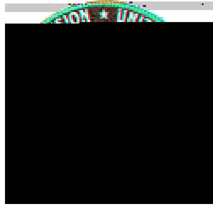

Section 5: Principles of Navigation

Remarks of Maureen K. Ohlhausen[1]
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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.[2]

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

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.[13] Even if it makes sense to try to chart a course forward by looking so far back,[14] 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,[15] 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.[16]

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

[9] 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).

unlikely to exceed the boundaries of such a large territory.[17] 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.[18] 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.[19] The lack of testing by a court and the vehement objections by many of the FTC navigators[20] 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.[21]

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,[22] 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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[17] *See, e.g.*, *In re* Robert Bosch GmbH, FTel0 Td [(I)-10(n 3 l)-2 we wilsc 9 tRobeC woTn eeofet5T n 3 loavm(s)-m(s)-iet5,tin(T)

backgrounds.[25] 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).[26] 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.[27] President Clinton issued E.O. 12866 in 1993, and although it has

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[25] *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.").

[26] 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.

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."[28]

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.[29] I also believe that employing these principles to develop UMC guidance will help the Commission achieve transparency, predictability, and fairness in its enforcement efforts.[30]

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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[28] Breyer, *supra* note 14, at 5.
[29] *See* Ohlhausen *Bosch* Statement, *supra* note 7, at 2 ("[T]his enforcement policy appears to lack regulatory

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.[31]

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.[32] 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 condu12.3 -1.TDntirpe

confidence we will have that we are challenging conduct that is

First, the FTC should not use UMC to rehabilitate a deficient Sherman or Clayton Act claim.[54] 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.[55]

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.[56] 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 whrohiohie2(o)2(u)2(r)5(s)1(is)1(te)6s(e)4(c)4(ehd

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?[59]

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

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.[68] 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."[69]

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.[70] 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.[71] 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.[72]

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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[68] It is imperative that the Commission seek and incorporate public input into any UMC policy state 0.0M

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

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 sig1.003h830 Tcb2-1.15 Tdv]TJ 02(on t)-2(2w]TJ 0 Tc 0 (o)2
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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*[82] and the *Health Care Statements*[83] 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).[84] UMC should not require businesses to play nice with each other by following some version of the "Rules of Civility"[85] 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.[86] 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.[87] Thus, in my view it should no

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.[88] I respectfully come to a different conclusion. Moreover, even the most ardent supporters of the FTC as an ag,,t71(C)d [(M)1/f24 >>n02 Tc -0.85,,t715f

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.[92] 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.[93] 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.[94]

The hospital retrospective project was initiated to

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 of007[F6MCID 28 >2 -2(n6)-2(nnova2 -1a)-10(ck)- of 3v6(a)-10(cjv6(aut)

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 5 as