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Media Contact: Grace Galvin | ggalvin@wlf.org | 202-588-0302

WLF Encourages FTC to Maintain Transparency and Consensus in Paint-Marketing Regulation

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

“The FTC’s ‘catch-as-catch-can’ approach to regulatory enforcement under § 5 of the FTC Act is not only deeply unfair to the business community, but it also falls far short of satisfying the legal standard for fair notice.”

— Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation filed comments with the Federal Trade Commission (FTC) yesterday, strongly opposing the agency’s proposed efforts to re-open and modify prior consent agreements by settling new enforcement proceedings with third parties. WLF’s comments raise practical and constitutional concerns and highlight the competition-policy implications of the FTC’s ever-changing compliance regime for the architectural coatings industry.

In new orders published on July 11, 2017, the FTC seeks to modify its pre-existing Green Guides regime for regulating environmental marketing claims, specifically with respect to emissions and VOC-free claims. The FTC also proposes to “harmonize” the new rules with consent orders the agency entered into back in 2013.

As WLF’s comments point out, the Green Guides were created and subsequently amended using a transparent process very similar to the rulemaking process prescribed by the Administrative Procedure Act. During previous changes in policy, the FTC invited notice and comment from affected stakeholders, submitted the guidance to the full Commission for approval, and published the final Green Guides in the Code of Federal Regulations. WLF argues that before the FTC may substantively amend the Green Guides yet again via the new orders, the agency must follow a similar notice-and-comment process.

WLF’s comments further explain how industry stakeholders have come to rely upon the guides as authoritative and binding. Efforts to modify the guides through enforcement proceedings puts regulated parties in a difficult position as they would be unable to predict or conform to the Commission’s changing interpretations of the law.

Rather than “regulation by consent decree,” WLF argues that the FTC should implement its new interpretations in formal regulations pursuant to notice-and-comment procedures. That process is much more transparent, binds the agency, and includes input from all affected stakeholders.

Celebrating its 40th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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