



United States of America  
**Federal Trade Commission**

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**Section 5: Principles of Navigation**

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**U.S. Chamber of Commerce  
Washington, D.C.**

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**I. Introduction**

Good morning. I am delighted to be here at the U.S. Chamber of Commerce. Let me thank Sean Heather of the Chamber for inviting me to speak today. In my remarks, I would like to discuss unfair methods of competition (UMC) under Section 5 of the Federal Trade Commission (FTC) Act.<sup>2</sup> By that, of course, I mean standalone Section 5 enforcement – separate from our enforcement of the antitrust laws. My primary goal in making these remarks is to continue the dialogue on Section 5, both inside and outside the Commission.<sup>3</sup> As a Commissioner, I have called for our agency to issue some type of policy statement or other guidance on how and when it will pursue standalone Section 5 cases. Today I offer some thoughts on what might inform such a statement, as well as some guiding and limiting principles for consideration by my colleagues at the Commission and by interested parties outside the agency. Finally, calling on these principles, I will suggest how the agency should prioritize its competition efforts.

**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. In issuing our 1980 statement on the

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<sup>1</sup> The views expressed in this speech are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I am grateful to my attorney advisors, Greg Luib and Alex Okuliar, for their invaluable assistance in preparing this speech.

<sup>2</sup> 15 U.S.C. § 45.

<sup>3</sup> I commend my colleague, Commissioner Wright, for pursuing this dialogue by recently issuing a proposed Commission policy statement on UMC. *See* Commissioner Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act (June 19, 2013), available at <http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf>. Previous efforts to grapple with UMC also include speeches and articles by other Commissioners, as well as a Commission workshop in 2008. Materials related to the workshop are available at <http://www.ftc.gov/bc/workshops/section5/index.shtml>.

concept of “unfair acts or practices” under our 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.”<sup>4</sup> This characterization just as aptly describes the state of our UMC authority today.

In my first year 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,<sup>5</sup> I have repeatedly asked, “Where is the chart?” Without a chart, I have only been willing to wade cautiously in the shallows, with a matter involving exchanges of competitively sensitive information among competitors,<sup>6</sup> where the shore was clearly in sight. When asked to set out for a longer journey, such as in the *Bosch* and *Google/MMI* standard-essential patents matters, I have taken a position that can be in the most basic terms characterized as follows: “Without a chart, I will not depart.”<sup>7</sup>

Now, I am an old FTC hand and learned my 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 expressed strong concerns about using Section 5.<sup>8</sup> I

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<sup>4</sup> Fed. Trade Comm’n, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, 104 F.T.C. 1070, 1071 (1984) (appended to *In re Int’l Harvester Co.*, 104 F.T.C. 949 (1984)) [hereinafter FTC Unfairness Statement], available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>. The FTC also has issued a policy statement regarding its approach to enforcing its “deceptive acts or practices” authority under Section 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.

<sup>5</sup> 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.

<sup>6</sup> See *In re Bosley, Inc.*, FTC File No. 121-0081, Decision & Order (Apr. 8, 2013) (settling standalone Section 5 complaint), available at <http://ftc.gov/os/caselist/1210184/index.shtm>.

<sup>7</sup> See *In re Robert Bosch GmbH*, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen, at 3 (Nov. 26, 2012) [hereinafter Ohlhausen *Bosch* Statement] (“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 . . .”), available at <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf>; *In re Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 5 (Jan. 3, 2013) [hereinafter Ohlhausen *Google/MMI* Dissent] (“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.”), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf>.

<sup>8</sup> See, e.g., Transcript of Fed. Trade Comm’n Workshop, Section 5 of the FTC Act as a Competition Statute at 64 (Oct. 17, 2008) [hereinafter Section 5 Workshop] (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.”), available at <http://www.ftc.gov/bc/workshops/section5/transcript.pdf>; Timothy J. Muris & Paloma Zepeda, *The Benefits, and Potential Costs, of FTC-Style Regulation in Protecting Consumers*, 8 COMPETITION L. INT’L 11, 14 (2012) (“[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.”); *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, Dissenting Statement of Chairman Majoras (Jan. 23, 2008) [hereinafter Majoras *N-Data* Dissent], available at <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf>; *id.*, Dissenting Statement of Commissioner William E. Kovacic [hereinafter Kovacic *N-Data* Dissent], available at <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>; William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010).

have also studied the logs of previous sailings under the unfair methods flag, such as *Official Airlines Guide*,<sup>9</sup> *Boise Cascade*,<sup>10</sup> and *Ethyl*.<sup>11</sup> The lesson I draw from this history is that if you are sailing beyond the chart, here be dragons.<sup>12</sup>

When looking for possible sources for a chart, I have found that many would-be chart makers have looked to what the boat builders said almost 100 years ago. It seems to me, 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.<sup>13</sup> Even if it makes sense to try to chart a course forward by looking so far back,<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup>

Accordingly, the Commission has from time to time set out with the idea that because the chart is theoretically very expansive, we do not even need a chart because our excursions are

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<sup>9</sup> *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).

<sup>10</sup> *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.”).

<sup>11</sup> *E.I. 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.”).

<sup>12</sup> See *The Lenox Globe* (ca. 1503-07) (in the collection of the New York Public Library) (“HC SVNT DRACONES” (i.e. “here be dragons”) appears on the eastern coast of Asia).

<sup>13</sup> See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

<sup>14</sup> See STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 8 (1982) (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.”).

<sup>15</sup> See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 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”).

<sup>16</sup> See, e.g., Section 5 Workshop, *supra* note 8, at 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.”); *id.* at 208 (Commissioner Jon Leibowitz) (discussing Supreme Court precedents and concluding: “I decided or I think we’ve all decided, that 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*, 21 B.C. L. REV. 227, 284-90 (1980) (discussing potentially broad implications of *S&H* for Section 5 enforcement); FTC Chairman Michael Pertschuk, Remarks before Annual Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools, at 12 (Dec. 27, 1977) (“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.”).

unlikely to exceed the boundaries of such a large territory.<sup>17</sup> This approach to navigation has not fared well either, with the *Abbott Labs* case in 1994 hitting some of the same shoals that sunk our case in *Ethyl* ten years before that.<sup>18</sup> The courts have very clearly told the Commission that we have 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.<sup>19</sup> The lack of testing by a court and the vehement objections by many of the FTC navigators<sup>20</sup> 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.<sup>21</sup>

Given this history, the other question I have asked is whether the UMC route is the only or the best way to get where we want 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,<sup>22</sup> the Sherman Act route still goes almost everywhere a competition agency should wish to travel. This then prompts the question, "If the destination is already on the Sherman train line, why not take that route?"

I realize 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 we set off into uncharted waters, I want to know where we are going and, equally if not more important, where we will not venture.

Although it has been amusing to engage in this extended nautical metaphor, my goal today 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

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<sup>17</sup> See, e.g., *In re Robert Bosch GmbH*, FTC File No. 121-0081, Statement of the Commission, at 3 (Nov. 26, 2012) ("[W]e view this action as well within our Section 5 authority."), available at <http://www.ftc.gov/os/caselist/1210081/121126boschcommissionstatement.pdf>. How do we know that we are well within our authority if we have not identified how far that authority reaches?

<sup>18</sup> See *FTC v. Abbott Labs.*, 853 F. Supp. 526, 535-36 (D.D.C. 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).

<sup>19</sup> Setting Section 5 policy via consent is particularly problematic when we do so in the context of a Hart-Scott-Rodino merger review (as we 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.

<sup>20</sup> See generally Majoras *N-Data* Dissent, *supra* note 8; Kovacic *N-Data* Dissent, *supra* note 8.

<sup>21</sup> For example, reneging on a patent licensing commitment was deemed 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.

<sup>22</sup> Of course, much, if not all, of this constriction was undertaken for sound legal and economic reasons.

government for almost two decades. It also is essentially a forward-looking inquiry that asks what I believe is the most crucial question here: Why will consumers and competition be better off in the future by the FTC using our UMC authority more expansively?

I realize that 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 fifty, sixty, and more years ago. As rigorous and interesting as that focus has been – and I admire the great work that has been done in this area by former Chairman Kovacic and others – I believe we need to look forward to the next 100 years of the FTC's 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 we want to go and why. Our 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 I will explain in more detail, our 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.”<sup>23</sup> Thus, UMC is best viewed as an 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 favoring domestic competitors.<sup>24</sup>

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

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<sup>23</sup> Section 5 Workshop, *supra* note 8, at 67 (Robert Pitofsky); *see also id.* at 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”); *id.* at 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 Radicals Here?*, 20 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 1, 15 (2011) (“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).

<sup>24</sup> This view has the added benefit of avoiding sending mixed signals to competition enforcers around the world, whom we often counsel to adopt a similar economic efficiency focus in enforcing their competition laws.

backgrounds.<sup>25</sup> Accordingly, in developing a UMC framework, I propose looking to the principles and underlying philosophy expressed in Executive Order 12866 (E.O. 12866 or the Order).<sup>26</sup> For those of you who are not administrative law mavens, E.O. 12866 established a regulatory philosophy and twelve principles of regulation for use by federal agencies in deciding whether and how to regulate.<sup>27</sup> President Clinton issued E.O. 12866 in 1993, and although it has

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<sup>25</sup> See Breyer, *supra* note 14, at 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.”).

<sup>26</sup> Exec. Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Sept. 30, 1993), *supplemented by* Exec. Order 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011). E.O. 12866 sets forth the following twelve principles that agencies should follow to the extent permitted by law and where applicable:

1. 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.
2. 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.
3. Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior or providing information upon which choices can be made by the public.
4. 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.
5. 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.
6. 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.
7. 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.
8. Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.
9. 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.
10. Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other federal agencies.
11. 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.
12. 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.

*Id.* § 1(b).

<sup>27</sup> 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*, 63 ADMIN. L. REV. 37, 41 (2011).

been supplemented and amended since then, the philosophy and guiding principles remain in effect and relevant today.

At its core, E.O. 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.”<sup>28</sup>

Before I continue, let me provide a few clarifications. First, looking to E.O. 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, I merely advocate drawing upon these carefully developed regulatory principles and adapting them to the task at hand. Second, I am not arguing for the explicit application of E.O. 12866 to the FTC – with respect to either UMC or the agency’s efforts more generally. Rather, I am drawing on the “regulatory humility” I see reflected in the philosophy and principles of E.O. 12866 in staking out my views on Section 5.<sup>29</sup> I also believe that employing these principles to develop UMC guidance will help the Commission achieve transparency, predictability, and fairness in its enforcement efforts.<sup>30</sup>

#### **IV. Drawing the UMC Boundaries**

The various principles underlying E.O. 12866 suggest that we 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, we should use UMC only in cases of substantial harm to competition. Second, we 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

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<sup>28</sup> Breyer, *supra* note 14, at 5.

<sup>29</sup> See Ohlhausen *Bosch* Statement, *supra* note 7, at 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, Section 5 Recast: Defining the Federal Trade Commission’s Unfair Methods of Competition Authority, at 15 (June 19, 2013) (“[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.”), available at <http://www.ftc.gov/speeches/wright/130619section5recast.pdf>.

<sup>30</sup> See, e.g., Ohlhausen *Bosch* Statement, *supra* note 7, at 3 (“It is important that government strive for transparency and predictability.”); Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission’s Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012) [hereinafter Ohlhausen Disgorgement Dissent] (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 our jurisdiction without sufficient guidance as to the circumstances in which the FTC will pursue the remedy of disgorgement in antitrust matters), available at <http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf>.

disproportionate to its benefits. Third, in using UMC, we 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.<sup>31</sup>

In assessing a potential UMC enforcement action, we should weigh all of these factors together, although I believe the first factor, identifying the problem, should always be one of the foremost considerations. I will take this opportunity to expand a bit on these six proposed UMC factors.

***Choosing a Destination/Identifying the Problem.*** First, E.O. 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.<sup>32</sup> Similarly, it is essential that we be clear about the problem that we want to use UMC to address. To return to my navigation analogy, if we do not know where we want to go, how can we set a course or even know if we have arrived successfully?

As stated above, UMC enforcement should seek to address anticompetitive conduct that results in a diminution of consumer welfare by reducing output, raising prices, or lowering quality. We must tie our UMC enforcement back to our core mission of promoting and protecting consumer welfare. In my view, then, our UMC authority should be used solely to address harm to competition or the competitive process, and thus to consumers. We should not use our 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 behavior for insignificant or illusory increases in consumer welfare or to shield competitors from the rigors of efficient competition.”<sup>33</sup>

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<sup>31</sup> A summary of these factors is included in the appendix to this speech. I remain 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).

<sup>32</sup> See Exec. Order 12866 § 1(b)(1).

<sup>33</sup> ABA SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT 2012-20 (2013) [hereinafter ABA TRANSITION REPORT]; see also Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 878-79 (2010) (“[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 Section 5 efforts on “cases where there is clear harm to the competitive process and to consumers.” *Oversight of the Federal Trade Commission Bureau of Competition and the Department of Justice Antitrust Division: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 13 (2010) (statement of the Federal Trade Commission), available at <http://www.ftc.gov/os/testimony/100727antitrustoversight.pdf>.

I further believe that any harm to competition pursued under our UMC authority ought to be substantial. This substantiality requirement would mirror the one in our 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.<sup>34</sup> As the Unfairness Statement notes, “The Commission is not concerned with trivial or merely speculative harm.”<sup>35</sup> Our enforcement efforts on the competition side of Section 5 should likewise focus solely on substantial harms to ensure both that we are properly allocating our scarce resources<sup>36</sup> and that we are not pursuing matters with high legal and political risks for little consumer benefit.<sup>37</sup>

***Identifying Currents and Shoals/Analyzing Benefits, Costs, and the Impact on Incentives.*** Analyzing the relative benefits and costs of a regulation underlies several of the guiding principles in E.O. 12866. For example, the Order calls for agencies to consider both the costs and the benefits of proposed regulations,<sup>38</sup> as well as incentives for innovation, among other factors.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> Even recently, the Commission’s action in the *Intel*<sup>42</sup> case that targeted above-cost discounting has been strongly criticized for its potential

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<sup>34</sup> FTC Unfairness Statement, *supra* note 4, at 1073.

<sup>35</sup> *Id.*; see also ABA TRANSITION REPORT, *supra* note 33, at 20 (“Standalone Section 5 enforcement should be used, if at all, only when the conduct involves substantial competitive harm.”).

<sup>36</sup> In all agency activities, we must keep the concept of opportunity costs firmly in mind. I do not believe that there are so few instances of competitive harm reachable under the Sherman and Clayton Acts occurring today that we should focus significant enforcement efforts on standalone Section 5 matters that do not present substantial harm.

<sup>37</sup> There may be circumstances in which all of my 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. I have in mind a standard of likelihood that is comparable to the “dangerous probability of success” element in claims of attempted monopolization.

<sup>38</sup> See Exec. Order 12866 § 1(b)(6).

<sup>39</sup> See *id.* § 1(b)(5).

<sup>40</sup> See *id.* § 1(b)(5), (11).

<sup>41</sup> See, e.g., Hovenkamp, *supra* note 33, at 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 U.S. 316 (1966)); *id.* at 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.”).

<sup>42</sup> *In re Intel Corp.*, FTC File No. 061-0247, Complaint, at 17-18 (Dec. 16, 2009) (alleging monopolization, attempted monopolization, unfair methods of competition, unfair acts or practices, and deceptive acts or practices violations), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>.

for chilling procompetitive business conduct.<sup>43</sup>

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,<sup>44</sup> 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. My colleague, Commissioner 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.<sup>45</sup> I believe it is also appropriate to include a disproportionate harm test in any policy statement on UMC to address cases in which some efficiencies are present. The disproportionate harm test would focus our 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 has previously advocated for the disproportionality test in the Section 2 context,<sup>46</sup> and it is part of Professor Hovenkamp's preferred general definition of anticompetitive exclusion under Section 2.<sup>47</sup>

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, the test I am proposing is a demanding one, reflecting my significant concerns about an expanded Section 5 chilling procompetitive conduct. The more demanding this test, the more

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<sup>43</sup> See, e.g., Hovenkamp, *supra* note 33, at 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*, ICLE Antitrust and Competition White Paper Series, at 25 (June 8, 2010) (“[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.”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1624943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1624943).

<sup>44</sup> 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 (D.C. 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 Section 5 liability.

<sup>45</sup> See Wright, *supra* note 3, at 9-13.

<sup>46</sup> See Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 14, *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) [hereinafter *Trinko* Brief] (citing III PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 651a, 658f, at 72, 131-32, 135 (2d ed. 2002)), available at <http://www.ftc.gov/os/2003/05/trinkof.pdf>.

<sup>47</sup> See III AREEDA & HOVENKAMP, *supra* note 46, ¶ 651a, at 96 (3d ed. 2008) (“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.”).

confidence we will have that we are challenging conduct that is something other than competition on the merits.<sup>48</sup>

Further, to avoid chilling procompetitive conduct, I propose that the FTC seek only prospective, non-punitive remedies for UMC violations. In short, barring some extraordinary circumstance, this means cease-and-desist orders. Further, 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 I opposed<sup>49</sup> – the Commission explained that it has no intention to seek disgorgement in standalone Section 5 cases.<sup>50</sup> These remedial principles are consistent with and, one might argue, required by, the lighter-handed penalties rationale underlying the enactment of Section 5.<sup>51</sup>

***Preventing Collisions at Sea/Avoiding Inconsistent or Duplicative Efforts and Institutional Conflict.*** E.O. 12866 also counsels an agency to avoid regulations that are inconsistent with, or duplicative of, those that it or other federal agencies already have.<sup>52</sup> This is a vital issue for UMC, as much of the debate has centered 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.<sup>53</sup>

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<sup>48</sup> As the antitrust agencies acknowledged in their *Trinko* Brief, applying the disproportionality test is not without its difficulties. See *Trinko* Brief, *supra* note 46, at 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 I recognize the test may not be perfect, I question 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 PARL. DEB., H.C. (5th ser.) (1947) 206-07 (U.K.) (Winston Churchill) (“It has been said that democracy is the worst form of government except all the others that have been tried.”).

<sup>49</sup> See Ohlhausen Disgorgement Dissent, *supra* note 30.

<sup>50</sup> See Statement of the Fed. Trade Comm’n, Withdrawal of the Commission’s Policy Statement on Monetary Equitable Remedies in Competition Cases, at 2 n.6 (July 31, 2012), available at <http://www.ftc.gov/os/2012/07/120731commissionstatement.pdf>.

<sup>51</sup> See Kovacic & Winerman, *supra* note 8, at 931-32. One benefit of using Section 5 that Commissioners supporting broader UMC enforcement have stressed is the insignificant likelihood of follow-on litigation from Section 5 enforcement relative to enforcement of the antitrust laws. See, e.g., Section 5 Workshop, *supra* note 8, at 215 (Commissioner Jon Leibowitz). Other Commissioners, however, have cast doubt on the robustness of this benefit. See Kovacic *N-Data* Dissent, *supra* note 8, at 1-2. In my view, we ought to revisit the notion that standalone Section 5 cases do not result in any follow-on litigation against FTC respondents. See, e.g., 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 . . .”).

<sup>52</sup> See Exec. Order 12866 § 1(b)(10).

<sup>53</sup> See, e.g., Section 5 Workshop, *supra* note 8, at 98-99 (William Page) (advocating use of Section 5 in certain cases “in which the plaintiff cannot satisfy *Twombly*’s pleading standards”); *id.* at 158 (Bert Foer) (advocating use of Section 5 in unilateral conduct cases in which the respondent’s market share “is less than the 70 percent or so that often characterizes Sherman Act decisions”); *id.* at 169 (Thomas Krattenmaker) (advocating use of Section 5 in “gap-filling cases” that are “missing some legal hook that’s required under the Sherman Act”).

First, the FTC should not use UMC to rehabilitate a deficient Sherman or Clayton Act claim.<sup>54</sup> 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.<sup>55</sup>

Second, if there is a viable Sherman or Clayton Act claim that the FTC can pursue for a particular type of conduct, then we should not use UMC in such a case. Those Acts, as currently interpreted by the courts, likely cover almost all the anticompetitive conduct that we should want to reach.<sup>56</sup> Moreover, we must be sensitive to the fact that the FTC shares antitrust enforcement authority with DOJ. Using UMC to supplant unnecessarily the Sherman or Clayton Act sets up a conflict with our sister enforcer by creating the implication that those acts do not prohibit the challenged conduct. Of even greater concern, it 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,<sup>57</sup> I believe it is crucial that we minimize these types of conflicts.<sup>58</sup>

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

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<sup>54</sup> See, e.g., Jon Leibowitz, "Tales from the Crypt": Episodes '08 and '09: The Return of Section 5, at 5 (Oct. 17, 2008) ("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.'"), available at <http://www.ftc.gov/bc/workshops/section5/docs/jleibowitz.pdf>; Section 5 Workshop, *supra* note 8, at 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."); *In re General Foods Corp.*, 103 F.T.C. 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.").

<sup>55</sup> See Majoras *N-Data* Dissent, *supra* note 8, at 4-6; Kovacic *N-Data* Dissent, *supra* note 8, at 2-3.

<sup>56</sup> See, e.g., II AREEDA & HOVENKAMP, *supra* note 46, ¶ 302h, at 30 (3d ed. 2007) ("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*, GLOBAL COMPETITION POLICY ONLINE 5 (Nov. 2008) (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"), available at <https://www.competitionpolicyinternational.com/file/view/5707>.

<sup>57</sup> See, e.g., Yochi J. Dreazen & John R. Wilke, *Justice Department, FTC Deal Dividing Merger Reviews Collapses*, WALL ST. J., May 21, 2002, at B6; Ira Teinowitz, *Senator Wants to "Eliminate" FTC Chief: Ugly Public Feud Heats Up Further*, AdAge.com, Apr. 15, 2002, available at <http://www.ftc.gov/opa/2002/04/adagenews.pdf>.

<sup>58</sup> 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, e.g., Thomas A. Lambert, *Four Lessons from the Whole Foods Case*, 31 REGULATION 22, 29 (Spring 2008), available at <http://ssrn.com/abstract=1121789>; *Whole Foods Fiasco*, WALL ST. J., Dec. 31, 2008, at A8, available at <http://online.wsj.com/article/SB123068935035244619.html>. A broad application of UMC to impose a different standard on businesses based on which agency reviews their actions will raise similar concerns.

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?<sup>59</sup>

In determining whether the definition of UMC should be expanded to cover a particular type of conduct, we should also 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.*** E.O. 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.<sup>60</sup> 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 FTC Act, including in particular the notion that the agency would research and evaluate potentially problematic business conduct.

***Choosing the Most Direct Route/Evaluating Existing Alternatives.*** In keeping with the principles underlying E.O. 12866, we should also undertake two related inquiries that focus on whether using UMC is the most efficient route to address the substantial harm to consumer welfare we have 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.<sup>61</sup> The second inquiry asks whether there are feasible alternatives to direct regulation, including providing information to improve marketplace choices.<sup>62</sup>

The FTC has often 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

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<sup>59</sup> See Ohlhausen *Bosch* Statement, *supra* note 7, at 2; Ohlhausen *Google/MMI* Dissent, *supra* note 7, at 3-6.

<sup>60</sup> See Exec. Order 12866 § 1(b)(7).

<sup>61</sup> See *id.* § 1(b)(2).

<sup>62</sup> See *id.* § 1(b)(3).

particular changes in the law.<sup>63</sup> 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 market options.<sup>64</sup>

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 I mentioned earlier, because their use will minimize conflicts between the FTC's UMC authority and the authority of other federal agencies – including in particular DOJ's Antitrust Division – over the same conduct.<sup>65</sup>

***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.<sup>66</sup> 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. I am certainly not the first person to call for such guidance,<sup>67</sup> but I will continue to advocate for it in my role as a

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<sup>63</sup> See, e.g., Comments of U.S. Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, *In re 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 (U.S.P.T.O. Feb. 1, 2013), available at <http://www.ftc.gov/os/2013/02/130201pto-rpi-comment.pdf>; FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>; FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

<sup>64</sup> 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>.

<sup>65</sup> See, e.g., Ohlhausen *Bosch* Statement, *supra* note 7, at 1-2 (raising concerns regarding institutional conflict between the FTC and DOJ implicated by application of Section 5 to seeking of injunctions on FRAND-encumbered standard-essential patents); Ohlhausen *Google/MMI* Dissent, *supra* note 7, at 5-6 (same). What should agency stakeholders make of the FTC investigating Google/MMI for violating Section 5 by seeking injunctions on FRAND-encumbered SEPs, while at the same time DOJ is reportedly investigating Samsung for the same conduct, presumably under Section 2?

<sup>66</sup> See Exec. Order 12866 § 1(b)(12).

<sup>67</sup> See, e.g., ABA TRANSITION REPORT, *supra* note 33, at 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 & Winerman, *supra* note 8, at 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, *supra* note 54, at 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, *supra* note 8, at 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.”).

Commissioner if the Commission pursues expansive UMC theories. I am, of course, willing to consider both the form and the substance of such a document.<sup>68</sup> 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.”<sup>69</sup>

Beyond a policy statement on our UMC authority, the Commission ought to take additional steps in the interest of transparency when it brings a standalone Section 5 case.<sup>70</sup> First, the Commission ought to explain why the particular conduct at issue is best addressed by Section 5. That is, the agency ought to 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.<sup>71</sup> Providing such explanations goes to the institutional comparative advantage rationale underlying the creation of the FTC and enactment of Section 5.

Further, 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.<sup>72</sup>

## 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? In what types of cases would I support a standalone Section 5 claim? Ultimately, as you may have surmised from my suggested UMC criteria, I believe that UMC ought to extend only a very limited amount beyond the antitrust laws.

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<sup>68</sup> It is imperative that the Commission seek and incorporate public input into any UMC policy statement. *Cf.* Exec. Order 12866 § 6(a)(1) (“Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process.”).

<sup>69</sup> FTC Unfairness Statement, *supra* note 4, at 1071. *See also* ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 29 (2007) (stating that antitrust standards “should be clear, predictable, and administrable, so that businesses can comply with them and courts can administer them”).

<sup>70</sup> 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 Section 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.

<sup>71</sup> *See, e.g.*, ABA TRANSITION REPORT, *supra* note 33, at 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.”); II AREEDA & HOVENKAMP, *supra* note 46, ¶ 302h, at 35 (3d ed. 2007) (“[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.”).

<sup>72</sup> *See, e.g.*, Ohlhausen Google/MMI Dissent, *supra* note 7, at 1-3; Kovacic *N-Data* Dissent, *supra* note 8, at 2-3; Hovenkamp, *supra* note 33, at 878-79 (“Expansive readings of the FTC Act should not unreasonably blur the line between competition concerns and consumer protection concerns . . .”).

Let me briefly mention some of the many reasons why this should be the case, several of which I have already mentioned. First, it is crucial to avoid false positives and the chilling of efficient conduct in any UMC enforcement the agency pursues. Second, we need to provide clarity and predictability to those subject to our 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 thirty years or so, today it is still more expansive – and arguably much more so – than it was in 1914. Thus, I would argue that 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 U.S. competition policy over nearly a century counsels against any significant expansion beyond the antitrust laws.<sup>73</sup> Fifth, given the development of the antitrust laws in the courts over the past thirty years, we have ample reason to think that we will fare even worse today than we did back in the late 1970s and early 1980s in our last significant foray into Section 5 territory.<sup>74</sup> Sixth, there is a significant potential for political backlash for any Section 5 overreach.<sup>75</sup> Finally, we need to minimize any substantive divergence between the FTC and DOJ. The farther we go beyond the antitrust laws, the larger that divergence will be.<sup>76</sup>

As I will discuss later, all of these concerns should counsel the agency not to seek an expansive definition of UMC, but rather to focus its efforts and many tools on improving the antitrust laws. In other words, I see 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, once we have promulgated 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, I would note the limited utility of 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, let me briefly address a few of the most frequently discussed areas of actual and potential UMC enforcement. In each of these areas, I am expressing my general views on the use of UMC in a specific area; my vote on bringing any particular enforcement action would depend on whether the facts presented satisfied my proposed UMC factors.

***Invitations to Collude.*** Perhaps unsurprisingly, I will start with invitations to collude. This is clearly the most worn path in modern Section 5 enforcement.<sup>77</sup> Although there is some

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<sup>73</sup> See, e.g., Kovacic & Winerman, *supra* note 8, at 933-34.

<sup>74</sup> See, e.g., Section 5 Workshop, *supra* note 8, at 11-12, 14 (Commissioner William E. Kovacic).

<sup>75</sup> See, e.g., Ohlhausen *Bosch* Statement, *supra* note 7, at 3-4; Kovacic & Winerman, *supra* note 8, at 943.

<sup>76</sup> 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. We 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.

<sup>77</sup> By my count, the FTC has entered into nine consent agreements since 1992 involving the application of UMC to invitations to collude.

opposition to the use of our 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 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.<sup>78</sup> 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.<sup>79</sup> 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 I would like to see included in any UMC policy statement.<sup>80</sup>

***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*<sup>81</sup> matter, I 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. I was concerned that the types of information exchanges – particularly those related to pricing – that appeared to have taken place significantly raised the risk of collusion among the competitors at issue. Further, 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

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<sup>78</sup> 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).

<sup>79</sup> See *Majoras N-Data Dissent*, *supra* note 8, at 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).

<sup>80</sup> The farther the conduct at issue is from a naked or explicit invitation to collude, the less likely I would be to support a UMC case challenging such conduct. See, e.g., *In re Stone Container Corp.*, FTC File No. 951-0006, Dissenting Statement of Commissioner Orson Swindle (Feb. 25, 1998) (dissenting from consent agreement settling charges that Stone Container engaged in an implicit invitation to collude with its competitors), available at <http://www.ftc.gov/os/1998/02/9510006.os.htm>.

<sup>81</sup> See *In re Bosley, Inc.*, *supra* note 6.

conduct. Finally, although one of the primary reasons for my concern about the use of Section 5 was, and continues to be, the lack of guidance that the Commission is providing to businesses subject to our jurisdiction, those concerns were significantly lower in the *Bosley* matter because the *Competitor Collaboration Guidelines*<sup>82</sup> and the *Health Care Statements*<sup>83</sup> 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. As you may have gleaned from my preferred UMC criteria, I do not believe we should seek to prohibit business torts that do not substantially harm competition (or otherwise fail my proposed UMC criteria).<sup>84</sup> UMC should not require businesses to play nice with each other by following some version of the “Rules of Civility”<sup>85</sup> 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. I opposed our use of Section 5 in the *Bosch* and *Google/MMI* matters and continue to believe that we should not impose liability on an owner of a standard-essential patent merely for enforcing its patent rights in the 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 deception on an SSO.<sup>86</sup> Assuming it was properly treated as a Section 5 violation over fifteen years ago, when the FTC settled its case against Dell, this is now a viable Section 2 claim.<sup>87</sup> Thus, in my view it should no longer be pursued as a standalone Section 5 claim.

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<sup>82</sup> See FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(b) (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>83</sup> See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE Statement 6 (1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>.

<sup>84</sup> See, e.g., Ohlhausen *Google/MMI* Dissent, *supra* note 7, at 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”); *id.* at 4-5 & n.22 (objecting to use of Section 5 in case lacking evidence of substantial consumer harm, as opposed to perceived harm to particular competitors).

<sup>85</sup> See generally GEORGE WASHINGTON, GEORGE WASHINGTON’S RULES OF CIVILITY AND DECENT BEHAVIOUR IN COMPANY AND CONVERSATION (Charles Moore ed., 1926).

<sup>86</sup> See, e.g., *In re Rambus, Inc.*, --- F.T.C. --- (2006) (Comm’n opinion) (finding deception that undermined the standard-setting process), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>, *rev’d*, *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *In re Union Oil Co. of Cal.*, 138 F.T.C. 1 (2003) (*Unocal*) (Comm’n opinion) (same); *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order) (alleging same).

<sup>87</sup> See, e.g., *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).

## VI. Staying the Antitrust Course

Although I believe that Section 5 (properly interpreted) should not play a significant role in the FTC's competition enforcement efforts, I do think that many of the unique features of the FTC can and should be used to further develop and improve the antitrust laws. Using the Executive Order 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. Before I continue with my recommendation to stay the antitrust course (rather than go adrift on the sea of Section 5), let me address a fairly significant foundational issue.

Some have argued that if Section 5 does not go beyond the antitrust laws, it calls into question the need for the FTC to exist.<sup>88</sup> I respectfully come to a different conclusion. Moreover, even the most ardent supporters of the FTC as an agency and Section 5 as a competition statute acknowledge that Section 5 has not played a meaningful or enduring role in shaping U.S. competition policy over the past century.<sup>89</sup>

Instead, I maintain that the pertinent inquiry is why, despite the fact that the agency has not used its UMC authority very successfully, has it in the last few decades not just thrived but become one of the most respected competition agencies in the world? I believe 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.<sup>90</sup> Additionally, the bipartisan, multimember composition of the agency allows it to build consensus on questions of antitrust law over a longer timeframe – that is, one that may span multiple administrations.

Thus, my recommendation is that the Commission focus primarily on improving the implementation of the antitrust laws rather than trying to expand its UMC authority. Looking back over my experience at the FTC over the past fifteen years, there are several examples of FTC successes in developing the antitrust laws.<sup>91</sup> For example, an important focus of agency 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* doctrines. In the recent *Phoebe Putney* decision, the Supreme Court sided unanimously with the FTC in finding that the state of Georgia

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<sup>88</sup> See, e.g., Kovacic & Winerman, *supra* note 8, at 944.

<sup>89</sup> See *id.* at 933-34, 941-42. Other than in the *Sperry & Hutchinson* case from the early 1970s, the last FTC victory in the courts of appeals in a standalone Section 5 case came in the 1960s. See *id.* at 941.

<sup>90</sup> Other beneficial features of the FTC (in its own right and as part of a dual enforcement system with the DOJ) include: (1) better outcomes from diversification in enforcement mechanisms through dual DOJ and FTC enforcement of the antitrust laws; (2) the benefits of having an “independent” agency enforce the antitrust laws; and (3) the benefits that result from housing competition and consumer protection enforcement in a single institution.

<sup>91</sup> There, of course, were many valuable FTC contributions to the development of the antitrust laws prior to my time at the Commission. In the interest of time, I focus solely on the more recent contributions.

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.<sup>92</sup> 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.<sup>93</sup> That clear articulation test was not satisfied in *Phoebe Putney*.

I firmly believe our 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 our enforcement efforts and has culminated in several favorable results, including not only *Phoebe Putney*, but also our recent victory in the Fourth Circuit in the *North Carolina Dental* matter, where 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.<sup>94</sup>

The hospital retrospective project was initiated 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 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 favorable decisions in hospital merger challenges, including court victories in *Rockford*<sup>95</sup> and *ProMedica*<sup>96</sup> and abandoned mergers in other matters.<sup>97</sup>

Other valuable contributions to the development of the antitrust laws include the Commission's *Unocal*<sup>98</sup> opinion in the *Noerr-Pennington* area, the Commission's *Three*

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<sup>92</sup> See *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).

<sup>93</sup> *Id.* at 1012-13.

<sup>94</sup> See *N.C. State Bd. of Dental Exam'rs v. FTC*, --- F.3d ---, 2013 WL 2367806 (4th Cir. May 31, 2013), *dismissing appeal from In re N.C. State Bd. of Dental Exam'rs*, --- F.T.C. --- (2011) (Comm'n opinion), *available at* <http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf>; *see also In re S.C. State Bd. of Dentistry*, 138 F.T.C. 229 (2004) (Comm'n opinion) (addressing clear articulation prong of state action doctrine), *appeal dismissed*, *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006); *In re Ky. Household Goods Carriers Ass'n*, 139 F.T.C. 404 (2005) (Comm'n opinion) (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).

<sup>95</sup> *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012) (granting FTC's motion for preliminary injunction).

<sup>96</sup> *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011) (granting FTC's motion for preliminary injunction). The Commission's opinion in this matter is currently on appeal at the Sixth Circuit.

<sup>97</sup> See, e.g., Press Release, Fed. Trade Comm'n, 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 (June 27, 2013), *available at* <http://www.ftc.gov/opa/2013/06/capella.shtm>; Press Release, Fed. Trade Comm'n, FTC Approves Order Dismissing Administrative Complaint Against Inova Health System Foundation and Prince William Health System, Inc. (June 17, 2008), *available at* <http://www.ftc.gov/opa/2008/06/inovafyi.shtm>.

<sup>98</sup> *Unocal*, *supra* note 86.

*Tenors*<sup>99</sup> and *Realcomp*<sup>100</sup> opinions in the joint conduct area, and the Commission's *Rambus*<sup>101</sup> opinion in the monopolization area. There are, of course, others; however, my time here is short.

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

Having circumnavigated the topic of UMC and the best way to deploy the FTC's unique capabilities in this speech, I will continue to think about where the boundaries of Section 5 should be and look forward to engaging my fellow Commissioners and others within the agency, as well as interested parties outside the agency, on these important but complex issues. If my colleagues wish to pursue expanded UMC theories, my hope is that the Commissioners will be able to work together to develop a policy statement upon which we can all agree. In the meantime, the principles I have discussed today will dictate my votes on any standalone Section 5 cases presented to the Commission. Finally, I will continue to support the Commission's long-term efforts to improve the application of the antitrust laws through our unique attributes as an institution.

I would be happy to address any questions you may have.

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<sup>99</sup> *In re PolyGram Holding, Inc.*, 136 F.T.C. 310 (2003) (Comm'n opinion), *appeal dismissed*, *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

<sup>100</sup> *In re Realcomp II, Ltd.*, --- F.T.C. --- (2009) (Comm'n opinion), *available at* <http://www.ftc.gov/os/adjpro/d9320/091102realcompopinon.pdf>, *appeal dismissed*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

<sup>101</sup> *In re Rambus, Inc.*, *supra* note 86.

**Appendix**  
**FTC Commissioner Maureen K. Ohlhausen**  
**Summary of Proposed Factors for Enforcement of**  
**Section 5/Unfair Methods of Competition**  
**July 25, 2013**

**Factor 1: Substantial Harm to Competition**

- The FTC's unfair methods of competition (UMC) authority should be used solely to address substantial harm to competition or the competitive process, and thus to consumers.
- Our UMC authority should not be used to address merely harm to competitors.
- UMC enforcement should seek to address anticompetitive conduct that results in a diminution of consumer welfare by reducing output, raising prices, or lowering quality.

**Factor 2: Lack of Procompetitive Justification/Disproportionate Harm Test**

- 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 a lack of any procompetitive justification for the conduct; or
  - 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.
- The more demanding this test, the more confidence we will have that we are challenging conduct that is something other than competition on the merits.

**Factor 3: Avoiding/Minimizing Institutional Conflict**

- The FTC should avoid or minimize conflict with its sister antitrust agency, the Department of Justice, which also enforces the Sherman and Clayton Acts, but does not have UMC authority.
- The FTC should not use its UMC authority to rehabilitate a deficient Sherman or Clayton Act claim.
- If there is a viable Sherman or Clayton Act claim that the FTC can pursue for a particular type of conduct, then we should not use UMC in such a case. Those Acts, as currently interpreted by the courts, likely cover almost all the anticompetitive conduct that we should want to reach.
- 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?
- In determining whether the definition of UMC should be expanded to cover a particular type of conduct, we should also 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.

**Factor 4: Grounding UMC Enforcement in Robust Economic Evidence**

- 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.

**Factor 5: Use of Non-Enforcement Tools as Alternative to UMC Enforcement**

- The FTC has often 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.
- 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, because their use will minimize conflicts between the FTC's UMC authority and the authority of other federal agencies – including in particular the Department of Justice – over the same conduct.

**Factor 6: Providing Clear Guidance on UMC**

- The FTC must provide clear guidance and seek to minimize the potential for uncertainty in the UMC area.
- 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.
- Beyond a policy statement on our UMC authority, the Commission ought to take additional steps in the interest of transparency when it brings a standalone Section 5 case.
  - First, the Commission ought to explain why the particular conduct at issue is best addressed by Section 5. That is, the agency ought to 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.
- Finally, 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.