Public Knowledge

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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Submitted via Regulations.gov

Re: File No. 251 004, Omnicom/IPG

INTRODUCTION

The Federal Trade Commission's proposed consent order conditioning approval of the Omnicom-Interpublic Group merger on restrictions regarding advertising placement decisions based on "political or ideological viewpoints" represents a fundamentally flawed approach to merger enforcement that violates the First Amendment, misunderstands how the advertising industry operates, and ignores the actual competitive harms this merger poses. We urge the Commission to reconsider and reject this proposed order.

The consent order suffers from three fatal defects: (1) it relies on a fundamental misunderstanding of how advertising agencies operate and make advertising placements; (2) it is an unconstitutional condition that violates the First Amendment rights of speech and association; and (3) it entirely ignores the genuine competitive concerns raised by this merger while pursuing a politically motivated remedy untethered to any legitimate antitrust harm.

I. THE PROPOSED CONSENT ORDER IS BASED ON A MISUNDERSTANDING OF THE ADVERTISING INDUSTRY AND BRAND SAFETY PRACTICES

Contrary to FTC Chairman Ferguson's assertion that advertisers hire agencies to "make decisions on where [advertisers'] advertisements should be placed,"[1] the reality is that *advertisers* make placement decisions based on recommendations from ad agencies in the form of media plans. The standard template[2] for media buying services contracts from the U.S. advertising industry's main trade association makes clear that advertisers control the parameters for brand safety and standards, determining in writing the contexts that are "safe and protective"

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[1] Fed. Trade Comm'n, Statement of Chairman Andrew N. Ferguson,
In the Matter of Omnicom Group/The Interpublic Group of Cos., Matter 2510049 (Jun. 23, 2025),
https://www.ftc.gov/system/files/ftc_gov/pdf/omnicom-ipg-ferguson-statement_0.pdf.
[2] Association of National Advertisers, *Master Media Planning & Buying Services Agreement* (Version 2.0, 2018),
https://www.ana.net/miccontent/show/id/ii-media-buying-services-agreement-template-2018.

of their brands. This distinction is important because it means advertising placement decisions are actually made by tens of thousands of advertisers across industry sectors, product categories, and consumer segments, all with their own criteria for brand standards—not by a handful of consolidated agencies.

In the United States, approximately three-quarters of all advertising–roughly $300 billion–is placed in digital channels, including social media platforms, search engines, and online publishers' websites.[3] Much of this advertising is placed through monopolized ad tech platforms and opaque automated auctions. This system creates a significant challenge: advertisers' brands can appear alongside harmful material such as foreign disinformation campaigns, harmful consumer scams, and hate speech, making it appear as though the advertiser endorses such content. With billion-dollar budgets, prized brand reputations, and consumer loyalty at stake, advertisers developed protective strategies including inclusion lists and exclusion lists of content, sophisticated monitoring systems, and industry coalitions to share and promote best practices.[4] These practices represent legitimate business decisions to protect brand value and consumer relationships, not coordinated ideological censorship.

The FTC's approach reflects adoption of a false narrative: that advertisers conspire with social media platforms and others to systematically "censor" conservative voices. This claim distorts standard business practices designed by advertisers to avoid brand association with toxic content as evidence of pervasive ideological bias. In reality, advertisers' decisions are driven primarily by shareholder interests and brand protection. The notion that advertising placement decisions constitute systematic political censorship lacks empirical foundation.

The order reflects a basic misunderstanding of how the advertising industry operates. Despite Chairman Ferguson's assertions,[5] advertising agencies do not unilaterally decide where to place advertisements. They make recommendations based on client-specified parameters.[6] The FTC's own order acknowledges this reality by "preserving individual advertisers' ability to choose where their ads are placed."[7] This acknowledgment undermines both the order's necessity

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[3] eMarketer, *US Digital Ad Spend to Exceed $300 Billion in 2024* (Dec. 16, 2024), https://www.emarketer.com/content/us-digital-ad-spend-exceed--300-billion-2024, *see also* eMarketer, *Digital Makes Up Over Three-Quarters of Total Ad Spend in the US* (Jan. 9, 2024), https://www.emarketer.com/content/digital-makes-up-over-three-quarters-total-ad-spend-us.

[4] Lisa Macpherson, *Antitrust or Anti-truth? Jim Jordan's Latest Attack on the "War on Disinformation"*, Public Knowledge (Apr. 1, 2024), https://publicknowledge.org/antitrust-or-anti-truth-jim-jordans-latest-attack-on-the-war-on-disinformation/.

[5] Fed. Trade Comm'n, Statement of Chairman Andrew N. Ferguson, In the Matter of Omnicom Group / The Interpublic Group of Cos., Matter 2510049, at 1 (Jun. 23, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/omnicom-ipg-ferguson-statement_0.pdf.

[6] Media Buying Agreement, *supra* note 2.

[7] Press Release, Fed. Trade Comm'n, FTC Prevents Anticompetitive Coordination in Global Advertising Merger (Jun. 23, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/06/ftc-prevents-anticompetitive-coordination-global-advertising-merger (hereinafter "FTC Press Release").

and its constitutional justification, while it imposes practical burdens on advertisers who will be forced to take greater responsibility for developing exclusion lists and brand safety protocols.

The consent order's specific language improperly shifts responsibility to advertisers for roles traditionally played by their agencies. For example, Omnicom cannot "rely on 'exclusion lists' to differentiate media publishers on the basis of political or ideological viewpoints" unless developed at the client's request. These restrictions shift the operational burden onto advertisers, requiring them to take on roles related to brand safety that agencies have traditionally helped manage.

These constraints force advertisers to assume greater responsibility for research and implementation of brand safety measures. As noted in one advertising trade publication, "If you don't want your stuff to be shown against Nazis, you're going to have to figure out how, and instruct Omnicom accordingly."[8] The order requires Omnicom to report to the FTC for four years "the number of times a publisher appears on 'exclusion lists' developed or applied by Omnicom at the express direction of a particular client based on political ideology." This reporting mandate rests on the false premise that "political ideology" drives exclusion lists, and may subject Omnicom's clients to political attacks by the agency.

Ironically, although the consent order purports to promote ideological neutrality, by requiring Omnicom to report how often specific publishers appear on exclusion lists (while simultaneously prohibiting the company from analyzing or applying those lists across multiple clients) the FTC's order potentially exposes advertisers to retaliation for legitimate brand safety decisions. In light of its improper interpretation of the advertising industry, the consent order should be recanted.

II. THE PROPOSED CONSENT ORDER VIOLATES THE FIRST AMENDMENT

The proposed consent order is constitutionally flawed regardless of whether advertising agencies actually engage in ideologically-motivated placement decisions. Advertising placement is an inherently expressive choice protected by the First Amendment. Regardless of the underlying motivation, government interference with these choices violates the Constitution – the choice of where to place advertisements is an inherently expressive act.

Every decision about where to place advertising, whether based on brand safety, audience demographics, content quality, or even political considerations, is a form of protected expression under the First Amendment. When an agency recommends one platform over another, and the client accepts or rejects this advice, both convey an expressive message about the client's values, target audience, and brand identity. The constitutional protection of advertising decisions does

[8] Wendy Davis, FTC Hobbles Brand Safety, MediaPost (Jun. 23, 2025) https://www.mediapost.com/publications/article/406908/ftc-hobbles-brand-safety.html.

not turn on whether they are motivated by political ideology. Whether an agency avoids a platform due to concerns about extremist content, low-quality journalism, inappropriate audience demographics, or technical performance issues, each choice represents an editorial judgment about the appropriate context for the client's message. The government may not condition merger approval on the surrender of this editorial discretion.

That said, even if advertisers rarely[9] make ideologically-motivated placement decisions, the proposed order creates a profound chilling effect on all placement recommendations. Under the specter of government monitoring and potential enforcement action, agencies will inevitably second-guess legitimate brand safety and editorial judgments, wondering whether the FTC might label their recommendations as impermissibly "political." This chilling effect may manifest in several ways. To avoid FTC scrutiny, agencies may recommend placing advertisements on platforms that do not meet their professional standards or their clients' brand safety requirements. The fear of being accused of "political" bias could lead agencies to include marginal or problematic platforms in their media plans, regardless of what the best interests of their clients may be.

The order's reporting requirements and compliance obligations will inevitably transform what should be nimble, professional editorial decisions into bureaucratic processes designed to create paper trails demonstrating "political neutrality." This bureaucratization itself interferes with the expressive function of advertising placement. Moreover, by forcing agencies to shift responsibility for exclusion lists onto clients, the order disrupts the professional relationship in which agencies are hired precisely for their expertise and judgment. This inappropriate transfer of responsibility interferes with the ad agencies' ability to deliver the professional expressive services they were hired to provide. These chilling effects are exactly why the First Amendment prohibits the kind of content-based viewpoint discrimination the FTC is attempting to engage in here, as multiple lines of Supreme Court precedent show.

A. The Proposed Order is a Content-Based Prior Restraint on Protected Speech

The proposed order functions as a content-based, prior restraint on speech. The Supreme Court has held that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[10] When a regulation distinguishes among speech based on the message expressed, the speaker's viewpoint, or the subject matter, it triggers strict scrutiny.

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[9] While the proposed order's lack of factual foundation does not make it legally stronger, notably, even if the FTC's concerns about ideological bias were well-founded, this could make the order more, not less, constitutionally problematic. Pure political or ideological considerations in advertising placement decisions would represent the most clearly protected form of expressive conduct.

[10] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

The FTC's order explicitly targets advertising decisions made "based on political or ideological viewpoints"—regulation that distinguishes speech based on content and triggers strict scrutiny. While the proposed order does not specify that companies cannot disfavor platforms with one ideological tendency or another, it does not matter. As the Court explained in *Moody v. NetChoice*, government actions promoting "neutrality" in viewpoint are necessarily content-based because they alter companies' "choices about the views they will, and will not, convey."[11] The Court continued that "we have time and again held that type of regulation to interfere with protected speech."[12]

The FTC's order cannot survive strict scrutiny. The openly stated goal of limiting the suppression of "advertising spending on publications with disfavored political or ideological viewpoints" is not only not a compelling government interest—it is not a valid government interest at all. As the Supreme Court confirmed in *NetChoice*, "a State may not interfere with private actors' speech to advance its own vision of ideological balance."[13]

Even if the FTC's interest in preventing anticompetitive conduct were deemed compelling, the means chosen must be narrowly tailored, requiring that "it must be the least restrictive means of achieving a compelling state interest."[14] The FTC's condition sweeps far beyond any narrowly tailored remedy for antitrust harm, chilling a wide range of protected expressive choices, not merely those with anti-competitive, as opposed to expressive, motivations.

C. The Proposed Order Lacks Procedural Safeguards, and a Nexus to Competitive Harm

The FTC's order ignores essential constitutional protections against prior restraint. Under *Freedman v. Maryland*,[15] any prior restraint scheme must include procedural safeguards: requiring that the burden must lie on the government, restrictions must be imposed for a brief and definite period, and prompt judicial review must be available. The FTC's order includes none of these protections, granting the agency continuing authority to review and penalize advertising decisions with no neutral adjudicator and no specified criteria. As the Supreme Court noted, "Any system of prior restraints of expression comes … bearing a heavy presumption against its constitutional validity."[16] This presumption is met here and confirmed by ample evidence.

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[11] *Moody v. NetChoice*, 144 S. Ct. 2383, 2405 (2024).
[12] *Id.*
[13] *Id*. at 2391.
[14] *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).
[15] 380 U.S. 51 (1965).
[16] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Additionally, even if the FTC's objective was permissible, the order fails the nexus requirement from *Nollan v. California Coastal Commission*.[17] This test requires that there be an "essential nexus" between a condition attached to a government benefit and the related harm the government seeks to address. Here, the link between the alleged harm (potential coordination) and the condition (a sweeping prohibition on viewpoint-based ad placement) is not merely attenuated but nonexistent. The FTC's order is not tailored to target specific anticompetitive collusion but burdens protected expression generally, sweeping in legitimate editorial judgments that lie at the core of First Amendment protection. As in *Nollan*, where the Court invalidated a permit condition requiring beachfront access easement that bore no logical connection to a legitimate government interest, the FTC here imposes a political neutrality requirement that bears no constitutionally sufficient nexus to its antitrust theory.

D. The Proposed Order Violates Freedom of Expressive Association and Editorial Discretion

The FTC's order is an unconstitutional intrusion on editorial discretion and freedom of expressive association. Omnicom and IPG, as advertising agencies working on behalf of advertisers, exercise editorial discretion over the placement of advertising dollars. This is an expressive function that reflects their values and those of their clients and their brands. If an agency declines to place ads on a platform that hosts white supremacist content, election misinformation, or other material it deems contrary to its values, or even material that is merely insufficiently expressive of the values of the client's brand or its target consumer, that is a constitutionally protected decision. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[18] the Court rejected efforts to force parade organizers to include a group whose message altered the expressive content of their event. Even though the organizers were private citizens using a public street, the Court found that "the selection of contingents in the parade clearly expressive" and was constitutionally protected. Similarly, in *Miami Herald Publishing Co. v. Tornillo*,[19] the Court recognized that editorial decisions about what to include and exclude constitute protected speech. In *Miami Herald*, the Court struck down a Florida statute requiring newspapers to print political candidates' replies to critical editorials, recognizing that the editorial process itself, which includes what to include and exclude, is protected speech, and that "compelling editors or publishers to publish that which 'reason' tells them should not be published" violates the First Amendment.

The FTC's order also violates freedom of expressive association. As *Boy Scouts of America v. Dale*[20] established, "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express." Just as the Boy Scouts could not be compelled to retain a scoutmaster whose presence altered their

[17] 483 U.S. 825 (1987)
[18] 515 U.S. 557 (1995).
[19] 418 U.S. 241 (1974).
[20] 530 U.S. 640 (2000).

message, so too may a communications firm decline to associate with media platforms or publishers whose values they reject. The FTC's order forecloses that option.

E. The Proposed Order Violates the Unconstitutional Conditions Doctrine

The order violates the unconstitutional conditions doctrine, which prohibits the government from conditioning benefits on a waiver of constitutional rights. It is black-letter constitutional law that the government may not do indirectly what it is forbidden to do directly. As the Court has said, "[T]he government may not require a person to give up a constitutional right…in exchange for a discretionary benefit conferred by the government[.]"[21] Even where no right to a government benefit exists, the state may not impose conditions that would be unlawful if imposed directly. As the Supreme Court made plain in *Perry v. Sindermann*, the government may not "deny a benefit to a person on a basis that infringes his constitutionally protected interests," especially free speech.[22] This includes coercing silence or ideological conformity as the price of admission to the market.

Likewise, in *Agency for International Development v. Alliance for Open Society International*,[23] the Court struck down a law requiring foreign aid recipients to affirm their opposition to sex work. The government argued that the requirement merely clarified the program's goals, but the Court found that compelling a pledge of belief as a condition of participation was impermissible. "It requires them to pledge allegiance to the Government's policy," the Court wrote, and "[t]hat condition violates the First Amendment." So too here. The FTC demands that Omnicom and IPG pledge allegiance to a government-prescribed stance of neutrality toward all political content—a compelled affirmation of belief that violates the same constitutional principles.

The principle that government benefits may not be conditioned on ideological tests is of broad applicability. In *Baird v. State Bar of Arizona*,[24] the Supreme Court struck down a state bar's refusal to admit an applicant who declined to answer whether she had ever been a member of the Communist Party or any group that advocated the overthrow of the U.S. government by force. The applicant had no history of misconduct, had passed the bar exam, and had answered all other questions about her character and qualifications. The Court held that the First Amendment forbids the state from excluding individuals from professional practice merely for refusing to disclose beliefs or associations, noting that "[a] State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."[25]

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[21] *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).
[22] 408 U.S. 593, 597 (1972); see also *Koontz v. St. Johns River Water Mgmt.*, 570 U.S. 595, 607 (2013).
[23] 570 U.S. 205 (2013).
[24] 401 U.S. 1 (1971).
[25] *Id*.

III. THE PROPOSED ORDER IGNORES ACTUAL COMPETITIVE HARMS

The consent order entirely ignores the serious competitive concerns raised by this merger between industry behemoths. As the FTC's own complaint noted, "Coordinated interaction harms consumers because it enables competitors collectively to compete less aggressively, reduce product quality, [and] slow the rate of innovation."[26]

Industry analysis by Ebiquity, a leading media investment consulting firm, warned that the merger could "limit contestability or stifle innovation in the market."[27] The FTC's own press release acknowledges agency roles in "pricing, ad placement, and sponsorships,"[28] yet the consent order addresses none of these competitive concerns. The order fails to address commission rate negotiations, service fees and media discounts, real-time bidding approaches, value pot allocations and rebates, data consolidation, service level agreements, and labor dislocation from promised $750 million in cost savings.[29]

Instead, the FTC's theory focuses narrowly on alleged coordination to "boycott" politically controversial publishers, while providing little concrete evidence such coordination exists or poses real competitive threats. The cited bases derive from partisan political reports and social media complaints, not the robust economic analysis typically required for merger enforcement. This reliance on political actors rather than economic studies raises serious concerns about the order's underlying motivation and evidentiary foundation. Paradoxically, the order permits coordination among the 1500+ agencies under Omnicom's umbrella, plus the ones they will acquire from IPG, while prohibiting only coordination with third parties. This approach fails to address actual competitive coordination risks while pursuing speculative political theories.

V. PROCEDURAL AND ENFORCEMENT CONCERNS

It appears that in their urgency to complete their $13 billion merger with IPG, Omicom has agreed to the terms of the consent order. But this doesn't let the FTC off the hook. Even if adopted and accepted by the parties, the order would be legally unenforceable and constitutionally void. Although this is not a statute enacted by Congress but rather a condition appended to a merger approval, that distinction is immaterial for constitutional purposes. Agency

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[26] Complaint, *In the Matter of Omnicom Group Inc. & The Interpublic Group of Companies, Inc.*, Fed. Trade Comm'n (Jun. 23, 2025), at 3.
[27] Ebiquity, What Does the Omnicom-IPG Merger Mean for Brands? (July 2025), https://www4.ebiquity.com/EBQ-What-Does-the-Omnicom-IPG-Merger-Mean-for-Brands.pdf.
[28] FTC Press Release, *supra* n.7.
[29] Lisa Macpherson & Elise Phillips, Update: The FTC's Consent Order in the Omnicom Ad Agency Merger Misses the Point (Jun. 27, 2025), https://publicknowledge.org/update-the-ftcs-consent-order-in-the-omnicom-ad-agency-merger-misses-the-point/.

action, whether by rule, adjudication, or negotiated settlement, must conform to constitutional limits.

A merger condition that purports to require private entities to forfeit their right to engage in expressive conduct, such as making decisions about where and whether to advertise based on political or moral considerations, is no less constitutionally suspect than a statute that compels speech directly. The fact that the government chooses to cloak its condition in the form of a regulatory approval does not exempt it from First Amendment scrutiny. As the Supreme Court has explained, "Congress cannot recast a condition on funding as a mere definition of its program" in an attempt to sidestep First Amendment limits.[30] Likewise, the FTC may not reframe compelled ideological neutrality as a "voluntary" merger condition in order to evade the same constitutional restraints.

The FTC may therefore not enforce this condition, even if it adopts it. Should the parties ultimately decline to comply with this condition, the FTC may not retaliate by reinitiating proceedings, reopening its review, or seeking to block the merger on alternative grounds, as that would itself constitute an independent First Amendment violation. Retaliation for the exercise of constitutional rights is not permitted. The Supreme Court has been clear that "[a]s a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for exercising their constitutional rights.[31] The logic of this rule applies to corporate entities asserting their expressive rights, which the government may not demand that they waive.

CONCLUSION

The FTC's proposed consent order not only misunderstands the advertising industry's operational realities but also infringes upon core First Amendment protections and ignores genuine competitive harms posed by the Omnicom-IPG merger. By conditioning merger approval on unconstitutional restrictions unrelated to legitimate antitrust concerns, the order sets a dangerous precedent for regulatory overreach. We urge the Commission to withdraw the proposed order and instead focus its efforts on addressing the actual competitive risks this merger presents through lawful and appropriate means.

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[30] *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).
[31] *Hartman v. Moore*, 547 U.S. 250, 256 (2006).