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Section 5 of the FTC Act: principles of navigation

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Section 5 of the Federal Trade Commission (FTC) Act prohibits 'unfair methods of competition' (UMC), including conduct that violates either the antitrust laws or Section 5 standing alone. Although it has existed for nearly 100 years, the FTC has never issued any formal guidance on its Section 5 enforcement policy. Relying on commonly used regulatory principles, this article identifies six criteria that the FTC should satisfy in pursuing any standalone Section 5 enforcement. First, the FTC should use its UMC authority only in cases of substantial harm to competition. Second, the FTC should pursue a UMC violation only where there is no procompetitive justification for the challenged conduct or where such conduct results in harm to competition that is disproportionate to its benefits. Third, in using its UMC authority, the FTC should avoid or minimize conflict with other institutions, including most notably the Department of Justice. Fourth, UMC enforcement must be grounded in robust economic evidence regarding the anticompetitive effects of the challenged conduct. Fifth, prior to pursuing a UMC violation, the agency should consider using its many non-enforcement tools to address the perceived competitive problem. Finally, the agency should provide clear guidance and minimize uncertainty in the UMC area.

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I. Introduction

Section 5 of the Federal Trade Commission (FTC or Commission) Act prohibits, among other business conduct, 'unfair methods of competition' (UMC).[1] During the nearly 100 years of its existence, the FTC has pursued as UMC

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[1] 15 USC s 45(a)(1) ('Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful.').

violations both conduct that violates the Sherman Act and other federal antitrust laws, as well as conduct that would not necessarily violate the antitrust laws but that represents a so-called standalone Section 5 violation.

This latter type of enforcement of standalone Section 5 violations has garnered at various times in the agency's history either hostile political reaction, critical commentary, or stinging appellate court losses. While individual Commissioners and FTC staff have engaged in occasional discussions regarding the proper scope of Section 5,[2] the FTC has not issued any formal report, statement, or guidelines regarding UMC enforcement policy under Section 5.

The primary goal of this article is to continue the dialogue, both inside and outside the agency, on the FTC's policy concerning standalone Section 5 enforcement.[3] As a Commissioner, this author has called for the FTC to issue some type of policy statement or other guidance on how and when the agency will pursue standalone Section 5 cases. This article offers some views on what might inform such a statement, as well as some guiding and limiting principles for consideration by the other sitting Commissioners and by interested parties outside the agency. In any case, in the absence of a Section 5 policy statement from the Commission, the principles discussed below will dictate this author's votes in any standalone Section 5 cases presented to her.

The article is structured as follows. The following section, 'A sea of uncertainty', briefly addresses the history of the FTC Act and then explains the need for the FTC to issue a Section 5 policy statement. The next section, 'Proposed principles of navigation', argues that Section 5 ought to be viewed as economic, rather than social, regulation. As such, Section 5 can and should be viewed through the same regulatory lens as rulemaking and other actions taken by regulatory agencies. The section 'Drawing the UMC boundaries' sets forth six criteria—based on regulatory principles with a strong, bipartisan pedigree—that the FTC should satisfy in pursuing any Section 5 enforcement. The section 'Charting the UMC course' argues that UMC enforcement should extend only a very limited amount beyond the antitrust laws and provides the author's views on the applicability of Section 5 to certain specific types of conduct. The final section, 'Staying the antitrust course', suggests how the FTC should prioritize its competition efforts. In particular, the section discusses how many of the unique features of the FTC cited by proponents of expanding UMC enforcement should be used to further develop and improve the antitrust laws rather than expand the scope of Section 5.

[2] For example, in 2008, the FTC held a day-long public workshop to explore the proper scope of the UMC prohibition in s 5. See Federal Trade Commission Workshop, 'Section 5 of the FTC Act as a Competition Statute' (17 October 2008) <http://www.ftc.gov/bc/workshops/section5/index.shtml> accessed 25 September 2013.

[3] The author commends her colleague, Commissioner Wright, for pursuing this dialogue by recently issuing a proposed Commission policy statement on UMC. See Joshua D Wright, Commissioner, US Federal Trade Commission, 'Proposed Policy Statement Regarding Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act' (19 June 2013) <http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf> accessed 25 September 2013. Previous efforts to grapple with UMC also include speeches and articles by other Commissioners, as well as the Commission workshop in 2008 noted above.

II. A sea of uncertainty

For many decades, the Commission's exercise of its UMC authority has launched the agency into a sea of uncertainty, much like the agency weathered when using its unfairness authority in the consumer protection area in the 1970s.[4] In issuing its 1980 statement on the concept of 'unfair acts or practices' under its consumer protection authority, the Commission acknowledged the uncertainty that had surrounded the concept of unfairness, admitting that 'this uncertainty has been honestly troublesome for some businesses and some members of the legal profession.'[5] This characterization just as aptly describes the state of the agency's UMC authority today.

As a Commissioner, when asked to set out on the open waters of unfair methods of competition under Section 5 in a five-person boat,[6] this author has repeatedly asked, 'Where is the chart?' Without a chart, the author has been willing only to wade cautiously in the shallows, with a matter involving exchanges of competitively sensitive information among competitors,[7] where the shore was clearly in sight. When asked to set out for a longer journey, such as in the *Bosch*[8] and *Google/MMI*[9] standard-essential patents matters, she has taken a position that can be in the most basic terms characterized as follows: 'Without a chart, I will not depart.'[10]

Now, the author is an old FTC hand and learned her craft under some of the finest captains, including Robert Pitofsky, Timothy J Muris, Deborah Platt Majoras, and William E Kovacic. All of them have at one time or another

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[4] See eg J Howard Beales, 'Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission' (2005) 72 Antitrust LJ 1057, 1061–65 (discussing events leading up to the issuance of the FTC's Unfairness Statement).

[5] Federal Trade Commission, 'Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction' (1984) 104 FTC 1070, 1071 (appended to Matter of Intl Harvester Co 104 FTC 949 (1984)) <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> accessed 25 September 2013. The FTC also has issued a policy statement regarding its approach to enforcing its 'deceptive acts or practices' authority under s 5, as well as several guidelines on the competition side, including the *Horizontal Merger Guidelines*, the *Competitor Collaborations Guidelines*, and the *Health Care Statements*, among others.

[6] Although the boat may have five berths, it can be steered by only three when the Commission has a full complement of Commissioners and as few as two in some circumstances.

[7] See Decision and Order, Matter of Bosley Inc FTC File No 121-0081 (8 April 2013) (settling standalone s 5 complaint) <http://ftc.gov/os/caselist/1210184/index.shtm> accessed 25 September 2013.

[8] Matter of Robert Bosch GmbH FTC File No 121-0081.

[9] Matter of Motorola Mobility LLC and Google Inc FTC File No 121-0120.

[10] See Statement of Commissioner Maureen K Ohlhausen, Matter of Robert Bosch GmbH FTC File No 121-0081 (26 November 2012) 3 ('Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition....') <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf> accessed 25 September 2013; Dissenting Statement of Commissioner Maureen K Ohlhausen, Matter of Motorola Mobility LLC and Google Inc FTC File No 121-0120 (3 January 2013) 5 ('I disagree with my colleagues about whether the alleged conduct violates Section 5 but, more importantly, believe the Commission's actions fail to provide meaningful limiting principles regarding what is a Section 5 violation in the standard-setting context, as evidenced by its shifting positions in *N-Data*, *Bosch*, and this matter.') <http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf> accessed 25 September 2013.

expressed strong concerns about using Section 5.[11] The author also has studied the logs of previous sailings under the unfair methods flag, such as *Official Airlines Guide*,[12] *Boise Cascade*,[13] and *Ethyl*.[14] The lesson she draws from this history is that if you are sailing beyond the chart, here be dragons.[15]

When looking for possible sources for a chart, it has become clear that many would-be chart makers have looked to what the boat builders said almost 100 years ago. It seems, however, that the builders had a variety of views and even thought the boat should be a different kind of vessel, from a skiff to an ocean liner.[16] Even if it makes sense to try to chart a course forward by looking so far back,[17] this makes reliance on the historical record for chart-making guidance a 'take your pick' exercise. Some have tried to rely on relatively newer pronouncements by the Supreme Court,[18] which suggested that the contours of UMC were expansive, exceeding both the letter and the spirit of the antitrust laws. They believe that this means the FTC can sail beyond the realm of antitrust and into the waters of general public policy.[19]

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[11] See eg Transcript, Federal Trade Commission Workshop, 'Section 5 of the FTC Act as a Competition Statute' (17 October 2008) 64 (Robert Pitofsky) ('I believe one must be very, very cautious about using Section 5. It is not a roving mandate to the Commission to go around doing good from an antitrust point of view.') <http://www.ftc.gov/bc/workshops/section5/transcript.pdf> accessed 25 September 2013; Timothy J Muris and Paloma Zepeda, 'The Benefits, and Potential Costs, of FTC-Style Regulation in Protecting Consumers' (2012) 8 Competition L Intl 11, 14 ('[T]he FTC should be a referee, not the star player in the market economy. The agency has not always viewed its mission in this fashion. In the 1970s, using authority under section 5 haphazardly and without meaningful standards, the Commission embarked on a vast enterprise to transform entire industries.'); Dissenting Statement of Chairman Deborah Majoras, Matter of Negotiated Data Solutions LLC FTC File No 051-0094 (23 January 2008) <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf> accessed 25 September 2013; Dissenting Statement of Commissioner William E Kovacic, Matter of Negotiated Data Solutions LLC FTC File No 051-0094 (23 January 2008) <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf> accessed 25 September 2013; William E Kovacic and Marc Winerman, 'Competition Policy and the Application of Section 5 of the Federal Trade Commission Act' (2010) 76 Antitrust LJ 929.

[12] *Official Airline Guides Inc v FTC* 630 F 2d 920, 927 (2d Cir 1980) (raising concerns that enforcement of the FTC's order would allow the FTC to delve into 'social, political, or personal reasons' for a monopolist's refusal to deal and to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry).

[13] *Boise Cascade Corp v FTC* 637 F 2d 573, 582 (9th Cir 1980) ('[T]o allow a finding of a section 5 violation on the theory that the mere widespread use of the [delivered pricing] practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior.').

[14] *EI du Pont de Nemours & Co v FTC* 729 F 2d 128, 139 (2d Cir 1984) (*Ethyl*) ('[T]he Commission owes a duty to define the conditions under which conduct . . . would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.').

[15] See The Lenox Globe (ca. 1503–07) (in the collection of the New York Public Library) ['HC SVNT DRACONES' (ie 'here be dragons') appears on the eastern coast of Asia].

[16] See generally Marc Winerman, 'The Origins of the FTC: Concentration, Cooperation, Control, and Competition' (2003) 71 Antitrust LJ 1.

[17] See Stephen G Breyer, *Regulation and Its Reform* (Harvard University Press 1982) 8 (describing 'the stalemate often produced by looking for the justifications of a regulatory program in its authorizing statute, in the arguments of its supporters, or in the underlying motives of those who fought for enactment of the program'; 'Statutes are typically vague, open-ended, or conflicting in their statements of purpose. . . . The arguments of supporters may or may not reflect their underlying objectives, and their true motives are difficult to fathom.').

[18] See *FTC v Sperry & Hutchinson Co* 405 US 233, 244 (1972) (*S&H*) (holding that, like a court of equity, the FTC can consider 'public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws').

[19] See eg Section 5 Workshop (n 11) 137 (Commissioner J Thomas Rosch) ('*S&H*, in my judgment, is alive and well, notwithstanding the trilogy of appellate cases decided in the early '80s, that rejected the Commission's decisions challenging conduct as unfair methods of competition under Section 5.'); ibid 208 (Commissioner Jon Leibowitz) (discussing Supreme Court precedents and concluding: 'I decided or I think we've all decided, that

Accordingly, the Commission has from time to time set out with the idea that because the chart is theoretically very expansive, it does not even need a chart because its excursions are unlikely to exceed the boundaries of such a large territory.[20] This approach to navigation has not fared well either, with the *Abbott Labs* case in 1994 hitting some of the same shoals that sunk the FTC's case in *Ethyl* 10 years before that.[21] The courts have very clearly told the Commission that it has to have a chart.

Since receiving that clear signal flag, the Commission has brought some UMC cases but only in settlements, where the defendant basically agrees for purposes of the settlement that its conduct appears somewhere on the theoretical UMC chart.[22] The lack of testing by a court and the vehement objections by many of the FTC navigators[23] undercut the confidence one can have in this type of guidance, which is essentially a one-entity chart sketched on the back of a settlement agreement, often with the drafters disagreeing on the proper route.[24]

Given this history, the other question this author has asked is whether the UMC route is the only or the best way to get where the Commission wants to go. Now, when it built the FTC boat, Congress was concerned that the Sherman Act, as interpreted by the courts, did not reach far enough. To continue the transportation analogy, the Sherman train lines were rather limited in 1914. Ninety-nine years later, however, the courts recognize the Sherman Act's expanded reach, with extensive precedent developed through actions by the antitrust enforcement authorities, including the FTC, and private parties. Although the courts have trimmed back a few spur lines since the 1960s and 1970s,[25] the Sherman Act route still goes almost everywhere a competition agency should

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the FTC Act goes well beyond the metes and bounds of the Sherman Act.'); Neil W Averitt, 'The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act' (1980) 21 BC L Rev 227, 284–90 (discussing potentially broad implications of *S&H* for Section 5 enforcement); Michael Pertschuk, Chairman, US Federal Trade Commission, Remarks before Annual Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools (27 December 1977) 12 ('Frankly, I don't know how far we can travel on *S&H* green stamps, but we intend to make use of the precedent, as it illustrates the elastic nature of the concept of 'unfairness' which Section 5 embodies.').

[20] See eg Statement of the Commission, Matter of Robert Bosch GmbH FTC File No 121-0081 (26 November 2012) 3 ('[W]e view this action as well within our Section 5 authority.') <http://www.ftc.gov/os/caselist/1210081/121126boschcommissionstatement.pdf> accessed 25 September 2013. How can the Commission know that it is well within its authority if it has not identified how far that authority reaches?

[21] See *FTC v Abbott Labs* 853 F Supp 526, 535–36 (DDC 1994) ('The Second Circuit stated emphatically that some workable standard must exist for what is or is not to be considered an unfair method of competition under § 5. Otherwise, companies subject to FTC prosecution would be the victims of "uncertain guesswork rather than workable rules of law."') (quoting *Ethyl* 729 F 2d at 139).

[22] Setting s 5 policy via consent is particularly problematic when the Commission does so in the context of a Hart–Scott–Rodino merger review (as it did in the *Bosch* matter), where there is likely to be even less resistance from parties who are primarily interested in seeking clearance of a merger by the FTC.

[23] See generally Majoras *N-Data* Dissent (n 11); Kovacic *N-Data* Dissent (n 11).

[24] For example, the FTC deemed reneging on a patent licensing commitment both an unfair method of competition and an unfair act or practice in the *N-Data* consent, then only an unfair method of competition in the more recently settled *Bosch* and *Google/MMI* cases.

[25] Much, if not all, of this constriction was undertaken for sound legal and economic reasons.

wish to travel. This then prompts the question, 'If the destination is already on the Sherman train line, why not take that route?'

Others believe that, because there are places worth visiting that the Sherman railroad will not reach, it is important to be able to use the UMC route under Section 5. They may be right in some cases, but, before the FTC sets off into uncharted waters, this author wants to know where the agency is going and, equally if not more important, where it will not venture.

Although it has been amusing to engage in this extended nautical metaphor, the goal of this article is serious: to offer a framework for defining the parameters of the FTC's UMC authority. It calls upon drafting tools that have been carefully developed and widely deployed in government for almost two decades. It also is essentially a forward-looking inquiry that asks what this author believes is the most crucial question here: Why will consumers and competition be better off in the future by the FTC using its UMC authority more expansively?

A significant focus in evaluating the proper scope of UMC has been the legislative history of the FTC Act and the agency's cases from 50, 60, and more years ago. As rigorous and interesting as that focus has been—and the extensive work that former Chairman Kovacic and others have done in this area is admirable—the FTC should look forward to the next 100 years of its existence and ask whether and how consumer welfare will be promoted by expanding UMC beyond the antitrust laws.

III. Proposed principles of navigation

As a threshold matter, it is necessary to understand what type of goals UMC should pursue, to know where the Commission wants to go and why. The FTC's enforcement of the antitrust laws (other than Section 5) has evolved over the past 100 years in so many ways, including, importantly, a greater focus on consumer welfare. As explained in more detail below, the agency's UMC authority similarly should address solely harm to competition and thus consumers—not harm to competitors. This reflects a fairly strong consensus that UMC should not address conduct that may be characterized as unjust or immoral but ultimately does not harm competition and consumers. Former FTC Chairman Robert Pitofsky captured this view quite well at the 2008 Section 5 workshop, explaining that: 'Oppressive, coercive, bad faith, fraud, and even contrary to good morals. I think that's the kind of roving mandate that will get the Commission in trouble with the Courts and with Congress.'[26] Thus, UMC is best viewed as an

[26] Section 5 Workshop (n 11) 67 (Robert Pitofsky); see also ibid 87 (Robert Lande) ('I submit if the Commission tried to have an expansive reading of Section 5 . . ., but did not do so in a way that was clear and was bounded, then the Supreme Court would today restrict Section 5 . . . to the other antitrust laws. And this would especially happen if the Commission interpreted Section 5 in a way that was non-economic, such as condemning conduct that was unjust, oppressive or immoral'); ibid 176 (Thomas Leary) ('I'm very wary of a Section 5 standard that relies on my ideas or anyone else's ideas as what are good morals, what is abusive and oppressive and what have you.'); Thomas Dahdouh, 'Section 5, the FTC and Its Critics: Just Who Are the

economic regulation of business conduct, not a social regulation, which is to say that it should focus only on economic efficiency goals, not social goals, such as increased employment or better working conditions, or industrial policy goals, such as favouring domestic competitors.[27]

Once UMC is defined as an economic regulation, it is logical when drafting a chart of its appropriate scope to look for guidance in existing regulatory philosophy and principles for regulation in general to aid the analysis by FTC Commissioners, who come from a variety of backgrounds.[28] Accordingly, in developing a UMC framework, this author proposes looking to the principles and underlying philosophy expressed in Executive Order 12866 (EO 12866 or the Order).[29] EO 12866 established a regulatory philosophy and 12 principles of

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Radicals Here?' (2011) 20 Competition: J Antitrust & Unfair Competition L Sec St B Cal 1, 15 ('A standard tethered to some notion of harm to competition and the competitive process jettisons formulations of a Section 5 standard that are too unprincipled and ambiguous. Consequently, while even the Supreme Court has spoken of Section 5 as used to challenge conduct that is somehow "against public policy", such formulations are simply inherently amorphous in principle and unworkable in practice.') (footnote omitted).

[27] This view has the added benefit of avoiding sending mixed signals to competition enforcers around the world, whom the FTC often counsels to adopt a similar economic efficiency focus in enforcing their competition laws.

[28] See Breyer (n 17) 3 ('It proved equally illusory to look to regulators as "scientists," professionals, or technical experts, whose discretion would be held in check by the tenets of their discipline. It has become apparent that there is no scientific discipline of regulation, nor are those persons appointed to regulatory offices necessarily experts. Indeed, some of the most successful – as well as some of the least successful – regulators have had political backgrounds and have lacked experience in regulatory fields.').

[29] Executive Order 12866, Regulatory Planning and Review, 58 Fed Reg 51735 (30 September 1993), *supplemented by* Executive Order 13563, 76 Fed Reg 3821 (18 January 2011). EO 12866 sets forth the following 12 principles that agencies should follow to the extent permitted by law and where applicable:

(i) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
(ii) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other laws) should be modified to achieve the intended goal of regulation more effectively.
(iii) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behaviour or providing information upon which choices can be made by the public.
(iv) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.
(v) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.
(vi) Each agency shall assess both the costs and benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.
(vii) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.
(viii) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behaviour or manner of compliance that regulated entities must adopt.
(ix) Wherever feasible, agencies shall seek views of appropriate state, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities.
(x) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other federal agencies.

regulation for use by federal agencies in deciding whether and how to regulate.[30] President Clinton issued EO 12866 in 1993, and although it has been supplemented and amended since then, the philosophy and guiding principles remain in effect and relevant today.

At its core, EO 12866 seeks to ensure that a regulation does more good than harm for the public by requiring a federal agency to identify a significant market failure or systemic problem, to evaluate alternative approaches to regulation, to choose the regulatory action that maximizes net benefits, to base the proposal on strong economic evidence, and to understand the expected effects of the regulation on those who bear the costs of the regulation and those who enjoy its benefits. Other scholars of regulation have also endorsed this basic approach. For example, now-Justice Stephen Breyer in his 1982 book, *Regulation and Its Reform*, framed the proper inquiry as follows: 'The framework is built upon a simple axiom for creating and implementing any program: determine the objectives, examine the alternative methods of obtaining these objectives, and choose the best method for doing so.'[31]

Before continuing, a couple clarifications are in order. First, looking to EO 12866 and its underlying principles in developing a UMC framework does not mean that one should strictly adhere to each and every principle in the Order. Rather, this article merely advocates drawing upon these carefully developed regulatory principles and adapting them to the task at hand. Second, this article is not arguing for the explicit application of EO 12866 to the FTC—with respect to either UMC or the agency's efforts more generally. Rather, this author is drawing on the 'regulatory humility' she sees reflected in the philosophy and principles of EO 12866 in staking out her views on Section 5.[32] Employing these principles to develop UMC guidance will also help the

(xi) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities, consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(xii) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

ibid s 1(b).

[30] Elements of these regulatory principles have been present in various parts of the federal government since the 1960s. See Jim Tozzi, 'OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding' (2011) 63 Admin L Rev 37, 41.

[31] Breyer (n 17) 5.

[32] See Ohlhausen *Bosch* Statement (n 10) 2 ('[T]his enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to that of these other institutions.'); see also Joshua D Wright, Commissioner, US Federal Trade Commission, 'Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority' (19 June 2013) 15 ('[T]he Commission must recast its unfair methods of competition authority with an eye toward regulatory humility in order to effectively target plainly anticompetitive conduct.') <http://www.ftc.gov/speeches/wright/130619section5recast.pdf> accessed 25 September 2013.

Commission achieve transparency, predictability, and fairness in its enforcement efforts.[33]

IV. Drawing the UMC boundaries

The various principles underlying EO 12866 suggest that the FTC consider several important factors to discern when consumers and competition would be better off with a definition of UMC that goes beyond the antitrust laws. First, the FTC should use its UMC authority only in cases of substantial harm to competition. Second, the FTC should use UMC only where there is no procompetitive justification for the challenged conduct or where such conduct results in harm to competition that is disproportionate to its benefits. Third, in using UMC, the FTC should avoid or minimize conflict with other institutions, including most notably the Department of Justice (DOJ). Fourth, UMC enforcement must be grounded in robust economic evidence regarding the anticompetitive effects of the challenged conduct. Fifth, prior to using UMC, the agency should consider using its many non-enforcement tools to address the perceived competitive problem. Finally, the agency should provide clear guidance and minimize the potential for uncertainty in the UMC area.[34]

In assessing a potential UMC enforcement action, the FTC should weigh all of these factors together, although the first factor, identifying the problem, should always be one of the foremost considerations. The following discussion expands on these six proposed UMC factors.

Choosing a destination (identifying the problem)

First, EO 12866 calls for each agency to identify the specific market failure or other particular problem that it intends to address through regulation to help assess whether such regulation is warranted.[35] Similarly, it is essential that the FTC be clear about the problem that it wants to use UMC to address. To return to the navigation analogy, if the FTC does not know where it wants to go, how can it set a course or even know if it has arrived successfully?

As stated above, UMC enforcement should seek to address anticompetitive conduct that results in a diminution of consumer welfare by reducing output,

[33] See eg Ohlhausen *Bosch* Statement (n 10) 3 ('It is important that government strive for transparency and predictability.'); Maureen K Ohlhausen, Commissioner, US Federal Trade Commission, Statement Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (31 July 2012) (dissenting from the FTC's July 2012 withdrawal of its policy statement regarding the seeking of disgorgement in competition cases because of concern that such withdrawal would reduce agency transparency and leave those subject to its jurisdiction without sufficient guidance as to the circumstances in which the FTC will pursue the remedy of disgorgement in antitrust matters) <http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf> accessed 25 September 2013.

[34] The author remains open to considering different or additional factors that ought to be included in any UMC policy statement issued by the Commission, such as a market power screen for unilateral conduct or a culpability element (going beyond the business justification criterion discussed below).

[35] See Executive Order 12866 s 1(b)(1).

raising prices, or lowering quality. The Commission must tie its UMC enforcement back to its core mission of promoting and protecting consumer welfare. The FTC's UMC authority therefore should be used solely to address harm to competition or the competitive process, and thus to consumers. The FTC should not use its UMC authority to address harm merely to competitors. As the ABA Section of Antitrust Law argued in its most recent Presidential Transition Report, 'Section 5 should not be used to sacrifice efficient behaviour for insignificant or illusory increases in consumer welfare or to shield competitors from the rigors of efficient competition.'[36]

Furthermore, any harm to competition pursued under the FTC's UMC authority ought to be substantial. This substantiality requirement would mirror the one in the FTC's Unfairness Statement on the consumer protection side, which states that the consumer injury must be substantial for the agency to pursue an unfair act or practice claim under Section 5.[37] As the Unfairness Statement notes, 'The Commission is not concerned with trivial or merely speculative harms.'[38] Enforcement efforts on the competition side of Section 5 should likewise focus solely on substantial harms to ensure both that the agency is properly allocating its scarce resources[39] and that it is not pursuing matters with high legal and political risks for little consumer benefit.[40]

Identifying currents and shoals (analysing benefits, costs, and the impact on incentives)

Analysing the relative benefits and costs of a regulation underlies several of the guiding principles in EO 12866. For example, the Order calls for agencies to consider both the costs and the benefits of proposed regulations,[41] as well as

[36] ABA Section of Antitrust Law, 'Presidential Transition Report: The State of Antitrust Enforcement 2012' (2013) 20; see also Herbert Hovenkamp, 'The Federal Trade Commission and the Sherman Act' (2010) 62 Fla L Rev 871, 878–79 ('[T]he practices that [the FTC] condemns must really be "anticompetitive" in a meaningful sense. That is, there must be a basis for thinking that the practice either does or will lead to reduced output and higher consumer prices or lower quality in the affected market. . . . [A]nd most importantly, consumers—and not competitors—must be the ultimate protected class.'). A focus on harm to competition is fully consistent with the sentiment expressed by former Chairman Leibowitz to Congress in 2010 that the FTC ought to focus its standalone s 5 efforts on 'cases where there is clear harm to the competitive process and to consumers.' Prepared Statement of the Federal Trade Commission, presented by Jon D Leibowitz, Chairman, before the US House Committee on the Judiciary (27 July 2010) 13 <http://www.ftc.gov/os/testimony/100727antitrustoversight.pdf> accessed 25 September 2013.

[37] FTC Unfairness Statement (n 5) 1073.

[38] ibid; see also ABA Transition Report (n 36) 20 ('Standalone Section 5 enforcement should be used, if at all, only when the conduct involves substantial competitive harm.').

[39] In all agency activities, the FTC must keep the concept of opportunity costs firmly in mind. Given the many instances of competitive harm that are reachable under the Sherman and Clayton Acts occurring today, the FTC should not focus significant enforcement efforts on standalone s 5 matters that do not present substantial harm.

[40] There may be circumstances in which all of these proposed UMC criteria are met, except that the substantial harm has not yet taken place. In such cases, the Commission ought to intervene only if there is a high likelihood of the harm taking place. This author contemplates a standard of likelihood that is comparable to the 'dangerous probability of success' element in claims of attempted monopolization.

[41] See Executive Order 12866 s 1(b)(6).

incentives for innovation, among other factors.[42] The Order further requires agencies to design regulations in the most cost-effective manner to achieve the regulatory objective and to tailor regulations to impose the least burden on society, including individuals, businesses, and other entities.[43]

This requirement to design regulations to be cost-effective and preserve incentives for innovation highlights a concern that has plagued UMC enforcement for many years, which is the need to avoid false positives—that is, the condemning of conduct that is procompetitive or competitively neutral. The tendency to deter the use of some new, efficient business practice has been a recurring theme in the history of Section 5.[44] Even recently, the Commission's action in the *Intel*[45] case that targeted above-cost discounting has been strongly criticized for its potential for chilling procompetitive business conduct.[46]

To impose the least burden on society and avoid reducing businesses' incentives to innovate, the FTC should challenge conduct as an unfair method of competition only in cases in which there is either a lack of any procompetitive justification for the conduct,[47] or when the conduct at issue results in harm to competition that is disproportionate to its benefits to consumers and to the economic benefits to the defendant, exclusive of the benefits that may accrue from reduced competition. FTC Commissioner Josh Wright has endorsed the first part of this proposed test, which limits UMC enforcement to cases in which the conduct at issue generates no cognizable efficiencies.[48] It is also appropriate, in this author's view, to include a disproportionate harm test in any policy statement on UMC to address cases in which some efficiencies are present.

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[42] See ibid s 1(b)(5).

[43] See ibid s 1(b)(5), (11).

[44] See eg Hovenkamp (n 36) 874 ('Reaching beyond what the Sherman Act reaches is likely to condemn practices that are not economically harmful and that might even benefit consumers. Indeed, historical experience provides considerable warrant for that position.') [discussing *FTC v Brown Shoe Co* 384 US 316 (1966)]; ibid 885 ('The FTC's contemplated relief [in *Intel*] may lead the FTC down the same unfortunate road it travelled in the 1970s and earlier, when the FTC condemned practices that really were not anticompetitive. In the process the actions benefitted competitors but caused consumers more harm than good.').

[45] Complaint, Matter of Intel Corp FTC File No 061-0247 (16 December 2009) 17–18 (alleging monopolization, attempted monopolization, unfair methods of competition, unfair acts or practices, and deceptive acts or practices violations) <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf> accessed 25 September 2013.

[46] See eg Hovenkamp (n 36) 894 ('An injunction against practices that are clearly exclusionary and have little social value is one thing, but an order requiring Intel to refrain from bidding aggressively for additional sales in the way that any rational firm would is likely to benefit mainly Intel's rivals at consumers' expense.'); Joshua D Wright, 'An Antitrust Analysis of the Federal Trade Commission's Complaint against Intel' (2010) ICLE Antitrust and Competition White Paper Series, 25 ('[T]he novel use of Section 5 power against Intel will properly be seen as boundless, and firms will refrain from welfare-enhancing discounts and other pro-consumer behavior accordingly.') <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1624943> accessed 25 September 2013.

[47] To satisfy this part of the test, the procompetitive justification offered must not be pretextual, for it is likely any reasonably creative party can conjure some justification for its actions. Rather, the procompetitive justification must explain why the conduct is a 'form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal . . .' *United States v Microsoft Corp* 253 F 3d 34, 59 (DC Cir 2001).

Often closely related to business justification is a party's intent in engaging in particular conduct. As in Sherman Act cases, although improper intent or motive can be probative of effects, alone it should not justify a finding of standalone s 5 liability.

[48] See Wright (n 3) 9–13.

The disproportionate harm test would focus any UMC enforcement on conduct that is most likely to harm competition. It also avoids attempts to balance precisely procompetitive and anticompetitive effects that are based on after-the-fact evaluations of conduct whose effects on consumers and competitors, as well as the firm itself, may have been unclear when undertaken. The FTC previously has advocated for the disproportionality test in the Section 2 context,[49] and it is part of Professor Hovenkamp's preferred general definition of anticompetitive exclusion under Section 2.[50]

Although the disproportionality test potentially allows for an increased reach of Section 5 relative to one that allows Section 5 enforcement only where no procompetitive justifications are offered, this disproportionality test is a demanding one, reflecting significant concerns about an expanded Section 5 chilling procompetitive conduct. The more demanding this test, the more confidence the FTC will have that it is challenging conduct that is something other than competition on the merits.[51]

Furthermore, to avoid chilling procompetitive conduct, the FTC should seek only prospective, non-punitive remedies for UMC violations. In short, barring some extraordinary circumstance, this means cease-and-desist orders. Furthermore, the FTC should not seek disgorgement for standalone violations of Section 5. Although the Commission withdrew its policy statement on disgorgement in competition cases last year—an action opposed by this author[52]—the Commission explained that it has no intention to seek disgorgement in standalone Section 5 cases.[53] These remedial principles are consistent with and, one might argue, required by, the lighter-handed penalties rationale underlying the enactment of Section 5.[54]

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[49] See Brief of the United States and the Federal Trade Commission as Amici Curiae in Support of Petitioner, *Verizon Commc'ns Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) 14 (citing Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law*, vol 3 (2nd edn, Aspen Publishers 2002) paras 651a, 658f, at 72, 131–32, 135) <http://www.ftc.gov/os/2003/05/trinkof.pdf> accessed 25 September 2013.

[50] See Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law*, vol 3 (3rd edn, Aspen Publishers 2008) para 651a, at 96 ['We define monopolistic conduct as acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits.'].

[51] As the antitrust agencies acknowledged in their *Trinko* Brief, applying the disproportionality test is not without its difficulties. See *Trinko* Brief (n 49) 14 ('Applying that standard "can be difficult," because "the means of illicit exclusion, like the means of legitimate competition, are myriad."') (quoting *Microsoft* 253 F 3d at 58). Although the test may not be perfect, it is questionable whether any other test for UMC would lack imperfections. To paraphrase Sir Winston Churchill, it may be the worst test except for all the others. See 444 UK Parliamentary Debates, House of Commons (5th series 1947) cols 206–07 (Winston Churchill) ('It has been said that democracy is the worst form of government except all the others that have been tried.').

[52] See Ohlhausen Disgorgement Dissent (n 33).

[53] See Statement, US Federal Trade Commission, 'Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases' (31 July 2012) 2 n 6 <http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf> accessed 25 September 2013.

[54] See Kovacic and Winerman (n 11) 931–32. One benefit of using s 5 that Commissioners supporting broader UMC enforcement have stressed is the insignificant likelihood of follow-on litigation from s 5 enforcement relative to enforcement of the antitrust laws. See eg Section 5 Workshop (n 11) 215 (Commissioner Jon Leibowitz). Other Commissioners, however, have cast doubt on the robustness of this benefit. See Kovacic *N-Data* Dissent (n 11) 1–2. The FTC ought to revisit the notion that standalone s 5 cases do not result in any

Preventing collisions at sea (avoiding inconsistent or duplicative efforts and institutional conflict)

EO 12866 also counsels an agency to avoid regulations that are inconsistent with, or duplicative of, those that it or other federal agencies already have.[55] This is a vital issue for UMC, as much of the debate has centred around its use either to shore up Sherman Act cases that lack a required element or to duplicate Sherman Act or Clayton Act enforcement under some circumstances.[56]

First, the FTC should not use UMC to rehabilitate a deficient Sherman or Clayton Act claim.[57] Recent history suggests that the temptation to use Section 5 as a path to avoid the requirement of clearly specifying theories and harms is a powerful one, as highlighted by the strong dissents by Chairman Majoras and Commissioner Kovacic in the *N-Data* matter.[58]

Second, if there is a viable Sherman or Clayton Act claim that the FTC can pursue for a particular type of conduct, then it should not use UMC in such a case. Those acts, as currently interpreted by the courts, likely cover almost all the anticompetitive conduct that the agency should want to reach.[59] Moreover, the FTC must be sensitive to the fact that it shares antitrust enforcement authority with DOJ. Using UMC to supplant unnecessarily the Sherman or Clayton Act

follow-on litigation against FTC respondents. See eg *Liu v Amerco* 677 F 3d 489, 491, 495 (1st Cir 2012) (holding that customer stated a claim against U-Haul and its parent company under Massachusetts unfair trade practices statute for inviting its competitors to collude; 'Liu's complaint alleged peculiar facts not uncovered by Liu but recounted in documents stemming from an investigation by the Federal Trade Commission . . . .').

[55] See Executive Order 12866 s 1(b)(10).

[56] See eg Section 5 Workshop (n 11) 98–9 (William Page) (advocating use of s 5 in certain cases 'in which the plaintiff cannot satisfy *Twombly*'s pleading standards'); ibid 158 (Bert Foer) (advocating use of s 5 in unilateral conduct cases in which the respondent's market share 'is less than the 70 per cent or so that often characterizes Sherman Act decisions'); ibid 169 (Thomas Krattenmaker) (advocating use of s 5 in 'gap-filling cases' that are 'missing some legal hook that's required under the Sherman Act').

[57] See eg Jon Leibowitz, Commissioner, US Federal Trade Commission, '"Tales from the Crypt": Episodes '08 and '09: The Return of Section 5' (17 October 2008) 5 ('Nor would we be wise to use the broader [Section 5] authority whenever we think we can't win an antitrust case, as a sort of "fallback."') <http://www.ftc.gov/bc/workshops/section5/docs/jleibowitz.pdf> accessed 25 September 2013; Section 5 Workshop (n 11) 127 (Robert Pitofsky) ('I really do not like that idea that Section 5 is there to diminish the burden on the Commission on how it proves its cases. . . . I can't believe that Congress in 1914 said, let's make it easier for the Commission to prove its cases, let's put unfairness in there.'); Matter of General Foods Corp 103 FTC 204, 365 (1984) ('While Section 5 may empower the Commission to pursue those activities which offend the "basic policies" of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed.').

[58] See Majoras *N-Data* Dissent (n 11) 4–6; Kovacic *N-Data* Dissent (n 11) 2–3.

[59] See eg Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law*, vol 2 (3rd edn, Aspen Publishers 2007) para 302h, at 30 ('Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anticompetitive agreement or monopolistic situation that ought to be attacked whether "completely full blown or not." Nothing prevents those statutes from working their own condemnation of practices violating their basic policies.'); Joe Sims, 'A Report on Section 5' (November 2008) Global Competition Policy Online 5 (expressing 'serious doubts' that 'there are some real, not imaginary or hypothetical, competitive problems that are currently causing meaningful competitive harm and that cannot adequately be dealt with by the application of the Sherman and Clayton Acts, with their depth of judicial interpretation and gloss accumulated over more than a century of extensive private and public litigation'), <https://www.competitionpolicyinternational.com/file/view/5707> accessed 25 September 2013.

creates a conflict between these sister enforcers by creating the implication that those acts do not prohibit the challenged conduct. Of even greater concern, such use of UMC subjects businesses engaged in the same conduct to different liability standards based solely on the agency to which an investigation happens to be cleared. This could transform the FTC and DOJ's informal clearance procedures from a matter of administrative efficiency to a deciding factor for liability for certain conduct. As someone who was at the Commission when Congress last expressed grave concerns about the clearance process,[60] this author believe it is crucial that these types of conflicts are minimized.[61]

The need to avoid institutional conflict extends beyond the FTC's relationship with DOJ. Before pursuing a standalone Section 5 case, the FTC ought to assess whether it is best or particularly well situated to address the conduct at issue. Or, are other government entities, such as the federal courts, the Patent and Trademark Office, or the International Trade Commission, better able than the FTC to address the conduct?[62]

In determining whether the definition of UMC should be expanded to cover a particular type of conduct, the FTC also should look beyond other government entities and consider whether market responses, self-regulation, or private suits for contract breaches, business torts, or Lanham Act violations, to name just a few, can achieve the same ends equally or more effectively.

Using navigational aids (having an economic basis for enforcement decisions)

EO 12866 calls for agencies to base their regulatory decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, any contemplated regulation.[63] Similarly, any effort to expand UMC beyond the antitrust laws should be grounded in robust economic evidence that the challenged practice is anticompetitive and reduces consumer welfare. Prior to filing an enforcement action targeting particular business conduct, the agency, through its competition policy research and development efforts, should acquire substantial expertise regarding such conduct and its effects, if any, on consumer welfare. That approach, after all, is fully consistent with the rationales underlying Section 5 of the

[60] See eg Yochi J Dreazen and John R Wilke, 'Justice Department, FTC Deal Dividing Merger Reviews Collapses' *Wall St J* (New York, 21 May 2002) B6; Ira Teinowitz, 'Senator Wants to "Eliminate" FTC Chief: Ugly Public Feud Heats Up Further' *AdAge.com* (New York, 15 April 2002).

[61] Some raised concerns regarding different preliminary injunction standards applicable to FTC and DOJ court challenges of proposed mergers following the D.C. Circuit's decision in *Whole Foods*. See eg Thomas A Lambert, 'Four Lessons from the Whole Foods Case' (Spring 2008) 31 Regulation 22, 29; 'Whole Foods Fiasco' *Wall St J* (New York, 31 December 2008) A8. A broad application of UMC to impose a different standard on businesses based on which agency reviews their actions will raise similar concerns.

[62] See Ohlhausen *Bosch* Statement (n 10) 2; Ohlhausen *Google/MMI* Dissent (n 10) 3–6.

[63] See Executive Order 12866 s 1(b)(7).

FTC Act, including in particular the notion that the agency would research and evaluate potentially problematic business conduct.[64]

Choosing the most direct route (evaluating existing alternatives)

In keeping with the principles underlying EO 12866, the FTC also should undertake two related inquiries that focus on whether using UMC is the most efficient route to address the substantial harm to consumer welfare it has identified. The first asks whether existing laws or regulations have created or contributed to the perceived competitive problem and whether the better course is to modify those laws or regulations to address the problem more effectively.[65] The second inquiry asks whether there are feasible alternatives to direct regulation, including providing information to improve marketplace choices.[66]

The FTC often has sought to address a competitive concern in the marketplace via its many non-enforcement tools, such as conducting research, issuing reports and studies, and engaging in competition advocacy. For example, the agency has done extensive non-enforcement work on ways to improve the patent system, including offering suggestions for particular changes in the law.[67] As another example in the patent area, non-enforcement activity may include advocacy efforts encouraging improved rules for standard-setting organizations (SSOs) to the extent the agency is concerned about the competitive effects of having unspecified terms, such as fair, reasonable, and non-discriminatory (FRAND) licensing obligations, in the agreements between SSOs and their members. There are also many examples outside the patent area, such as the Commission's joint efforts with the DOJ to address competitive issues in the real estate industry through advocating for increased consumer choice in brokerage services, issuing a report on competition in the industry, and releasing consumer education materials that informed consumers about their marketplace options.[68]

The agency should consider its non-enforcement options not only because they may offer the most efficient and effective routes to reducing competitive problems but also, as mentioned above, because their use will minimize conflicts

[64] See Kovacic and Winerman (n 11) 930–32.

[65] See ibid s 1(b)(2).

[66] See ibid s 1(b)(3).

[67] See eg Comments, US Department of Justice Antitrust Division and Federal Trade Commission, Matter of Notice of Roundtable on Proposed Requirements for Recordation of Real-Party-in-Interest Information throughout Application Pendency and Patent Term, Dkt No PTO-P-2012-0047 (USPTO 1 February 2013) <http://www.ftc.gov/os/2013/02/130201pto-rpi-comment.pdf> accessed 25 September 2013; Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011) <http://www.ftc.gov/os/2011/03/110307patentreport.pdf> accessed 25 September 2013; Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (2003) <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> accessed 25 September 2013.

[68] The Commission's various efforts in the real estate area are described, and related materials are available, at <http://www.ftc.gov/bc/realestate/index.htm> accessed 25 September 2013.

between the FTC's UMC authority and the authority of other federal agencies—including in particular DOJ's Antitrust Division—over the same conduct.[69]

Producing a readable chart (providing clear guidance)

Finally, the FTC must provide clear guidance and seek to minimize the potential for uncertainty in the UMC area.[70] Fundamentally, this means that a firm must be reasonably able to determine that its conduct would be deemed unfair at the time it undertakes the conduct and not have to rely on an after-the-fact analysis of the impact of the conduct that was not foreseeable. Practically, this means that the Commission ought to develop and issue a policy statement of some kind that provides guidance on how the agency will and will not use its UMC authority. Such a policy statement would be useful not only to firms subject to the FTC's jurisdiction, but also to Commission staff, who may be tasked with litigating UMC cases in administrative litigation at the agency.

This author is certainly not the first person to call for such guidance,[71] but she will continue to advocate for it in her role as a Commissioner if the Commission pursues expansive UMC theories. This author is willing to consider both the form and the substance of such a document.[72] In any case, as with the Unfairness Statement on the consumer protection side, the goal would be 'to provide a reasonable working sense of the conduct that is covered.'[73]

Beyond a policy statement on its UMC authority, the Commission ought to take additional steps in the interest of transparency when it brings a standalone Section 5 case.[74] First, the Commission ought to explain why the particular conduct at issue is best addressed by Section 5. That is, the agency ought to

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[69] See eg Ohlhausen *Bosch* Statement (n 10) 1–2 (raising concerns regarding institutional conflict between the FTC and DOJ implicated by application of s 5 to seeking of injunctions on FRAND-encumbered standard-essential patents); Ohlhausen *Google/MMI* Dissent (n 10) 5–6 (same). What should agency stakeholders make, for example, of the FTC investigating Google/MMI for violating s 5 by seeking injunctions on FRAND-encumbered SEPs, while at the same time DOJ is reportedly investigating Samsung for the same conduct, presumably under s 2?

[70] See Executive Order 12866 s 1(b)(12).

[71] See eg ABA Transition Report (n 36) 20 ('As helpful and persuasive as the views of individual Commissioners may be, more formal expression of the views of the Commission as whole is needed.'); Kovacic and Winerman (n 11) 944 ('The first institutional predicate is for the Commission to articulate, in a policy statement or guidelines, its views about what constitutes an unfair method.'); Leibowitz (n 57) 4–5 ('If we do use Section 5—and I strongly believe we should—it is essential that we try to develop a standard. Businesses deserve, if not certainty, then at least a sense of what behavior we are trying to reach.'); Section 5 Workshop (n 11) 56 (Stephen Calkins) ('There ought to be Commission statements where the Commission as a Commission steps up and tries to figure out what it means to say and to say it.').

[72] It is imperative that the Commission seek and incorporate public input into any UMC policy statement. See Executive Order 12866 s 6(a)(1) ['Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process.'].

[73] FTC Unfairness Statement (n 5) 1071. See also Antitrust Modernization Commission, *Report and Recommendations* (2007) 29 (stating that antitrust standards 'should be clear, predictable, and administrable, so that businesses can comply with them and courts can administer them').

[74] Even before the Commission brings a UMC case, it should whenever possible provide some form of advance notice that it is assessing a particular type of conduct for potential s 5 treatment. This could be done, for example, through speeches by individual Commissioners or the Bureau of Competition Director, or perhaps in closing statements in cases involving the same or similar conduct.

identify the institutional advantages of the FTC as an agency and those of Section 5 as a statute that justify the application of Section 5 to the particular conduct. Second, the agency should explain why the antitrust laws could not reach the conduct at issue.[75] Providing such explanations goes to the institutional comparative advantage rationale underlying the creation of the FTC and enactment of Section 5.

Furthermore, in the interest of providing clear guidance and avoiding doctrinal confusion, the Commission generally should not pursue particular conduct as both an unfair method of competition and an unfair or deceptive act or practice, without clearly spelling out how particular alleged conduct meets each of the elements of a UMC and a consumer protection claim.[76]

V. Charting the UMC course

Having identified several guiding and limiting principles for consideration in developing a UMC policy statement, the logical next question is: What conduct meets these principles? That is, in what types of cases would a standalone Section 5 claim be justified? Ultimately, as suggested by the UMC criteria proposed above, this author believes that UMC ought to extend only a very limited amount beyond the antitrust laws.

There are many reasons why this should be the case, several of which were mentioned above. First, it is crucial to avoid false positives and the chilling of efficient conduct in any UMC enforcement the agency pursues. Second, the FTC needs to provide clarity and predictability to those subject to its UMC jurisdiction. Those goals become much less attainable, the farther the agency goes beyond the antitrust laws. Third, although Section 5 was designed to go beyond a cramped reading of the Sherman Act as of 1914, and the scope of the Sherman Act has been narrowed over the past 30 years or so, today it is still more expansive—and arguably much more so—than it was in 1914. Thus, reading Section 5 as largely coextensive with the Sherman Act today does not undercut the initial expansion that Section 5 may have served. Fourth, the lack of any meaningful, enduring role for Section 5 in shaping US competition policy over nearly a century counsels against any significant expansion beyond the antitrust laws.[77] Fifth, given the development of the antitrust laws in the courts over the

[75] See eg ABA Transition Report (n 36) 20 ('If it intends to pursue any standalone Section 5 theory, the FTC should specify the distinct contribution of the standalone theory to the prosecution of the claim and explain why the Sherman Act and the Clayton Act are not sufficient to address the competition concerns raised by the conduct in question.'); Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law*, vol 2 (3rd edn, Aspen Publishers 2007) para 302h, at 35 ('[T]o say that §5 is not limited by the other statutes is no excuse for sloppy thinking or a failure to show whether, how, and the degree to which any peculiarities of §5 proceedings call for a divergence from Sherman Act analysis of antitrust policies and their application to the particular case.').

[76] See eg Ohlhausen *Google/MMI* Dissent (n 10) 1–3; Kovacic *N-Data* Dissent (n 11) 2–3; Hovenkamp (n 36) 878–9 ('Expansive readings of the FTC Act should not unreasonably blur the line between competition concerns and consumer protection concerns . . . .').

[77] See eg Kovacic and Winerman (n 11) 933–4.

past 30 years, there is ample reason to think that the FTC will fare even worse today than it did back in the late 1970s and early 1980s in its last significant foray into Section 5 territory.[78] Sixth, there is a significant potential for political backlash for any Section 5 overreach.[79] Finally, the FTC needs to minimize any substantive divergence between itself and DOJ. The farther the FTC goes beyond the antitrust laws, the larger that divergence will be.[80]

As discussed below, all of these concerns should counsel the agency not to seek an expansive definition of UMC, but rather to focus its efforts and many available tools on improving the antitrust laws. In other words, there are too many risks and too little reward to pursue an expanded UMC role; the more prudent course is to focus on the antitrust laws.

As to which types of conduct UMC should capture, the short and admittedly less than totally satisfactory answer is that, if and when the FTC promulgates a policy statement, this still must be evaluated on a case-by-case basis to determine whether the particular conduct at issue passes the various screens that the Commission ultimately adopts in that guidance. Similarly, there is limited utility in discussing categories of potential UMC enforcement, such as gap-filling and frontier cases. Although useful as constructs for exploring underlying rationales for using UMC, the more important question is what criteria the Commission uses for evaluating whether it will pursue a UMC enforcement action. Nonetheless, the following sections briefly address a few of the most frequently discussed areas of actual and potential UMC enforcement. In each of these areas, this author is expressing her general views on the use of UMC in each particular area; her vote on bringing any particular enforcement action would depend on whether the facts presented satisfied her proposed UMC factors.

Invitations to collude

Invitations to collude clearly represent the most worn path in modern Section 5 enforcement.[81] Although there may be some opposition to the use of the FTC's UMC authority in this area, it does appear to be the least controversial one. Generally speaking, naked invitations to collude—that is, offers to enter into price-fixing or market-division agreements that would be per se illegal if accepted—represent a substantial harm to competition by significantly raising

[78] See eg Section 5 Workshop (n 11) 11–12, 14 (Commissioner William E Kovacic).

[79] See eg Ohlhausen *Bosch* Statement (n 10) 3–4; Kovacic and Winerman (n 11) 943.

[80] In arguing that a particular type of conduct is covered by UMC, the FTC is implicitly arguing that it is not covered by the Sherman or Clayton Act. The agency ought to be mindful of this effect, which is to constrain the Sherman or Clayton Act and in the process any further development of those acts by DOJ.

[81] The FTC has entered into nine consent agreements since 1992 involving the application of UMC to invitations to collude. See Matter of Quality Trailer Prods Corp 115 FTC 944 (1992); Matter of AE Clevite Inc 116 FTC 389 (1993); Matter of YKK (USA) Inc 116 FTC 628 (1993); Matter of Precision Moulding Co 122 FTC 104 (1996); Matter of Stone Container Corp 125 FTC 853 (1998); Matter of MacDermid Inc 129 FTC — (1999); Matter of FMC Corp 133 FTC 815 (2002); Matter of Valassis Commc'ns Inc 141 FTC 247 (2006); Matter of U-Haul Intl Inc 150 FTC 1 (2010).

the likelihood of collusion. They are unlikely to be efficiency enhancing, and prohibiting them under Section 5 should not adversely affect market incentives to pursue innovation or other procompetitive conduct. Invitations to collude are generally not reachable under the Sherman Act—although in some circumstances it is theoretically possible to pursue invitations to collude under an attempted monopolization theory.[82] In those circumstances, the FTC ought to consider whether a viable Section 2 claim is available and pursue it rather than a Section 5 claim. With that caveat, pursuing invitations to collude under Section 5 should be consistent with enforcement under the antitrust laws.[83] A clear prohibition on invitations to collude is also predictable and easy for businesses to comply with. Generally, then, challenging naked invitations to collude under Section 5 appears to meet the prudential requirements this author would like to see included in any UMC policy statement.[84]

Exchanges of competitively sensitive information among competitors

Exchanges of price and other competitively sensitive information—in the absence of an agreement to engage in such exchanges—are not necessarily prohibited by the antitrust laws. Similar to invitations to collude, such information exchanges are close to reaching the level of an agreement but they are not all the way there and thus are not reachable via the Sherman Act. Unless they are part of a benchmarking exercise, exchanges of competitively sensitive information among competitors generally are unlikely to be efficiency enhancing, and the substantial harm they present is the substantially increased risk of collusion—again, one of the most pernicious antitrust violations.

In April of this year, in the *Bosley*[85] matter, this author voted to accept a consent agreement settling a standalone Section 5 complaint against a firm that had exchanged competitively sensitive information with several of its competitors. That vote was based in part on a concern that the types of information exchanges—particularly those related to pricing—that appeared to have taken

[82] See *United States v American Airlines* 743 F 2d 1114, 1121–22 (5th Cir 1984) (holding that the government's complaint stated a claim for attempted monopolization based on airline CEO's solicitation of competitor to fix prices).

[83] See Majoras *N-Data* Dissent (n 11) 2–3 ('Although Section 5 enables the Commission to reach conduct that is not actionable under the Sherman or Clayton Acts, we have largely limited ourselves to matters in which respondents took actions short of a fully consummated Section 1 violation (but with clear potential to harm competition), such as invitations to collude. This limitation is partly self-imposed, reflecting the Commission's recognition of the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement.') (footnotes omitted).

[84] The farther the conduct at issue is from a naked or explicit invitation to collude, the less likely this author would be to support a UMC case challenging such conduct. See eg Dissenting Statement of Commissioner Orson Swindle, Matter of Stone Container Corp, FTC File No 951-0006 (25 February 1998) (dissenting from consent agreement settling charges that Stone Container engaged in an implicit invitation to collude with its competitors) <http://www.ftc.gov/os/1998/02/9510006.os.htm> accessed 25 September 2013.

[85] See *Bosley* (n 7).

place significantly raised the risk of collusion among the competitors involved. Furthermore, there did not appear to be any procompetitive justification for the information exchanges. As a result, there was little, if any, risk that use of Section 5 in that particular matter would discourage procompetitive business conduct. Finally, although one of the author's primary concerns about the use of Section 5 was, and continues to be, the lack of guidance that the Commission is providing to businesses subject to its jurisdiction, that concern was significantly lower in the *Bosley* matter because the *Competitor Collaboration Guidelines*[86] and the *Health Care Statements*[87] already provide fairly meaningful guidance to businesses in the area of information exchanges, albeit in the Sherman Act context.

Business torts

Another area often identified as ripe for UMC treatment is business torts that may threaten harm to competition. This author does not believe that the FTC should seek to prohibit business torts that do not substantially harm competition (or otherwise fail the above-proposed UMC criteria).[88] UMC should not require businesses to play nice with each other by following some version of the 'Rules of Civility'[89] in their dealings with competitors. Vigorous competition is sometimes a contact sport, and it should be allowed to remain so, unless the conduct at issue substantially harms competition. Moreover, businesses have recourse via tort or contract law claims that they can pursue if they believe a foul has occurred.

Conduct in the standard-setting context

A significant UMC focus at the FTC over the past decade and a half has been the standard-setting context. For example, in *N-Data*, *Bosch*, and *Google/MMI*, the FTC pursued as Section 5 violations breaches of various patent licensing commitments. The author opposed the FTC's use of Section 5 in the *Bosch* and *Google/MMI* matters and continues to believe that the FTC should not impose liability on an owner of a standard-essential patent merely for enforcing its patent rights in the federal courts or at the International Trade Commission without evidence of other anticompetitive conduct. Another type of conduct in the standard-setting context that the Commission has pursued under Section 5 is

[86] See Federal Trade Commission & US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) s 3.31(b) <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> accessed 25 September 2013.

[87] See US Department of Justice & Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (1996) Statement 6 <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf> accessed 25 September 2013.

[88] See eg Ohlhausen *Google/MMI* Dissent (n 10) 4 (raising concerns about 'mak[ing] the FTC into a general overseer of all business disputes simply on the conjecture that a dispute between two large businesses may affect consumer prices'); ibid 4–5 and n 22 (objecting to use of s 5 in case lacking evidence of substantial consumer harm, as opposed to perceived harm to particular competitors).

[89] See generally George Washington, *George Washington's Rules of Civility and Decent Behaviour in Company and Conversation* (Charles Moore edn 1926).

deception on an SSO.[90] Assuming it was properly treated as a Section 5 violation over 15 years ago, when the FTC settled its case against Dell, this is now a viable Section 2 claim.[91] Thus, it should no longer be pursued as a standalone Section 5 claim.

VI. Staying the antitrust course

Although Section 5 (properly interpreted) should not play a significant role in the FTC's competition enforcement efforts, many of the unique features of the FTC can and should be used to further develop and improve the antitrust laws. Using the EO 12866 approach also shows why the FTC is uniquely well suited to address competition law issues. The factors considered in the Order match up with the FTC strengths as an agency, including its capabilities in enforcement, policymaking, and research.[92]

As a threshold matter, one might ask: Why, despite the fact that the agency has not used its UMC authority very successfully, has the FTC in the last few decades not just thrived but become one of the most respected competition agencies in the world? The answer lies in the other unique, foundational aspects of the agency, including primarily its administrative litigation function and the extensive use of its competition policy tools to develop the antitrust laws, particularly in the cases of novel or factually complex conduct. More specifically, conducting competition policy R&D (by holding workshops and issuing reports) to assess the economic impact of a particular business practice and then, if warranted, using an administrative trial and potentially a Commission opinion to pursue such practice as a violation of the antitrust laws is an extremely valuable means for developing those laws.[93] Additionally, the bipartisan, multimember composition of the agency allows it to build consensus on questions of antitrust

[90] See eg Commission Opinion, Matter of Rambus Inc 142 FTC — (2006) (finding deception that undermined the standard-setting process) <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf> accessed 25 September 2013, *rev'd*, *Rambus Inc v FTC* 522 F 3d 456 (DC Cir 2008); Commission Opinion, Matter of Union Oil Co of Cal 138 FTC 1 (2003) (*Unocal*) (same); Consent Order, Dell Computer Corp 121 FTC 616 (1996) (alleging same).

[91] See eg *Broadcom Corp v Qualcomm Inc* 501 F 3d 297, 314 (3d Cir 2007) (holding that intentional misrepresentation to an SSO regarding a royalty commitment may constitute monopolization under certain circumstances).

[92] Before continuing with the recommendation to stay the antitrust course (rather than go adrift on the sea of s 5), a fairly significant foundational issue must be addressed. Some have argued that if s 5 does not go beyond the antitrust laws, it calls into question the need for the FTC to exist. See eg Kovacic and Winerman (n 11) 944. This author respectfully comes to a different conclusion. Moreover, even the most ardent supporters of the FTC as an agency and s 5 as a competition statute acknowledge that s 5 has not played a meaningful or enduring role in shaping US competition policy over the past century. See ibid 933–4, 941–2. Other than in the *Sperry & Hutchinson* case from the early 1970s, the last FTC victory in the courts of appeals in a standalone s 5 case came in the 1960s. See ibid 941.

[93] Other beneficial features of the FTC (in its own right and as part of a dual enforcement system with the DOJ) include: (i) better outcomes from diversification in enforcement mechanisms through dual DOJ and FTC enforcement of the antitrust laws; (ii) the benefits of having an 'independent' agency enforce the antitrust laws; and (iii) the benefits that result from housing competition and consumer protection enforcement in a single institution.

law and policy over a longer timeframe—that is, one that may span multiple administrations.

The Commission thus should focus primarily on improving the implementation of the antitrust laws rather than trying to expand its UMC authority. Looking back over the author's experience at the FTC over the past 15 years, there are several examples of FTC successes in developing the antitrust laws.[94] For example, an important focus of the agency's work has been an effort to narrow interpretations by the courts of exemptions to the antitrust laws, such as the state action and *Noerr–Pennington*[95] doctrines. In the recent *Phoebe Putney* decision, the Supreme Court sided unanimously with the FTC in finding that the state of Georgia had not contemplated that its hospital authorities would displace competition by consolidating hospital ownership, but rather that the state had conferred only general powers routinely conferred on private corporations.[96] The Court held that the state action doctrine applies only when the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the legislature.[97] That clear articulation test was not satisfied in *Phoebe Putney*.

The FTC's success in the *Phoebe Putney* case was the result of two separate efforts that started at the FTC in the early 2000s: (1) the State Action Task Force; and (2) the hospital merger retrospective project. The goal of the task force was to study the case law on the state action doctrine and to identify opportunities to direct the development of that case law in a manner that promotes competition and consumer welfare. That competition policy R&D effort influenced the agency's enforcement efforts and has culminated in several favourable results, including not only *Phoebe Putney*, but also the FTC's recent victory in the Fourth Circuit in the *North Carolina Dental* matter, in which the court upheld a Commission opinion holding that financially interested state boards, like private actors engaging in anticompetitive conduct, must be actively supervised by the state to benefit from state action protection.[98]

Former FTC Chairman Tim Muris initiated the hospital retrospective project to study consummated hospital mergers to determine whether any of them had resulted in higher prices and to update the agency's prior assumptions about the

[94] There, of course, were many valuable FTC contributions to the development of the antitrust laws prior to the author's time at the Commission. In the interest of brevity, this article focuses solely on the more recent contributions.

[95] See *Eastern RR Presidents Conference v Noerr Motor Freight* 365 US 127 (1961); *United Mine Workers of Am v Pennington* 381 US 657 (1965).

[96] See *FTC v Phoebe Putney Health Sys Inc* 133 S Ct 1003 (2013).

[97] ibid 1012–13.

[98] See *NC State Bd of Dental Exam'rs v FTC* 717 F 3d 359 (4th Cir 2013), *dismissing appeal from* Commission Opinion, Matter of NC State Bd of Dental Exam'rs 152 FTC — (2011) <http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf> accessed 25 September 2013; see also Commission Opinion, Matter of SC State Bd of Dentistry 138 FTC 229 (2004) (addressing clear articulation prong of state action doctrine), *appeal dismissed*, *SC State Bd of Dentistry v FTC* 455 F 3d 436 (4th Cir 2006); Commission Opinion, Matter of Ky Household Goods Carriers Ass'n 139 FTC 404 (2005) (addressing active supervision prong of state action doctrine), *appeal dismissed*, *Ky Household Goods Carriers Ass'n v FTC* 199 Fed Appx 410 (6th Cir 2006).

nature of competition in the health care sector. That project ultimately deserves credit for not only the *Phoebe Putney* decision, but also several other recent favourable decisions in hospital merger challenges, including court victories in *Rockford*[99] and *ProMedica*[100] and abandoned mergers in other matters.[101]

Other valuable contributions to the development of the antitrust laws include the Commission's *Unocal*[102] opinion in the *Noerr-Pennington* area, the Commission's *Three Tenors*[103] and *Realcomp*[104] opinions in the joint conduct area, and the Commission's *Rambus*[105]opinion in the monopolization area. There are, of course, many others.

In sum, the FTC has contributed significantly to developing the antitrust laws via its unique characteristics of policy and research tools as well as its administrative litigation capability. Going forward the agency should measure its success by looking at how it may continue to make valuable contributions to the antitrust laws, not in how it can pursue expansive UMC cases under Section 5.

VII. Conclusion

To conclude, although standalone Section 5 cases should not play a significant role in the FTC's competition enforcement efforts, the agency should use its many unique institutional features—including its administrative litigation, policymaking, and research capabilities—to further develop and improve the federal antitrust laws. The Commission's success stories in the competition space over the past several decades have come in its antitrust cases, not its pure Section 5 cases.

To the extent that the FTC does pursue standalone Section 5 enforcement, there are six important criteria that it should satisfy in so doing. First, the FTC should use its UMC authority only in cases of substantial harm to competition. Second, the FTC should pursue a UMC violation only where there is no procompetitive justification for the challenged conduct or where such conduct results in harm to competition that is disproportionate to its benefits. Third, in

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[99] *FTC v OSF Healthcare Sys* 852 F Supp 2d 1069 (ND Ill 2012) (granting FTC's motion for preliminary injunction).

[100] *FTC v ProMedica Health Sys Inc* 2011 WL 1219281 (ND Ohio 29 March 2011) (granting FTC's motion for preliminary injunction). The Commission's opinion in this matter is currently on appeal at the Sixth Circuit.

[101] See eg Press Release, Federal Trade Commission, 'Statement of FTC Competition Director Richard Feinstein on Today's Announcement by Capella Healthcare that It Will Abandon its Plan to Acquire Mercy Hot Springs' (27 June 2013) <http://www.ftc.gov/opa/2013/06/capella.shtm> accessed 25 September 2013; Press Release, Federal Trade Commission, 'FTC Approves Order Dismissing Administrative Complaint Against Inova Health System Foundation and Prince William Health System, Inc.' (17 June 2008) <http://www.ftc.gov/opa/2008/06/inovafyi.shtm> accessed 25 September 2013.

[102] *Unocal* (n 90).

[103] Commission Opinion, Matter of PolyGram Holding Inc 136 FTC 310 (2003), *appeal dismissed*, *PolyGram Holding Inc v FTC* 416 F 3d 29 (DC Cir 2005).

[104] Commission Opinion, Matter of Realcomp II Ltd 148 FTC — (2009) <http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf> accessed 25 September 2013, *appeal dismissed*, *Realcomp II Ltd v FTC* 635 F 3d 815 (6th Cir 2011).

[105] *Rambus* (n 90).

using its UMC authority, the FTC should avoid or minimize conflict with other institutions, including most notably the Department of Justice. Fourth, UMC enforcement must be grounded in robust economic evidence regarding the anticompetitive effects of the challenged conduct. Fifth, prior to pursuing a UMC violation, the agency should consider using its many non-enforcement tools to address the perceived competitive problem. Sixth, the agency should provide clear guidance and minimize uncertainty in the UMC area.

Having circumnavigated the topic of UMC and the best way to deploy the FTC's capabilities, this author will continue to consider where the boundaries of Section 5 should be and looks forward to engaging her fellow Commissioners and others within the agency, as well as interested parties outside the agency, on these important but complex issues. If the Commission wishes to pursue expanded UMC theories, the Commissioners ought to be able to work together to develop a policy statement upon which they all can agree. In the meantime, the principles discussed in this article will dictate this author's votes on any standalone Section 5 cases presented to the Commission. Finally, the author will continue to support the Commission's long-term efforts to improve the application of the antitrust laws through its unique attributes as an institution.