



## WORLD **PRIVACY** FORUM

### **Comments of World Privacy Forum**

**To: the Federal Trade Commission**

**Re: Proposed Consent Agreement In the Matter of Uber Technologies, Inc., File No. 152–3054**

*Via [ftcpublic.commentworks.com](https://www.ftcpublic.commentworks.com)*

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC– 5610 (Annex D)  
Washington, DC 20580

September 15, 2017

Thank you for the opportunity to comment on the proposed consent decree, *In the Matter of Uber Technologies, Inc.*, File No. 152–3054. The consent decree is at the FTC website at [https://www.ftc.gov/system/files/documents/cases/1523054\\_uber\\_technologies\\_decision\\_and\\_or\\_der.pdf](https://www.ftc.gov/system/files/documents/cases/1523054_uber_technologies_decision_and_or_der.pdf). The notice regarding the proposed consent decree appeared in 82 Federal Register 39582 (August 21, 2017).<sup>1</sup>

The World Privacy Forum is a non-profit public interest research group that focuses on privacy issues, including technology, finance, health, biometrics, and other privacy topics. Our research, testimony, consumer education, and other materials can be found at [www.worldprivacyforum.org](http://www.worldprivacyforum.org).<sup>2</sup>

We write to comment on two issues regarding the proposed consent decree, one material, and one regarding a simple and readily correctable error on the FTC website.

### **I. Material Problems in Consent Decree: Assessments are not Audits**

While we welcome the Commission’s action in this case, we find that the consent decree falls short in a material way. Our comments focus on the requirement in Part III of the decree regarding assessments. The requirement states:

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<sup>1</sup> 82 Federal Register 39582 (August 21, 2017). Available at: [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2017/08/uber\\_published\\_analysis\\_8-21-17.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2017/08/uber_published_analysis_8-21-17.pdf).

<sup>2</sup> World Privacy Forum home page, <https://www.worldprivacyforum.org>.

"Respondent must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be completed by a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. An individual qualified to prepare such Assessments must have a minimum of 3 years of experience in the field of privacy and data protection. All individuals selected to complete such Assessments must be approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in his or her sole discretion. Any decision not to approve an individual selected to conduct such Assessments must be accompanied by a writing setting forth in detail the reasons for denying such approval.

B. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment, and (2) each 2-year period thereafter for 20 years after the issuance date of the Order for the biennial Assessments.

C. Each Assessment must:

1. set forth the specific privacy controls that Respondent has implemented and maintained during the reporting period;
2. explain how such privacy controls are appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the Personal Information;
3. explain how the privacy controls that have been implemented meet or exceed the protections required by the Provision of this Order titled Mandated Privacy Program; and
4. certify that the privacy controls are operating with sufficient effectiveness to provide reasonable assurance to protect the privacy of Personal Information and that the controls have so operated throughout the reporting period.

D. Each Assessment must be completed within 60 days after the end of the reporting period to which the Assessment applies. Respondent must provide the initial Assessment to the Commission within 10 days after the Assessment has been completed. Respondent must retain all subsequent biennial Assessments, at least until the Order terminates. Respondent must submit any biennial Assessments to the Commission within 10 days of a request from a representative of the Commission."<sup>3</sup>

While this requirement for assessments appears impressive on the surface, it has serious shortcomings. The obligation for an assessment is less than meets the eye. **Assessment** in this context is a term of art, with specific meanings, as is the term **audit**, and the two terms are not interchangeable.

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<sup>3</sup>*In the Matter of Uber, Inc., Decision and Order*, US Federal Trade Commission. August 15, 2017. [https://www.ftc.gov/system/files/documents/cases/1523054\\_uber\\_technologies\\_decision\\_and\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/1523054_uber_technologies_decision_and_order.pdf).

In his book, *Federal Trade Commission Privacy Law and Policy*, Professor Chris Jay Hoofnagle explains the difference between an assessment and an audit.

Although many call this requirement an audit, it is not – it is an *assessment*. In the accounting world, an audit measures compliance against some predefined criteria, such as an International Organization for Standardization (ISO) standard. As assessment is a certification of compliance with a standard set by the respondent itself. [page 167].<sup>4</sup>

Further, as professor Hoofnagle observes, third-party assessments conducted by other companies under similar Commission consent decrees have been “less than rigorous” (page 167). The Commission does not require Uber to submit to the Commission any assessment after the first one, except upon request by a representative of the Commission. We would like to know more about how the Commission routinely follows up with consent decrees after the initial one to 3 years of the agreement.

The confusion about the difference between an assessment and an audit is commonplace. News stories often refer to **assessments** as **audits**. See, for example, Wired, *Uber Settles with FTC Again, This Time over 2014 Privacy Breach* (August 15, 2017).<sup>5</sup> The article states:

The company won't have to pay a fine, or at least it won't so long as **audits** show that the company is making good on its promises to ensure customers' and drivers' privacy and security.” [Emphasis ours].

Commission staff also sometimes refers to the assessments as audits, most recently in a September 2017 NCVHS hearing.<sup>6</sup> We find this to be significantly misleading. We suggest that any Commission staff member who discusses a Commission consent decree in public and who refers to an assessment as an audit be required to stay after work and write 100 times “*An assessment is not an audit...*”

We recommend, and in fact urge, that the Commission insist that Uber must obtain **actual audits**, that the audits be submitted to the Commission when conducted, and that the audits be made public with suitable redactions for any proprietary or sensitive information.

## II. Link Error on FTC Uber Case File Page

There is a small error on the Commission's Uber case page that should be corrected to reduce potential confusion.

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<sup>4</sup> CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY*, 167, Cambridge University Press, 2016.

<sup>5</sup> *Uber Settles with FTC Again, This Time over 2014 Privacy Breach*. Wired, August 15, 2017. <https://www.wired.com/story/uber-settles-with-ftc-again-this-time-over-2014-privacy-breach/>.

<sup>6</sup> National Committee on Vital and Health Statistics, Subcommittee on Privacy, Security, and Confidentiality, FTC Testimony, Sept. 13, 2017.

The Commission's webpage on the Uber case is located at: <https://www.ftc.gov/enforcement/cases-proceedings/152-3054/uber-technologies-inc>.<sup>7</sup> This page offers key documents relating to the case. The document that the FTC identifies in the first link under the Case Timeline is inaccurately labeled. The link reads as follows:

*Federal Register Notice Containing Proposed Consent Agreement*

The descriptive language for this link should be corrected, as the link does not actually lead consumers to the full text of the Proposed Consent Agreement. Instead, this link leads to a second FTC page, which has as its title *Uber Technologies, Inc; Analysis to Aid Public Comment; Proposed Consent Agreement*.<sup>8</sup> This second page is correctly titled, and correctly links to the Federal Register notice of August 21, 2017<sup>9</sup> containing the *Analysis to Aid Public Comment*.

Consumers clicking the original link hoping to find the a notice containing the proposed consent agreement will not have found what they were looking for. All the FTC needs to do to correct this issue is to retitle the first link to read: *Federal Register Notice, Analysis to Aid Public Comment; Proposed Consent Agreement*, or something similar. This is a simple but important fix.

Thank you for the opportunity to submit comments on this matter.

Respectfully,

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<sup>7</sup> Federal Trade Commission, Uber Technologies, Inc. page, file number 153 3054.

<sup>8</sup> Federal Trade Commission, *Uber Technologies, Inc; Analysis to Aid Public Comment; Proposed Consent Agreement*. <https://www.ftc.gov/policy/federal-register-notices/uber-technologies-inc-analysis-aid-public-comment-proposed-consent>.

<sup>9</sup> See Note 1.