federal agencies; (iii) unduly burdensome in today's competitive environment; and (iv) a hindrance to innovation. The FTC's lengthy order terms are exacerbated by the unworkable processes for early termination or modification of administrative and federal court orders, which few companies have been willing or able to successfully pursue. Thus, businesses under FTC order are often saddled with onerous and antiquated requirements, with little to no meaningful recourse.

This *Working Paper* explains why the FTC should depart from its 20-year sunset policy for administrative orders and reconsider its practice of seeking perpetual orders in federal court. In revising these policies and practices, we propose three approaches for the Commission to consider, each designed to better balance consumer welfare with the need to support legitimate, innovative business activity.

First, the Commission could consider adopting a flexible approach that allows for different sunset terms based on the specific factual and legal circumstances of each case. Through such an approach, the FTC could weigh the pro-competitive and pro-consumer benefits of a particular expiration term against any countervailing considerations.

Second, in the alternative the Commission should consider adopting a five-year sunset policy. Such an approach would, among other things, bring the FTC closer to other federal agencies on the issue of order termination, better align with the current pace of technological innovation and consumer expectations, and benefit the marketplace by providing clear expectations to stakeholders.

Third, the FTC could consider adopting a ten-year sunset policy that also permits parties to negotiate shorter termination periods for certain order provisions as the facts and law warrant. This approach offers the flexibility to extend the effective dates of certain provisions while allowing others to lapse, particularly where requirements are highly prescriptive and burdensome, or where technological advancements, evolving business practices, or shifting consumer expectations render them obsolete.

Any of these three approaches should also be coupled with an adjusted order modification and termination process that allows businesses demonstrably committed to compliance (e.g., where an independent compliance monitor has certified a company's compliance), to petition for modification or early termination if certain criteria are met.

Section I of this *Working Paper* discusses the history of the FTC and its orders. Section II explains why the FTC's current approach to order termination is not workable and needs reform. Section III recommends that the Commission adopt a new approach to order sunsetting and revise its termination and modification procedures, outlining potential frameworks for these proposed changes.

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I. HISTORY OF THE FTC AND ITS AUTHORITY

A. The FTC in 1914

In 1914, President Woodrow Wilson signed into law the Federal Trade Commission Act (the "FTC Act"), which established the Federal Trade Commission.[2] In creating the FTC, President Wilson envisioned an administrative body that would serve as a trusted advisor to the business community on unfair methods of competition, explaining that businesses "desire the advice, the definite guidance and information which can be supplied by an administrative body[.]"[3] To fulfill this mandate, Section 5 of the FTC Act of 1914 stated that "unfair methods of competition in commerce are hereby declared unlawful" and empowered the FTC to define what those methods might be.[4]

Although the FTC was given broad substantive authority, Congress granted the Commission limited enforcement methods. The statute permitted the Commission, whenever it had "reason to believe" a Section 5 violation had occurred (or was occurring), to issue a complaint and hold a hearing to determine whether to issue a cease-and-desist order banning the unlawful conduct.[5] The Commission would then "make a report in writing in which it [stated] its findings as to the facts" and serve the cease-and-desist order.[6]

If a party refused to obey the cease-and-desist order, the FTC could not levy penalties—instead, the Commission was required to request a federal court to review the agency's order.[7] The FTC's findings of fact were to be treated by

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[2] Pub. L. No. 63–203 § 3 (1914) [hereinafter FTC Act of 1914]; *see also Our History*, Federal Trade Commission, https://perma.cc/2HMH-X48M.

[3] Wilson, *supra* note 1.

[4] *See* FTC Act of 1914 § 5(b).

[5] *Id.*

[6] *Id.*

[7] *See id.* § 5(c).

the court as conclusive, but the FTC Act was silent as to whether the FTC's determinations held the weight of law.[8] If the court affirmed the Commission's order, the court would then issue its own order "commanding obedience" with the terms of the Commission's order.[9] If the business refused to comply, it could be subject to contempt proceedings for violating the court's order. In other words, "[a]ny punishment would be for contempt of the reviewing court's order after said court had affirmed the FTC's order, not strictly for violation of the Commission's order."[10]

B. The FTC in 1938

In 1938, Congress passed the Wheeler-Lea Act, which expanded the FTC's substantive authority to encompass "unfair or deceptive acts or practices" in addition to unfair methods of competition.[11] Importantly, this amendment also "put[] some teeth into the orders of the [Commission]."[12] The amendment provided that cease-and-desist orders would become final and enforceable 60 days after their issuance, even without a court's order, and permitted the FTC to collect civil penalties of up to $5,000 per violation[13]—transforming the FTC's orders from "mere exhortations to penalty-backed commands."[14] Still, the amendment "kept a meaningful limitation on the FTC's power": the FTC had to seek the Attorney General's assistance in bringing suit to recover penalties—the

[8] *See id.* (explaining that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" but remaining silent as to the legal weight of Commission findings).

[9] *Id.*

[10] Eli Nachmany, *The Original FTC*, 77 Ala. L. Rev. (forthcoming 2025) (quoting *The Federal Trade Commission Act of 1938,* 39 Colum. L. Rev. 259, 270 (1939)) (internal quotation marks omitted).

[11] Wheeler–Lea Amendments of 1938 [hereinafter Wheeler-Lea Amendment], § 1, Pub. L. No. 75-447, 52 Stat. 111, 111 (1938).

[12] *The Federal Trade Commission Act of 1938*, 39 Colum. L. Rev. 259, 270 (1939).

[13] *See* Wheeler-Lea Amendment § 3.

[14] Nachmany, *supra* note 10, at 44.

FTC could not do so on its own accord.[15]

C. The FTC in 1973

In 1973, Congress once again amended the FTC Act, amplifying the penalties for non-compliance with Commission orders from $5,000 to $10,000, and permitting the FTC to bypass the Department of Justice when bringing actions for violations of cease-and-desist orders.[16] This legislation also authorized the Commission to go to a United States district court to obtain temporary or preliminary injunctions and, in appropriate cases, permanent injunctions.[17]

Two years later, Congress passed into law the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act of 1975, which detailed a process for the FTC to create rules relating to unfair or deceptive acts and practices.[18] The statute allowed for penalties for each violation of a rule made through this process, greatly expanding the FTC's ability to obtain monetary relief.[19]

The FTC's enforcement powers also grew through the addition of Section 19 to the FTC Act, which allowed the Commission to seek consumer redress—such as "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice"—for either violating a Magnuson-Moss rule or for engaging in unfair or deceptive acts or practices that "a reasonable man would have known under the circumstances was dishonest

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[15] *See id.*

[16] Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93–153, 87 Stat. 576, 591–92 (1973).

[17] *See id.*

[18] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93–637, 88 Stat. 2183, 2193 (1975).

[19] *Id.* at 2201.

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or fraudulent."[20]

D. The FTC Today

Since 1975, the FTC has used its toolbox to implement several rules permitting civil penalties and has explored a number of novel theories for obtaining monetary relief. Most importantly for purposes of this *Working Paper*, however, is the FTC's recent and increasing reliance on consent orders obtained administratively or judicially to settle disputes.

Today, if the FTC elects to proceed through its administrative process, the Commission issues the company both (i) a complaint setting forth its charges, which the company can dispute through the FTC's administrative tribunal and (ii) a consent agreement, which the company can sign without admitting liability if it prefers to settle the dispute.[21] If the business decides to settle, both parties sign the consent agreement, and the Commission places the agreement on the record for 60 days for public comment.[22] If the Commission then decides to make the agreement final, the agreement becomes a binding order on the company (an "administrative order").[23] Using the tools the FTC has gained over the past 100 years, the agency can seek penalties for violations of these administrative orders.

The FTC can also settle a dispute judicially. While the FTC historically sought temporary injunctions in support of its own administrative proceedings, it has, since the 1980s, increasingly settled matters by filing proposed permanent injunctions in federal court, which the court can then enter (a "federal court order," and together with administrative orders, "consent orders"

[20] *See* 15 U.S.C. § 57b.

[21] *See id.*; *see also A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Federal Trade Commission (revised May 2021), https://perma.cc/AZS6-DLEW (last visited May 30, 2025).

[22] *See* 16 C.F.R. §§ 2.34(a), (c)-(d); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Federal Trade Commission (revised May 2021), https://perma.cc/PQK5-ERNM (last visited May 30, 2025).

[23] *See* 16 C.F.R. § 2.34(e).

or "orders").[24]

Administrative and federal court orders generally place the same types of obligations on companies. First, orders contain core injunctive provisions barring the unfair or deceptive conduct alleged to be unlawful.[25] Second, consent orders today generally include "fencing-in" relief, which prohibits conduct different from but related to the allegedly unlawful conduct (or the same conduct in a different context).[26] Third, orders include a number of other affirmative provisions, including customer notice provisions, recordkeeping obligations, compliance reporting requirements, and more.[27] Lastly, orders often require businesses to pay a sum of money.[28]

[24] The FTC may elect to seek an order from a federal district court under Sections 13(b) or 19 of the FTC Act. *See, e.g.*, *Fed. Trade Comm'n v. Herbalife Int'l of America, Inc. et al.*, No. 2:16-cv-05217-BRO-GJS (C.D. Cal. July 25, 2016); *Fed. Trade Comm'n v. Rite Aid Corp. et al.*, No. 2:23-cv-05023 (E.D. Pa. Dec. 19, 2023). Section 13(b) of the FTC Act (15 U.S.C. § 53(b)) allows the FTC to seek preliminary and, in some cases, permanent injunctions against companies that are violating, or about to violate, any law the Commission enforces. However, the Supreme Court's ruling in *AMG Cap. Mgmt. v. Fed. Trade Comm'n* limited the FTC's ability to seek monetary relief under this section, meaning that courts can no longer award restitution or disgorgement in these cases. *See* 593 U.S. 67 (2021). As discussed above, Section 19 (15 U.S.C. § 57b) authorizes the FTC to seek consumer redress in federal district court for either (1) violations of FTC trade regulation rules, or (2) acts or practices as to which the Commission had issued a final cease and desist order, if the Commission "satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent[.]" 15 U.S.C. § 57b(a)(2).

[25] *See, e.g.*, Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569, 42,570 n.1 (Aug. 16, 1995) (describing the existence of "core provisions" in administrative orders that "prohibit practices that would be unlawful whether used by parties subject to the order at issue or by other similarly situated persons or entities.").

[26] *See id.* at 42,571 (describing the existence of fencing-in provisions in administrative orders that prohibit practices "like and related" to the underlying allegedly illegal conduct).

[27] *Id.* at 42,573 n.18 (describing the existence of other supplemental relief such as "recordkeeping, order distributing, and reporting requirements"); *see also id.* at n.17 (explaining that "[s]upplemental relief in consumer protection orders tends to be more detailed in its prohibitions than core relief, and thus more potentially burdensome").

[28] *Id.* at n.13 (explaining that "the Commission may also impose or seek types of relief in administrative orders that … have no further effect once the actions they require have been taken. For example, some orders require the payment of redress to consumers … [or] the payment of disgorgement to the United States Treasury").

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Even though administrative orders and federal court orders contain the same general obligations, they bind companies for different amounts of time, with administrative orders lasting 20 years and federal court orders lasting indefinitely. This was not always the case, though.

Prior to 1995, administrative orders' core and fencing-in provisions generally lasted indefinitely, while supplemental provisions typically terminated after a specified period (often five or ten years).[29] On August 16, 1995, however, the FTC issued a policy statement announcing that ***all*** provisions in administrative orders would ordinarily terminate after 20 years (the "Policy Statement").[30] The Policy Statement did not affect the FTC's practice of terminating certain supplemental provisions in administrative orders earlier than 20 years.[31]

But the Policy Statement did not extend to federal court orders. Although federal court orders can be terminated only by the judge who entered the order, the FTC may include language in the order that limits a party's compliance obligations to a specified time period, and/or may file a motion with the court

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[29] *Id.* at 42,571 (explaining that certain supplemental provisions "terminate after a specified period of time, usually five or ten years").

[30] *Id.* at 42,569 ("Under this Policy Statement, the Commission will ordinarily terminate ('sunset') future competition and consumer protection administrative orders automatically after twenty years unless the Commission or the Department of Justice has filed a complaint (with or without an accompanying consent decree) in federal court to enforce such order pursuant to Section 5(1) of the Federal Trade Commission Act").

[31] *Id.* at 42,571 ("This will not affect the current practice of terminating certain supplemental provisions earlier than twenty years (e.g., provisions requiring distribution of the order)"). In the Policy Statement, the FTC also announced its intent to promulgate a rule that would terminate then-current administrative orders automatically after 20 years, explaining that a longer duration may be necessary for companies that had been subject to enforcement actions after entry of their orders. *See, e.g.*, *id.* at 42,569 ("The Commission also intends to terminate each existing administrative order twenty years after it was issued . . . . The Commission intends to implement its new policy with respect to existing administrative orders through rulemaking."). That rule became effective on January 2, 1996 and terminated thousands of existing administrative orders that were at least 20 years old at the time. *See, e.g.*, *FTC Says Hello to 1996 by Waving Goodbye to Thousands of Administrative Orders That Are At Least 20 Years Old*, Federal Trade Commission (Dec. 20, 1995), https://perma.cc/EM62-UW76 (last visited May 30, 2025) (explaining that the rule would "wav[e] goodbye to thousands of administrative orders that [were] at least 20 years old.").

seeking termination of the federal court order. Nevertheless, the FTC declined to address federal court orders through the Policy Statement because, as of 1995, no such orders "ha[d] been in force for twenty years" and because such orders traditionally "address[ed] particularly egregious conduct such as hard core fraud."[32] Therefore, the Commission reasoned that it had "significantly less experience on which to conclude that such orders serve their purpose after twenty years."[33] Today, federal court orders effective in perpetuity account for many of the orders the FTC enters, even in cases where the FTC did not allege "hard core fraud."[34]

II. FTC ORDER TERMS ARE UNNECESSARY, BURDENSOME, AND IN NEED OF REFORM

A 20-year term for administrative orders and a perpetual term for federal orders is not workable. As detailed below, these timeframes: (A) are incongruous with the way the FTC has evolved, resulting in lengthy orders that no longer deter recidivism; (B) do not comport with the sunset policies used by other federal agencies; (C) subject businesses to expensive, resource-heavy, and time-intensive order requirements for many decades; (D) fail to align with today's rapid pace of innovation; and (E) are exacerbated by the fact that there is no meaningful recourse for companies looking to modify or preemptively terminate their orders.

A. The FTC's Order Terms Have Not Evolved Along with the Agency

The FTC has evolved substantially since the agency's creation, but order

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[32] *Id.* at 42,573.

[33] *Id.* at 42,571.

[34] *See id.* at 42,573; *see also FTC Stakeholder Perspectives: Reform Proposals to Improve Fairness, Innovation, and Consumer Welfare*: *Hearing Before the S. Comm. on Commerce, Science and Transp.* (2017) (statement of William Macleod), https://perma.cc/5V6B-8TV3 ("To this day, most of those orders are perpetual, and they now account for two-thirds of the orders the FTC enters").

terms have not kept pace—resulting in lengthy orders that are not necessary to deter law violations.

As originally envisioned, the FTC could only issue cease-and-desist orders that prospectively banned a business's unlawful conduct—it could not seek redress or impose penalties for the unlawful conduct.[35] In this context, an indefinite order term banning the core practice had a clear rationale: the business's pre-order violations were, in effect, free, but a subsequent order violation would allow the FTC (or the Department of Justice (DOJ) on the FTC's behalf) to seek penalties.[36] A 20-year or indefinite order term thus gave the FTC a longer period to potentially obtain monetary relief, and deterred businesses seeking to avoid penalties from committing post-order violations.

That is a quite different FTC from the one that exists today. The FTC now has a number of ways to obtain monetary relief in the first instance and has issued a number of rules—the Telemarketing Sales Rule,[37] the Children's Online Privacy Protection Act, the CAN-SPAM Act, and the Return Online Shoppers' Confidence Act, to name a few—that specifically authorize civil penalties for violations. Moreover, unlike the prior FTC, the current FTC settles most of its matters through consent orders, not administrative cease-and desist orders—meaning it can, and does, obtain sizeable monetary remedies in the first instance. As the Commission's ability to obtain monetary relief at the outset has expanded, the rationale for lengthy, even perpetual, orders is substantially undermined, if it remains valid at all.

A review of recent FTC order enforcement actions exemplifies that lengthy order terms are not necessary to deter legal violations. Indeed, FTC order violations generally arise within the first few years after order entry. For example, since January 2018, the Commission has initiated at least 21 actions

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[35] *See supra*, Subsection I.A.

[36] *Id.*

[37] 16 C.F.R. Part 310.

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against individuals or businesses already under an FTC order.[38] Of those 21 actions, 17 (80.9%) of them were initiated within the first ten years after order entry, and 12 (57.1%) were brought within the first five years.[39] A 20-year order or indefinite order term is therefore vastly overbroad and not necessary from a deterrence perspective.[40]

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[38] In the Matter of Chemence, Inc. et al., FTC Matter No. X16-0032 (Dec. 22, 2020) (order entered in 2016); *Fed. Trade Comm'n v. Noland, et al.*, No. 2:20-cv-00047-PHX-DWL (D. Ariz. Jan. 17, 2020) (order entered in 2002); *Fed. Trade Comm'n v. Gravity Defyer Med. Tech. Corp.*, No. 1:22-cv-01464-RDM, (D.D.C. May 25, 2022) (order entered in 2001); *Fed. Trade Comm'n v. NutraClick, LLC et al.*, No. 2:20-cv-08612 (C.D. Cal. Sept. 21, 2020) (order entered in 2016); *United States v. Twitter, Inc.*, No. 3:22-cv-03070-TSH (May 25, 2022) (order entered in 2011); In the Matter of Resident Home LLC et al., FTC Matter No. 202-3179 (June 22, 2022) (order entered in 2021); *United States v. Williams Sonoma, Inc.*, No. 3:24-cv-02396 (N.D. Cal. Apr. 22, 2024) (order entered in 2020); *United States v. ByteDance, et al.*, No. 2:24-cv-06535 (C.D. Cal. Aug. 2, 2024) (order entered in 2019); *United States v. Facebook, Inc.*, No. 1:19-cv-02184 (D.D.C. July 24, 2019) (order entered in 2012); *United States v. Facebook, Inc.*, No. 1:19-cv-02184 (D.D.C. May 3, 2023) (modified order entered in 2020); *Fed. Trade Comm'n v. Health Research Labs. LLC et al.*, No. 2:17-cv-00467-JDL (D. Maine Dec. 17, 2019) (order entered in 2018); *Fed. Trade Comm'n v. Moneygram Int'l, Inc.*, No. 09-cv-6576 (N.D. Ill. Nov. 8, 2018) (order entered in 2009); *Fed. Trade Comm'n v. Springtech 77376, LLC, et al.*, No. 4:12-cv-4631-PJH (N.D. Cal. Jan. 9, 2018) (order entered in 2013); *Fed Trade Comm'n v. Gotra et al.*, No. 1:18-cv-10548 (D. Mass. Mar. 22, 2018) (order entered in 2014); In the Matter of Uber Tech., Inc., FTC Matter No. 152-3054 (Apr. 11, 2018) (order entered in 2017); *Fed. Trade Comm'n v. Interbill, Ltd., et al.*, No. 2:06-cv-01644-JCM-PAL (D. Nev. Apr. 10, 2019) (order entered in 2009); *Fed. Trade Comm'n v. iSpring Water Systems, LLC*, No. 1:16-cv-01620-AT (N.D. Ga. Apr. 10, 2019) (order entered in 2017); *Fed. Trade Comm'n v. Rite Aid Corp.*, No. 2:23-cv-05023 (E.D. Pa. Dec. 19, 2023) (order entered in 2010); *Fed. Trade Comm'n v. Harris Originals of NY, Inc., et al.*, No. 2:22-cv-04260 (E.D.N.Y. Nov. 13, 2024) (order entered in 2022); *Fed. Trade Comm'n v. Gravity Defyer Med. Tech. Co.*, No. 1:22-cv-01464-RDM (D.D.C. Jan. 15, 2025) (modified order entered in 2022); *Fed. Trade Comm'n v. Impetus Enter., Inc., et al.*, No. 8:18-cv-01987 (C.D. Cal. Nov. 6, 2018) (order entered in 2016).

[39] *See id.*

[40] Many of the FTC's most significant order enforcement actions have fallen within these time frames. For example, in August 2012 the FTC asserted that Google had misrepresented its tracking pixel practices to users of Apple Safari in violation of an October 2011 order that barred Google from, among other things, misrepresenting the extent to which consumers can control the collection of their personal information. At the time, this $22.5 million order violation settlement—which occurred one year after order entry—was the largest FTC penalty for violation of a Commission order. *See Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser*, Federal Trade Commission (Aug. 9, 2012), https://perma.cc/E6N8-QCDF (last visited May 30, 2025) (describing order enforcement action); *Decision and Order*, In the Matter of Google, Inc., FTC Matter No. 102-3136, (Oct. 24, 2011), https://perma.cc/49H5-7X79.

B. The FTC's Orders Are Significantly Longer Than Other Agencies' Orders

Congress intended for the FTC to define the law, not punish individual companies for conduct of previously ambiguous legal status. Because the original structure and purpose of the FTC, which led to lengthy orders, no longer retains vitality, comparison with other agencies is especially apt. That comparison reveals FTC order terms are inconsistent with—and far longer than—order terms used by agencies with similar authority.[41]

For example, administrative orders issued by the Consumer Financial Protection Bureau (CFPB) generally have a five-year term—15 years shorter than the length of FTC administrative orders (and significantly shorter than federal court orders, which last in perpetuity)—notwithstanding the fact that the CFPB, unlike the current FTC, has regularly been referred to as "anti-business."[42] In fact, 73% of CFPB orders issued since May 2023 expressly terminate entirely after five years, and an additional 13% terminate after five years but contain carveouts for specific provisions that last longer. Moreover, 5% of the CFPB's

Similarly, although the FTC first entered an order against Facebook in 2011, it modified that order in 2020 following a $5 billion settlement related to allegations that the company had deceived users about their ability to control the privacy of their personal information. Then, following that 2020 modification, the FTC alleged in 2023 that Facebook had failed to comply fully with the modified order and misled parents about their ability to control their children's actions on Facebook's platform. *United States v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 24, 2019) (enforcement action alleging violations of order entered in 2012). *United States v. Facebook*, *Inc.*, No. 19-cv-2184 (D.D.C. May 31, 2023) (enforcement action alleging violations of modified order entered in 2020).

[41] In addition to being inconsistent with other agencies, FTC order terms are inconsistent with the Commission's own application of the Regulatory Flexibility Act (the "RFA"), through which the agency reviews its guides and regulations every ten years "to ensure they remain relevant and … not unduly burdensome." *See* 5 U.S.C. §§ 601–612 (1980). A bipartisan Congressional mandate, the RFA has been a hallmark of responsible federal regulation for four decades. However, regulations that come in the form of FTC orders are not included in RFA reviews, even though such regulations now amount to tens of thousands of pages of specific requirements that can handicap a company and the economy.

[42] *See, e.g.*, *Nomination of Gary Gensler and Rohit Chopra: Hearing Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 117th Cong. 3 (2021) (opening statement of Sen. Pat Toomey) (calling CFPB a "hyperactive, often lawbreaking, antibusiness agency").

orders expressly terminate after seven or ten years. The varied order terms the CFPB uses suggest that the Bureau, unlike the FTC, contemplates the likely benefits and costs of a particular order term as applied to a particular case.

The Federal Communications Commission's (FCC) orders are even shorter than the CFPB's. Nearly two-thirds (65.7%) of FCC orders since May 2023 expire after three years, and an additional 2.9% expire after three years but contain a provision allowing the FCC to seek a 12-month extension if the business violates the order. 11.5% of FCC orders since May 2023 expire in two years or less (some with a provision allowing a 12-month extension), and 8.6% expire after four years. Again, the FCC's use of varied order durations indicates that the FCC pays careful attention to the question of what order duration is necessary or appropriate in a particular matter.

C. FTC Orders Are Unduly Burdensome Over the Course of 20 Years or More

FTC order terms are not only unnecessary from a deterrence perspective and dissimilar to those used by other agencies, but they are far too long given the extraordinary burdens and compliance challenges that FTC orders present. While the burden on companies under FTC order has always been acute, that burden is amplified considering the types of order provisions the Commission utilizes today.

First, as described above, the Commission generally includes in its consumer protection orders "fencing-in" relief designed to prohibit future unlawful conduct beyond what was declared unlawful in the underlying investigation.[43] For example, in matters involving allegedly unsubstantiated claims about the efficacy of a particular dietary supplement, the Commission typically includes an order provision requiring the company to obtain scientific

[43] *See, e.g.*, *Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) ("The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. Having been caught violating the Act, respondents must expect some fencing in.") (internal quotation marks and citation omitted).

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substantiation for any express or implied claim about the health benefits, efficacy, or performance of any health product.[44] Such provisions are often overbroad, anticompetitive, and vague. They are overbroad because they typically apply to any product the company has—or has yet to—develop over the course of many decades. They are unduly restrictive because they often ban conduct that is not necessarily illegal and raise a business's costs of innovation and communication above those of its competitors.[45] Moreover, fencing-in provisions are vague because it is unclear which implied claims the FTC would derive from any given advertisement or what level of substantiation it would require.

While these dynamics traditionally presented compliance challenges, that burden is heightened today. For instance, companies are advertising more, and through more channels, as compared to two decades ago, meaning the number of advertising practices and claims companies must review for compliance with FTC guidance has skyrocketed.[46] In turn, companies under order must devote substantially more time and resources to compliance, particularly compared to their competitors. Moreover, in recent years, the FTC's guidance and legal interpretations have fluctuated significantly from one administration to another[47]—a reality that is particularly frustrating for companies that face

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[44] *See, e.g.*, *POM Wonderful v. Fed. Trade Comm'n*, 777 F.3d 478, 505 (D.C. Cir. 2015).

[45] For example, the FTC's fencing-in relief in health-related matters is often more stringent than what the FDA requires. *See, e.g.*, *Concurring Statement of Commissioner Maureen K. Ohlhausen*, In the Matter of POM Wonderful (FTC Docket C-9344) (Jan. 10, 2013), https://perma.cc/E6GN-KRRV ("I am concerned that the majority's interpretation of certain exhibits blurs these boundaries and creates an inconsistency between FTC advertising requirements and FDA food labeling and advertising requirements").

[46] *See, e.g.*, Christine Moorman et al., *How the Pandemic Changed Marketing Channels*, Harvard Bus. Rev. (2023), https://perma.cc/B4X7-VVEP (explaining that 77% of business-to-consumer marketers have, since 2020, increased the number of marketing channels they use) (last visited May 30, 2025).

[47] *See, e.g.*, *Health Products Compliance Guidance*, Federal Trade Commission (Dec. 2022), https://perma.cc/QZG7-VL87 (last visited May 30, 2025) (departing from traditional totality of the evidence standard in health claims and announcing, without comment, a new requirement of randomized, controlled human clinical testing).

numerous administration changes over the course of a 20-year, or perpetual, order.

Second, separate from core and fencing-in relief, FTC orders also contain various affirmative obligations that require a substantial investment of time and money from companies. These affirmative obligations have traditionally involved things like recordkeeping, customer notice, and compliance reporting requirements, but more recently have also involved the implementation of detailed and prescriptive compliance programs and third-party monitoring.

For example, data privacy and security orders (let alone such specific and burdensome provisions) did not exist when the FTC crafted its current approach to order sunsetting and impose financial costs and present compliance burdens far beyond what would have been anticipated at that time.

In data privacy-related actions, the FTC often requires businesses to implement a comprehensive privacy program. While that is becoming a norm in today's competitive environment, companies under privacy order are also regularly required to engage, and bear the cost of, a third-party assessor that is subject to FTC staff approval. These assessors must perform—and submit to the FTC—a yearly or biennial assessment of the company's comprehensive program that describes whether the company has implemented and maintained the required privacy program, the effectiveness of the privacy program, any gaps or weaknesses in the program, and each piece of specific evidence used to make these determinations. In addition, as part of the assessment, the company under order must cooperate with the assessor by "provid[ing] or otherwise mak[ing] available all information and material in their possession, custody, or control" that is relevant to the assessment.[48] Apart from the assessor, companies under a privacy order generally must provide an evaluation of the privacy program to company executives at least every 12 months from the order

[48] *See, e.g.*, *Decision and Order*, In the Matter of Avast Ltd., et al., FTC Matter No. 202-3033 (Feb. 22, 2024), https://perma.cc/QY2T-CCHT.

entry date, establish privacy training programs to occur at least every 12 months, appoint a chief privacy officer and designated privacy personnel, and more.[49] In all, these provisions require the company to expend time and resources on audits, and to adhere to a rigid schedule that may conflict with other of the company's internal and external commitments.

Likewise, in data security matters, the Commission often requires businesses to obtain third-party assessments of the company's information security programs, which similarly require the company to cooperate with an assessor who submits annual or biennial reports detailing whether the company has implemented an information security program, the effectiveness of the company's information security program, any gaps or weaknesses in the program, and specific evidence reviewed in making those determinations. In addition to cooperating with the assessor by providing it with material information, companies under security orders must make available to the assessor "information about [their] network(s) and all of [their] IT assets . . . and [provide] visibility to those portions of the network(s) and IT assets deemed in scope."[50] Such requirements are burdensome over the course of one year and are immensely so over multiple years.

Setting aside data privacy and security orders, the Commission also sometimes requires companies to submit to, and pay for, independent compliance monitors that review and assess their compliance with order requirements. Such provisions may require a company, for example, to grant the auditor "unfettered" access to documents, personnel, and premises in its possession or control, cooperate with the auditor's requests, indemnify the auditor against claims, and permit the auditor to submit a biannual or annual

[49] *Id.*

[50] *See, e.g.*, *Decision and Order*, In the Matter of Chegg, Inc., FTC Matter No. 202-3151 (Jan. 25, 2023), https://perma.cc/GG7R-FFMT.

compliance report to the FTC.[51] Even where the company under audit demonstrates compliance every year, this provision—which had not been used in pre-1995 orders—continues to bind the business for two or more decades.

Even the more traditional affirmative obligations, such as recordkeeping, are more onerous today than in 1995. For example, not only are companies often required to maintain paper copies of documents as would have been contemplated in 1995—which is burdensome in today's modern era—but they also may have to retain email communications relating to the consent order. This requires a company to determine a way to isolate such emails and potentially subject them to a retention schedule different from other company communications. Toys "R" Us described experiencing these very burdens in a 2014 petition to reopen and modify its FTC competition order, explaining that the recordkeeping provision in its consent order "call[ed] for the indefinite retention of email, non-email electronic documents, and hard copy documents for all employees in specified document retention positions."[52] According to Toys "R" Us, this "result[ed] in hundreds of employees being subject to this policy, with hundreds of man-hours spent learning the retention parameters, training employees, and retaining non-email electronic and hard copy documents at the time of an employee's departure."[53]

In short, today's consent orders require a substantial investment over the course of 20 years or more. The time and resources spent complying with an often-decades old order is time that the business could otherwise spend competing in the marketplace and creating products and processes that benefit consumers.

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[51] *See, e.g.*, *Fed. Trade Comm'n v. Western Union Co.*, No. 1:17-CV-0110 (M.D. Pa. Jan. 20, 2017), https://perma.cc/CE4H-SHN4.

[52] *Petition of Toys "R" Us, Inc. to Reopen and Modify Final Order*, In the Matter of Toys "R" Us, FTC Docket No. 9278 (Jan. 3, 2014) at 25, https://perma.cc/QGU4-6YU4. The FTC approved the company's request to reopen and modify this competition order.

[53] *Id.*

D. The FTC's Approach Does Not Align with Today's Pace of Innovation

When the FTC last visited its approach to order expiration in 1995, traditional advertising methods—such as print, broadcast, and direct mail—dominated commercial communications, as they had for decades. Since then, the advertising landscape has expanded dramatically, giving rise to a multitude of new platforms and tools, including social media, influencer marketing, search engines, and targeted and native advertisements, as well as AI-generated content. These advertising mechanisms continue to evolve rapidly, with major changes occurring every few months, not decades.[54] Because FTC orders have such lengthy terms, businesses are unable to match today's accelerated pace of technological advancement.

1. FTC Orders Stifle Innovation and Useful Corporate Practices

The 20-year timeframe for administrative orders and the perpetual timeframe for federal orders has the effect of suppressing innovation and entrepreneurship. Indeed, companies may be hesitant to create and invest in new products, processes, or compliance techniques that may be of great benefit to consumers and the marketplace because they fear violating an order entered many years in the past. As was explained in the Presidential Transition Task Force Report, submitted by the American Bar Association Antitrust Law Section prior to the inauguration of President Trump in 2017, "[e]specially 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

[54] *See, e.g.*, *FTC Announces Regulatory Reform Measures Ranging from TVs and Textiles to Energy Labels and Email*, Federal Trade Commission (June 22, 2017), https://perma.cc/2ZV7-HJXW (acknowledging that the FTC should "take[] steps to ensure that its rules and guides keep pace with technological advances in the marketplace").

later, and may serve to chill innovative and useful corporate practices."[55]

As one example of an order chilling innovation, in 2009 the FTC entered an order against Sears Holding Management Corporation ("Sears") based on a determination that the company had "disseminated a desktop software application through its websites that contained inadequate disclosures regarding the scope of the application's data collection."[56] The order required Sears, among other things, to distribute all "tracking applications" (a defined term in the order) in a specific manner and to make and obtain certain disclosures and consumer consents.[57] In a 2017 motion to reopen and modify its consent order, Sears expressed that it was purporting to transform from a "brand-driven, brick-and-mortar retailer" to one that utilizes "digital commerce and marketing channels" to better serve consumers.[58] Sears argued that the order, which broadly applied to all tracking applications, such as mobile applications, inhibited its ability to achieve its strategic vision and adapt to an evolving marketplace. It further asserted that the order negatively impacted consumers by requiring consents and disclosures that did not align with consumer expectations and by prohibiting Sears from engaging in certain forms of "tracking" that may benefit consumers by, for example, improving the functionality of Sears' mobile applications.[59]

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[55] *Presidential Transition Report: The State of Antitrust Enforcement*, American Bar Association Antitrust Law Section (Jan. 2017) at 30, https://perma.cc/3ZQL-4RBT.

[56] *See Petition of Sears Holding Management Corporation to Reopen and Modify Final Order*, FTC Matter No. C-4264 (Oct. 30, 2017), https://perma.cc/C3WP-KE5G at 1 (describing *Decision and Order*, In the Matter of Sears Holding Mgmt, Corp., FTC Matter No. 082-3099 (Aug. 31, 2009), https://perma.cc/H4AE-AXGA).

[57] *See Decision and Order*, In the Matter of Sears Holding Mgmt., Corp., FTC Matter No. 082-3099 (Aug. 31, 2009), https://perma.cc/CT8C-NC6H).

[58] *See Petition of Sears Holding Management Corporation to Reopen and Modify Final Order*, FTC Matter No. 082-3099 (Oc. 30, 2017) at 15, https://perma.cc/5FZZ-XL88.

[59] *Id.* As discussed further in Subsection II.E, *infra*, the FTC ultimately granted Sears' petition for modification—the only instance in which the FTC has fully granted a modification to a consumer protection administrative order since 1995. This action highlights, however, that Sears was burdened with both petitioning for modification, an expensive and time-

2. FTC Orders Bind Companies to Antiquated Ideologies, Technologies, and Rules

The FTC's approach often binds a business to outdated ideologies, technologies, and "regulations [that] were enacted decades ago in very different economic and technological environments,"[60] creating unnecessary compliance burdens and disadvantaging the company compared to its competitors.

For instance, some companies are bound by recordkeeping provisions that are diametrically opposed to today's understanding of appropriate data retention practices, such as data minimization. A 2002 federal court order against GM Funding, Inc. ("GM"), that is still in effect today, exemplifies this reality. The order requires GM to retain—in perpetuity—"any documents that relate to [its] business practices or business or personal finances" including "consumer and financial information obtained through or as a result of email solicitations, computers, computerized files, … World Wide Web pages," and more.[61] Obviously, retaining any record that "relates to" GM's business is incredibly burdensome, requires impressive and likely expensive storage capabilities, and is unnecessary in a regulatory environment that promotes data minimization. What is more, under the order, GM is prohibited from deleting a broad swath of consumer personally identifiable information, including financial information, even where there is no business reason for the retention.[62]

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consuming process in its own right, in addition to adhering to its order requirements which, as the petition highlights, stunted the company's ability to grow and innovate.

[60] *Remarks of Acting Chairman Maureen K. Ohlhausen, The FTC at 100 [Days]*, Federal Trade Commission (May 3, 2017) at 9, https://perma.cc/5URN-W5TG ("Finally, as many of you are aware, the FTC was founded way back in 1914. During that time, we have naturally accumulated some rust and barnacles. Although we are primarily an enforcement agency, we do have a few regulations in place. Some of our regulations were enacted decades ago in very different economic and technological environments. Therefore, I've directed FTC staff to review our regulations to see which may have outlived their usefulness and whether we can leverage new technologies to make the existing rules more efficient and effective.").

[61] *Fed. Trade Comm'n v. GM Funding, Inc. et al.*, No. 8:02-cv-1026-D)C (C.D. Cal. Nov. 27, 2002), https://perma.cc/BW8K-Q2SX.

[62] *Id.*

This is completely incongruous with the FTC's current guidance on appropriate data retention policies and does not align with consumer expectations regarding the use and storage of their data.[63]

Additionally, the FTC's current approach often binds companies to antiquated rules and technologies. For example, according to Sears in its motion to reopen and modify (discussed on pages 19–20, *supra*), in the eight years since entry of Sears' order, desktop applications had "fallen out of favor in the marketplace" in favor of "app stores operated by Apple and Google" due to an "exponential growth in the use of smartphones and tablets."[64] Sears argued that, despite this "paradigm shift," the order's "broad definition of 'tracking application,' nonetheless encompasse[d] all of Sears' current mobile apps, forcing Sears to handle disclosures differently than other companies with mobile apps and disadvantaging Sears in the marketplace."[65] It further asserted that the order's consent and disclosure requirements were "obsolete and impractical" when applied to modern mobile applications, given that app stores enforce their own privacy restrictions and do not provide a way to showcase the consents required by the order.[66]

Similarly, some older orders, like the one entered against America Online, Inc. ("AOL"), require companies to physically mail notice or acquire paper consents from consumers even though most consents are now effectuated digitally.[67] Under AOL's order, for instance, the company was required to obtain

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[63] *See, e.g.*, *The Federal Trade Commission 2023 Privacy and Data Security Update*, Federal Trade Commission (2023) at 12, https://perma.cc/JYQ8-YWZV ("The FTC continues to strengthen the relief it obtains in data security cases to provide more protection for consumers and accountability for businesses, including data minimization.").

[64] *See Petition of Sears Holding Management Corporation to Reopen and Modify Final Order*, In the Matter of Sears Holding Mgmt. Corp., FTC Matter No. 082-3099 (Oc. 30, 2017) at 5, 13, https://perma.cc/G3BN-6T4G.

[65] *Id.*

[66] *Id.* at 14.

[67] *See, e.g.*, *Petition to Reopen Proceedings and Modify Order*, In the Matter of America Online, Inc. et al., FTC Matter No. 002-3000 (May 1, 2009), https://perma.cc/Q6UZ-KY6F.

the express informed consent of AOL subscribers who contacted the company with the intent to cancel service but who, instead, agreed to continue their paid member accounts.[68] Pursuant to the order, consent was deemed to be "informed" only if AOL clearly and conspicuously disclosed, among other things, that subscribers would be sent a notice via first-class mail within five business days.[69] In a petition to reopen and modify the order, AOL asserted that a digital method of obtaining informed consent that had been developed since entry of the order would be superior to consent effectuated via first-class mail "because it occurs immediately," "creates no additional burden on [consumers]," and would be more cost effective for the company.[70]

In short, as Acting Commissioner Maureen Ohlhausen explained in 2017, "[r]egulations 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."[71]

3. FTC Orders May Anchor Companies to Order Requirements That Do Not Reflect the Realities of Nascent Technologies

Given the rapid pace of technological advances, the FTC's approach also risks subjecting businesses to order requirements that were designed before the Commission and relevant stakeholders fully understood emerging issues relating to the product or service targeted in the order. Nowhere is that risk more apparent than with respect to artificial intelligence.

[68] *See Order,* In the Matter of America Online, Inc. et al., FTC Matter No. 002-3000 (Sept. 23, 2003) at 5–7, https://perma.cc/JM47-28HH.

[69] *Id.*

[70] *Petition to Reopen Proceedings and Modify Order*, In the Matter of America Online, Inc. et al., FTC Matter No. 002-3000 (May 1, 2009) at 5–7, https://perma.cc/TB39-CGB4. AOL ultimately withdrew its petition.

[71] *FTC Announces Regulatory Reform Measures Ranging from TVs and Textiles to Energy Labels and Email*, Federal Trade Commission (June 22, 2017), https://perma.cc/5KS7-4QB9 (last visited May 30, 2025).

For example, the FTC has, in recent years, required "algorithmic disgorgement" in matters where a company allegedly trained an AI model using improperly obtained data. The Commission's "algorithmic disgorgement" remedy requires the company under order to delete not only the improperly obtained data, but also "any models or algorithms developed in whole or in part" using that data.[72] This remedy is problematic for several reasons. First, deleting any models "developed in whole or in part" from the relevant data is often impossible, as it may require the ability to track all direct and indirect beneficiaries of data—a "Herculean" task if records of related data use do not exist.[73] Second, even if a small portion of the improperly obtained data is found to be directly or indirectly tied to a product that a company under order creates years from now, the FTC could seek disgorgement. In turn, the company may be disincentivized from further investing in automated technologies, lessening innovation, competition, and consumer welfare. Lastly, risk of algorithmic disgorgement may cause companies to avoid domiciling their company in the U.S. This may lead to other countries becoming "algorithm havens"—potentially causing the U.S. fall behind in the AI race and raising national security concerns.[74]

Despite these dynamics, the FTC has continued to order algorithmic disgorgement largely based on "speculat[ion] about harms from AI."[75] But, as Commissioner Holyoak has acknowledged, "when [the Commission] act[s] without fully understanding the problems—and without rigorous evidence of them—[it is] likely to get it wrong, decreasing innovation and harming

[72] *Decision and Order*, In the Matter of Everalbum, Inc., FTC Matter No. 192-3172 (May 6, 2021), https://perma.cc/CC83-BZ34.

[73] *See, e.g.*, Jeremy Straub, *Algorithmic Disgorgement is Bad for Science and Society*, LawFare: Cybersecurity & Tech (June 12, 2023, 3:00 A.M.), https://perma.cc/B39A-TXEK.

[74] *See id.*

[75] *See* Melissa Holyoak, Commissioner, Fed. Trade Comm'n, Keynote Address at the National Advertising Division Conference 2024 (Sept. 17, 2024) at 13, https://perma.cc/FA9V-E6E6.

consumers and competition rather than protecting them."[76] Commissioner Holyoak and Chair Ferguson similarly explained in a recent dissenting statement that "misguided enforcement" in "evolving [industries] like artificial intelligence" can harm consumers by stifling innovation and competition.[77]

E. The Current Process to Modify or Set Aside Order Is Unwieldy And Ineffective

The length of FTC orders is particularly oppressive given that the only mechanisms for order modification or termination are unwieldy and unworkable, as explained below.

1. Administrative Order Modification Process

A company subject to an administrative order can petition the FTC to have the order reopened and modified.[78] But the burden on a company in such a petition "is not a light one."[79] Specifically, under this "very high" standard,[80] a company must show "significant changes in law or fact" that either "eliminate the need for the order or makes continued application of it inequitable or harmful."[81] Alternatively, or in addition, the company can petition for

[76] *Id.* at 3.

[77] *Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson*, In the Matter of Rytr, LLC, FTC Matter No. 232-3052 (Sept. 25, 2024), https://perma.cc/24ZK-5PJ6.

[78] 15 U.S.C. § 45(b) (authorizing the FTC "at any time" to reopen and alter or set aside an order); 16 C.F.R. § 2.51 (specifying that, in order to alter or set aside an order, a respondent must make a "satisfactory showing" of either changed conditions of law or fact or that the public interest warrants modification or termination).

[79] *See Order Reopening and Modifying Order*, In the Matter of Toys "R" Us Inc., FTC Matter No. 9278 (Apr. 15, 2014), https://perma.cc/R9J2-SSBY (noting that, in petitions to reopen and modify an order, "[t]he petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders").

[80] *See, e.g.*, *Concurring Statement of Commissioner Christine S. Wilson*, In the Matter of InfoTrax Sys. LLC (FTC Matter No. 162-3130), Federal Trade Commission (Nov. 8, 2019), https://perma.cc/T5GY-NNQC at 2 (describing that "in practice the standard for an order modification is very high and the process often protracted and costly").

[81] *See Order Reopening and Modifying Order*, In the Matter of Sears Holding Mgmt., Corp., FTC Matter No. 082-3099 (Feb. 28, 2019) at 2, https://perma.cc/6VL2-WJFZ (citing S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979)).

modification based on public interest considerations.[82] This showing requires the company to demonstrate, for example, that "there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or in part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief."[83]

The process to reopen and modify an administrative order is "often protracted and costly."[84] "Conclusory statements" are insufficient to establish a significant change of fact, so companies' requests must include detailed evidence demonstrating that circumstances have evolved in a such a way as to eliminate the need for the order or that the public interest would be served.[85] As such, the current order modification procedure requires a significant investment on the part of the company, both in terms of its employees' time and the expense of hiring counsel to assist in this process. In addition, because the order modification procedure requires a notice and comment period during which interested parties may review the proposed order modification and submit comments, the process can be lengthy and unpredictable, and subject companies, including publicly traded ones, to unwanted public scrutiny and opportunistic interventions by competitors or investors.[86]

For these reasons, few companies have been willing or able to successfully pursue the FTC's order modification process. In fact, since 1995, it appears that

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[82] *See Order Reopening and Modifying Order*, In the Matter of Toys "R" Us Inc., FTC Matter No. 9278 (Apr. 15, 2014), https://perma.cc/75FN-RQHC (citing 16 C.F.R. § 2.51; 15 U.S.C. § 45(b)).

[83] *Id.*

[84] *See, e.g.*, *Concurring Statement of Commissioner Christine S. Wilson*, In the Matter of InfoTrax, FTC Matter No. 162-3130 (Nov. 8, 2019), https://perma.cc/YR57-576M.

[85] *See Order Reopening and Modifying Order*, In the Matter of Toys "R" Us Inc., FTC Matter No. 9278 (Apr. 15, 2014) at 3, https://perma.cc/K7XX-YMPD.

[86] *See* 16 C.F.R. § 2.51 ("A request under this section shall be placed on the public record except for material exempt from public disclosure under rule 4.10(a). Unless the Commission determines that earlier disposition is necessary, the request shall remain on the public record for thirty (30) days after a press release on the request is issued.").

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only three companies under consumer protection administrative orders—Sears, AOL, and General Nutrition Company ("GNC")—have requested that their orders be reopened and modified.[87] The FTC fully accepted Sears' request, partially accepted and partially denied GNC's request, and suggested to AOL that the company withdraw its request.

Even though Sears (facts discussed on pages 19–20, *supra*) is the only consumer protection matter since 1995 in which the petitioner's modification was fully accepted, only two commissioners, former Chair Maureen K. Ohlhausen and Commissioner Terrell McSweeney (two months before her resignation), took part in the decision. It is not clear whether this same decision would have been reached had a full roster of FTC commissioners been involved. Similarly, although the Commission partially accepted and partially denied GNC's request to modify two separate FTC orders, the FTC's determination came six months before the FTC amended the order modification standard to make it more exacting.[88] In other words, while the FTC accepted or partially accepted these requests, they were accepted under unusual or currently inapplicable circumstances.

AOL withdrew its petition to modify prior to the FTC's determination—but the surrounding circumstances highlight that the FTC's order modification procedure is not workable in practice. In that case, AOL sought a modification that would allow the company to obtain express informed consent through electronic means ("third-party verification" or "TPV") as opposed to first-class

[87] *Petition to Reopen and Modify Final Order,* In the Matter of Sears Holding Management, Corp., FTC Matter No. 082-3099 (Nov. 8, 2017) (request to modify portion of order fully granted); *Petition to Reopen Proceedings and Modify Order*, In the Matter of America Online, Inc. et al., FTC Matter No. 002-3000 (May 1, 2009) (petition withdrawn); *Petition to Reopen and Modify Order*, In the Matter of General Nutrition Corp., FTC Matter No. 091-0082 (May 7, 1995) (order to modify portions of order granted in part and denied in part).

[88] *See* 65 Fed. Reg. 50,636, 50,637 (modifying public interest prong of order modification standard because "[s]ome ha[d] interpreted" the prior standard as requiring only "a narrow showing of the requester's need for relief from competitive burdens imposed by the order.").

mail. Notably, in addition to the FTC's first-class mail requirement, the company was already obligated to use TPV to obtain consent based on the terms of settlements with certain state attorneys general. AOL therefore sought a modification that would bring its FTC order closer to those issued by state attorneys general. Despite the company's modest proposal, the FTC informed the company it was not prepared to recommend modification and suggested that AOL withdraw the petition. The FTC also urged the company, if it resubmitted the modification request, to include certain specific economic, consumer welfare, and operational data and analyses. Given the burden on the company in creating and obtaining such data and analyses, it was unable to resubmit its petition.

2. Federal Court Order Modification Process

The process for modifying a federal court order is no easier to navigate. Rule 60(b)(5) of the Federal Rules of Civil Procedure allows for the modification of a court order if applying that order prospectively is no longer equitable. In determining prospective application, courts look to whether the order (1) is executory (compels performance of a future act) or (2) involves the supervision of changing conduct or conditions.[89]

As with an administrative order modification, companies must make a strong showing that circumstances have changed to such a degree since the entry of the order that it is no longer "equitable" to require order compliance. The Supreme Court has made clear that such modification is appropriate only if a party is "suffering hardship so extreme and unexpected as to justify [] saying that they are the victims of oppression."[90] Indeed, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" should

[89] *FTC v. Hewitt*, 68 F.4th 461, 466–67 (9th Cir. 2023) (internal quotations and citations omitted).

[90] *U.S. v. Swift Co.*, 286 U.S. 106 (1932) (cited in § 2863 Judgment Satisfied or No Longer Equitable, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed.)).

lead to a change in an order entered with the consent of all concerned.[91] Given this exacting standard, few companies are able to demonstrate that their orders are no longer equitable.

Litigants can also seek relief from a federal court order under Rule 60(b)(6), which permits a court to reopen a judgment for "any other reason that justifies relief."[92] However, this catchall relief is available only in "extraordinary circumstances."[93] Courts have found such "extraordinary circumstances" in only limited instances, generally involving government inaction or unusual delays by courts, or if there is a strong public interest and egregious conduct.[94]

Finally, the Federal Rules of Civil Procedure also note that a court retains the power to entertain an independent action to relieve a party from a judgment, order, or proceeding.[95] But such independent action is available only under unusual and exceptional circumstances to prevent a grave miscarriage of justice.[96] Relief is reserved for "those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata."[97] In other words, the potential injustice must be so severe that enforcement of the judgment would be "manifestly unconscionable."[98]

Thus, without a meaningful way to modify—or fully terminate—antiquated administrative or federal orders, companies are bound to requirements that do not align with their current business practices or with consumers' evolving expectations in the marketplace.

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[91] *Id.*

[92] Fed. R. Civ. P. 60(b)(6).

[93] *See Gonzalez v. Crosby*, 545 U.S. 524, 524 (2005).

[94] *See* § 2864 Other Reasons Justifying Relief, 11 Fed. Prac. & Proc. Civ. § 2864 (3d ed.).

[95] Fed. R. Civ. P. 60(d).

[96] *Giasson Aero. Sci., Inc. v. RCO Eng'g Inc.*, 872 F.3d 336, 339 (6th Cir. 2017).

[97] *United States v. Beggerly*, 524 U.S. 38, 42 (1998) (internal quotations omitted).

[98] *Mitchell v. Rees*, 651 F.3d 593, 599 (6th Cir. 2011).

III. THE FTC SHOULD ADOPT A NEW AND CONSISTENT APPROACH TO ORDER SUNSETTING

The FTC should adopt a new sunset policy that aligns with—and does not stifle—today's pace of innovation. A new policy would help ease the heavy compliance burdens on businesses under order and permit them to keep pace with companies that may have engaged in similar conduct but were not subject to FTC order, bring the FTC closer to other federal agencies that issue consent decrees, and allow consumers to benefit from increased competition and entrepreneurship.

The FTC can implement a new approach to order sunsetting easily and without delay. Given that the Commission's current 20-year default timeframe for administrative orders is set forth in a policy statement, not a rule or legislation, the FTC can shift its sunsetting approach swiftly and without the need for a prolonged notice and comment period. Indeed, the FTC does not need to wait for any executive or congressional directive to effectuate this change. The Commission could also use its discretion to seek out time-limited compliance provisions in future federal court orders and could work with companies that are demonstrably committed to compliance to petition courts for the termination of existing court orders after a specified period. This would allow the FTC to take a consistent approach to order termination as to both administrative and federal court orders.

In designing a new approach to order termination, there are several approaches the FTC should consider, described in detail below. Any policy updates should also be coupled with a revised approach to administrative order modification and early termination processes.

A. Approach #1: Flexible, Fact-Specific Approach

First, the Commission could adopt a flexible sunset policy in which expiration periods are driven by the factual and legal circumstances of a specific matter. This approach would be more similar to a rule-of-reason analysis, allowing the FTC to weigh the pro-competitive and pro-consumer aspects of applying a certain sunset policy against any related restraints. Moreover, honest actors would have the opportunity to demonstrate to the Commission their commitment to compliance, which the FTC could then take into account when weighing a particular sunset term. For example, companies who consent to third-party auditors or monitors of their compliance may be treated differently and more favorably than companies who do not consent to such third-party oversight.

B. Approach #2: A Five-Year Sunset Policy Applied Uniformly

Second, the Commission should consider adopting a five-year sunset policy for all FTC orders, such that all provisions, and the order as a whole, would terminate after that period. The 2017 Presidential Transition Task Force Report previously recommended that the FTC adopt this approach, "at least where there are no extenuating circumstances (such as fraud or recidivism) justifying a longer duration."[99]

Under this policy, the FTC could preserve its resources by eliminating the need to negotiate different termination dates for different provisions within an order. It would also allow the FTC to provide clear and consistent guidance to all stakeholders.

Such an approach would strike a balance with legitimate business needs as well. A five-year policy would decrease the risk that a company becomes bound to a highly antiquated order that does not account for rapid changes in the advertising and technological landscape. While five years remains a significant timeframe in today's fast-paced environment, it is far less likely to witness the kinds of seismic shifts that occur routinely during a 20-year or perpetual span. Moreover, a five-year policy would dramatically reduce the cost

[99] *Presidential Transition Report: The State of Antitrust Enforcement*, *supra* note 55, at 30.

and resources associated with complying with an FTC order. Because this approach does not bind businesses to antiquated technology or inhibit their ability to innovate, consumers and competition would benefit in turn.

C. Approach #3: A Ten-Year Sunset Policy with the Option to Negotiate Shorter Periods for Certain Provisions

Lastly, the FTC could seek to limit administrative and federal orders to ten years but still allow businesses to negotiate shorter sunset periods for individual provisions on a case-by-case basis. Former Commissioner Christine Wilson promoted this same ten-year approach in InfoTrax (FTC Matter No. 162-3130), explaining that, "in many industries, it is not realistic for the Commission to draft injunctive relief expecting that it will remain relevant and continue benefitting consumers for 20 years," and recommending that the Commission should "limit the length of future administrative orders to 10 years."

As compared to a five-year policy, a ten-year approach gives the FTC the ability to bring order enforcement actions for a longer duration and to use the potential for shorter individual sunset periods as a bargaining chip during negotiations. A ten-year order would also benefit both the FTC and businesses by shaving off a decade of unneeded regulatory oversight—meaning the Commission could allocate less of its limited resources to order enforcement and monitoring, and businesses could devote a portion of the time and expense previously spent complying with an order to competing in the marketplace and focusing on consumers.

D. Any Approach Should Be Coupled with an Adjusted Approach to Administrative Order Modification

The FTC's current process for administrative order modifications does not work as intended. Businesses rarely utilize it—it is expensive, time consuming, and unlikely to result in a favorable decision due to the high legal standard involved.

As a result, each of the three approaches described in Subsections III.A–C, *supra*, should be accompanied by an adjustment to how order modification and early termination operates in FTC adjudication. More specifically, the FTC should consider adopting a policy statement providing examples of what may constitute "changed conditions of law or fact" or a modification that is in the "public interest."[100] In this policy statement, the FTC could make clear that a demonstrable commitment to order compliance coupled with an adequate compliance program may constitute a "changed condition of fact" justifying modification or, in extreme circumstances, termination. For example, where a company subject to an independent compliance monitor has faced years of compliance-related scrutiny, bore the costs of such audits, and has been found to be in substantial compliance each year of the monitoring period, it should have a workable route to lessen its compliance burdens. This approach would bring the FTC closer to other agencies, such as the CFPB and DOJ, that provide a mechanism for responsible companies to eventually ease their level of regulatory oversight.[101]

Additionally, although the agency does not have authority to modify the process for terminating or adjusting federal orders, it should adopt a more cooperative stance when faced with compliant businesses subject to legacy orders involving burdensome and antiquated requirements. In such instances, the FTC should collaborate with companies to petition federal courts for modification or termination of their outdated legacy orders.

[100] 15 U.S.C. § 45(b) (authorizing the FTC "at any time" to reopen and alter or set aside an order); 16 C.F.R. § 2.51 (specifying that, in order to alter an order, a respondent must make a "satisfactory showing" of either changed conditions of law or fact or that the public interest warrants modification).

[101] *See Statement of Policy on Applications for Early Termination of Consent Orders*, 12 C.F.R. Chapter X , Consumer Financial Protection Bureau, https://perma.cc/4EYV-24VT.

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CONCLUSION

The FTC is in a prime position to adopt a new approach to order termination for future orders—one that aligns with and modernizes the Commission's historic goal of protecting consumers without unduly burdening legitimate business activity.[102] As Chairman Ferguson recently acknowledged, the FTC's role should not be one of a regulator: it should instead serve as a cop protecting consumers from fraud.[103] Diverging from 20-year administrative orders and perpetual federal court orders in favor of any of the approaches outlined herein would promote that vision.

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[102] *E.g.*, *Strategic Plan for Fiscal Years 2018 to 2022*, Federal Trade Commission, https://perma.cc/4JNP-5UWQ (describing the FTC's mission as "[p]rotecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity").

[103] CNBC Television, *Watch CNBC's full interview with FTC Chair Andrew Ferguson*, YouTube (March 13, 2025) at 11:30, https://perma.cc/9LQT-FQHF ("I don't see it as the FTC's job to be a regulator. I'm a cop on the beat.").

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