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Draft for an FTC Policy Statement on The Prohibitions Against 'Unfair' Business Conduct

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DRAFT FOR AN FTC POLICY STATEMENT
ON THE PROHIBITIONS AGAINST "UNFAIR" BUSINESS CONDUCT

Section 5 of the Federal Trade Commission Act prohibits unfair conduct in commercial practices. The core prohibitions are the bans on "unfair methods of competition" and on "unfair or deceptive acts or practices."[1] Despite the centrality of these provisions to the FTC's work, they have long resisted attempts to define the concept of unfairness more precisely. This has created difficulties for enforcers, who have not had a defined tool to use, and also for businesses who seek to comply with these statutes, because the standards of conduct have not been clear.

This policy statement is intended to address these problems. It aims to provide a relatively short, consensus interpretation of Section 5's unfairness provisions. It will lay out both their distinctive powers, and also the principled limits on those powers. The core concept of Section 5 is that it is a flexible, gap-filling measure designed to help sustain a market economy. It does this by ensuring that the marketplace has both a sufficient array of options available, and a sufficient ability to freely select among them.

On the competition side, the ban on "unfair methods of competition" is broader than the Sherman Act. It reaches any kind of conduct that unreasonably narrows the range of selections in the nation's marketplace. On the consumer protection side, the ban on "unfair acts" is broader than simple deception. It reaches all forms of conduct that unreasonably limit parties' ability to select from among those options. In all its applications the unfairness power is limited to addressing conduct that it likely to produce some definable harm to the workings of the nation's market economy. This harm may involve either price, or nonprice effects such as diminished innovation. It does not extend to a general interest-balancing power to do good.

The body of this statement is divided into four principal sections. The first section reviews the legislative history and the level of flexibility and discretion given to the Commission. The second section describes the overall architecture of the unfairness provisions, focusing on how define their market-protecting mission and how to draw a principled line between the antitrust and consumer protection areas of law. The third section takes up antitrust issues in more detail, identifying specific classes of conduct that are or are not included in "unfair methods of competition." Finally, the fourth section carries out a similar analysis of "unfair acts or practices."

I. Legislative history, goals, and powers

The Federal Trade Commission Act was passed in 1914, primarily in response to concerns that the Sherman Act would not reach all business practices that were harmful to competition. Further harm might come either directly from a marketplace impact that was outside the Sherman Act, or indirectly as a result of misleading and diverting customers. Section 5 was therefore made broader than other trade statutes. One of the Act's principal sponsors noted that it was intended to "make some things punishable, to prevent some things, that can not be punished or prevented under the [Sherman] antitrust law."[2] Congress wrote the act broadly as a conscious choice, because "there were

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1 The operative sentence of Section 5 reads in full as follows: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. 45(a)(1).

2 51 CONG. REC. 12454 (remarks of Senator Cummins).

too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."[3] To apply this general standard, Congress created a specialized agency with broad discretion, and then determined to "leave it to the [C]ommission to determine what practices were unfair."[4]

Congress also set some specific limits on the Commission's discretion, however. An "unfair" method is to be defined by its effects on competition, not through an assessment of its moral or other qualities. A Commission action must also be to the interest of the public; the agency is not to take part in private disputes.[5] To compensate for the breadth of its discretion, the new Commission was given correspondingly limited remedies, primarily centered on injunctions and orders to guide future conduct.[6] And finally, the definition of "unfairness" is ultimately one for judicial determination.7

In 1938 the statute was amended by the Wheeler-Lea Act, which added the reference to "unfair acts or practices" and made it possible to address consumer interests directly. The subsequent case law has confirmed both the breadth and the boundaries inherent in this history. In *Indiana Federation of Dentists*, the Supreme Court noted that the unfair methods of competition language in Section 5 encompasses "not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons."[8] At the same time, other courts have emphasized the importance of maintaining conceptual rigor and predictability in the Commission's analysis. Businesses must not be "left in a state of complete unpredictability."[9]

II. The General Architecture of Section 5

Although Section 5 contains multiple provisions, enforced by separate divisions within the agency staff, it should be understood as tasking the Commission with a single, integrated mission. That mission is to maintain the prosperity of the United States by supporting a market economy that is responsive to consumer choices.

The goal of maintaining a market economy appears from two different sources. One is by seeing how often the legislative history referred to the fundamentally economic nature of the unfairness mission. Senator Newlands of Nevada, the principal sponsor of the FTC Act, remarked that the "legal significance is the same as the economic significance."10 The second source is the common-law experience of the nation's regulatory agencies in their case-by-case development of business law. Over the years a focus on market protection has been found to strike an optimal balance, broad enough to allow the scope that Congress clearly intended the trade-regulating agencies to exercise, but also concrete enough to be applied in a manageable way with meaningful reference points.

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[3] Senate Report, *supra*, at 13. *See also* H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess., 19 (1914).

[4] Report of the Senate Committee on Interstate Commerce, S. REP. NO. 597, 63d Cong., 2d Sess., 13 (1914).

[5] *See* FTC v. Klesner, 280 U.S. 19 (1929); 51 CONG REC. 11104-05 (remarks of Senator Cummins) (the bill is "not simply trying to protect one man against another;" an unfair method must involve "something that has a tendency to affect the people of the country or be injurious to their welfare").

[6] *See* 51 CONG REC. 11111-12 (remarks of Senator Newlands) (explaining decision not to include "extreme penalties" in the FTC Act, on grounds that rights and duties under that legislation would be continuously evolving).

7 *See, e.g., FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 249 (1972); *FTC v. R..F. Keppel & Bro.,* 291 U.S. 304, 314 (1934)

[8] FTC v. Indiana Federation of Dentists, 476 U.S.447, 454 (1986) (dictum). *See also* FTC v. Sperry & Hutchinson, 405 U.S. 233, 239 (1972) (Commission empowered "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws").

[9] E.I. duPont de Nemours & Co. v. FTC ("Ethyl"), 729 F.2d 128, 139 (2nd Cir. 1984).

10 *See* 51 CONG. REC. 12220

This overall vision helps identify the primary themes for public enforcement. A sound market economy requires two basic conditions: an array of options in the marketplace, and an ability on the part of consumers and suppliers to select freely from among those options.

Those two basic requirements help guide the proper interpretation of the two unfairness provisions of Section 5. The ban on "unfair methods of competition" protects the array of options in the marketplace, ensuring that they are not unreasonably diminished by antitrust types of behavior such as price-fixing or anticompetitive mergers. The ban on "unfair acts or practices" then protects the ability of purchasers to make free decisions from among those options, with their choices unstrained by consumer protection types of conduct such as deception, coercion, or the withholding of material information. [11]

In this way all the essential elements of a market economy are protected. Identifying this overall architecture of the statute has several benefits for administration of the law. It provides a framework for defining the proper scope of each part of Section 5, and helps determine when a particular matter should be assigned to one or the other side of the statute.

The distinction between the sides of the statute is immensely simple, but it is of fundamental importance. Seemingly intractable legal problems can sometimes be made simple by reconceptualizing them on the proper side of Section 5. It may be hard to show that the violation of a promise of nondiscriminatory patent licensing has led to actionable levels of market power, for example, but easy to show that the selection of a particular patented technology grew out of the deception of a standard-setting organization. Reconceptualizing cases in the other direction, it may be hard to show that a firm's overuse of noncompete clauses was deceptive to workers, but it may be easy to show that it holds down wages in violation of the law of most states and gives the firm an improper advantage over its competitors.

Because Section 5 is structured to support a market economy, it does not support actions to directly advance other social or political goals. For example, it does not allow instances of racial or social injustice to be condemned as unfair. On the other hand, if a situation can be properly condemned under any of several different market-oriented applications of the unfairness criteria, the Commission can properly select the economic course that also has beneficial indirect effects on other values.

III. Interpretation of "unfair methods of competition"

Within this general structure, the role of "unfair methods of competition" is to protect the range of competing options present in the marketplace. Historically the most attention has been paid

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[11] The Commission has described the interaction among the components of the FTC Act in the following terms:

> The various components of the statute form an integrated whole, allowing the Commission to promote the diverse benefits of a free and open economy. Thus the ban on unfair competition prevents exclusionary or anti-competitive behavior and helps preserve a full variety of marketplace options for consumers to choose among; the ban on deception helps ensure that consumers will not make that choice on the basis of misleading information; and the ban on unfair practices ensures that the choice is not distorted by coercion, the withholding of material information, or similar practices. Safeguards at all three levels are needed to ensure that substantial consumer injury is adequately addressed.

Companion Statement on the Commission's Consumer Unfairness Jurisdiction, 4 Trade Reg. Rep. (CCH) Para. 13,203 at p.20,909-3 (1980). For a concrete application of these distinctions *see, e.g.*, International Harvester, 104 F.T.C. 949 (1984).

to protecting purchase options available to consumers. Section 5 also applies, however, to the sales options available to suppliers, including to workers as suppliers of labor. Monopsony power is the mirror image of monopoly power, and is equally relevant.

There are three formal legal elements to an offense of unfair competition: (1) a definable harm to competition; (2) use of competitive techniques that are wrongful in the sense that they are not competition on the merits; and (3) an overall result that is harmful to consumers in its net effect. There is also a fourth consideration – predictability – which is not a formal part of the legal offense, but should be an important policy goal nonetheless.

Element 1: Harm to competition

An unfair method of competition requires, first of all, conduct that in some way concretely harms competition, or that poses an unreasonable risk of harming it in the future. Cognizable harms can take any of several forms. They may involve an immediate injury to the process of price competition, or injury to nonprice competition in terms of quality or innovation, or reasonably foreseeable injury to future competition in either sense.

a. Violations of the Sherman and Clayton Acts – Conduct that would violate the letter of the Sherman or the Clayton Acts will automatically involve sufficient competitive harm to satisfy the standards of the more inclusive FTC Act as well.

The FTC applies these statutes in light of its statutory plan. Because of the importance of marketplace options, the agency will be careful to look for possible lessening of either price or nonprice competition. Because of the particular importance of having new product and service options, the agency will be especially careful to consider possible harm to innovation. In conducting this latter inquiry, the agency will keep in mind the possibility that effective innovation competition in a particular market may require a larger number of participants than are needed to sustain effective price competition.

The Commission does not have jurisdiction to enforce the Sherman Act directly, so all its challenges to conduct that would violate that statute are necessarily brought under the authority of Section 5.[12] The Commission is specifically authorized to enforce the Clayton Act, and so most actions involving those theories of liability will be brought directly under that statute. The agency still has the option of proceeding under Section 5 instead, however.[13]

> Example 1: Competing x-ray laboratories agree about the terms on which they will do business with insurance companies. The FTC can pursue this conduct as an unfair method of competition, even though others with direct jurisdiction under the Sherman Act might challenge it under that statute instead.
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> Example 2: Two supermarket chains agree to a merger. In cases where Clayton 7 covers all significant aspects of the transaction, the FTC will normally proceed under that statute, rather than acting under Section 5.

b. Inadvertent technical gaps in the antitrust statutes – The Commission can also use Section 5 to fill technical gaps in the coverage of the Sherman and Clayton Acts. A "technical gap" exists in this sense

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[12] *See* FTC v. Cement Institute, 333 U.S. 683, 690-93 (1948); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1926).

[13] *See* Fashion Originators' Guild v. FTC, 312 U.S. 457, 464 (1941).

where the underlying statute does not literally apply to a particular situation, but where the conduct still has all the same substantive characteristics as a statutory violation, and where there is no reason to think that Congress intended to provide an exemption in the circumstance involved. A commonly cited example of this situation is the invitation-to-collude case.[14] Section 5 can apply in these situations to fill the gap. The competitive harm that would have justified application of the original statutes, had the gap not existed, should be sufficient to satisfy Section 5 as well.

> Example 3: A maker of vehicle axles invites a competitor to agree with it on prices, but the competitor declines. The firm's conduct would have made it liable for price-fixing if its offer had been accepted. The Sherman Act forbids actual collusion and attempted monopolization, but not attempted collusion. The FTC can nonetheless reach the invitation under Section 5, because doing so does not turn previously innocent conduct into a violation.[15]

> Example 4: An automobile manufacturer discriminates among the operators of car-rental fleets in the lease rates it charges. The Robinson-Patman Act prohibits discriminations in price. The FTC could not reach this situation on a theory of a technical gap, because doing so would alter the nature of the conduct that is prohibited, from selling to leasing.[16]

c. Incipient violations of the antitrust statutes – The Commission's authority under "unfair methods of competition" can also cover conduct that is not presently a violation of one of the other antitrust statutes, but that appears likely to lead to such a violation in the foreseeable future. This is one of the best-documented goals of Section 5. "A major purpose of [the FTC] Act was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained."[17]

Under this theory the Commission's task is essentially predictive. What conduct is being used, and what effects is it likely to have at different times in the future? In making this prediction the Commission can look at two possible mechanisms by which consequences can grow: increasing consequences of the conduct in the hands of the initially-acting firm; or a possible spread of the conduct as other firms in the industry begin to copy it, particularly if they will be forced to do so in order to remain competitive themselves.

There are also two limitations on this theory. One is the time horizon beyond which predictions can no longer be made with sufficient confidence. A second limitation comes from the

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[14] *See, e.g.,* Valassis Communications, 141 F.T.C. 247 (2006); Precision Moulding, 122 F.T.C. 104 (1996).

[15] *Cf.* Quality Trailer Products, 115 F.T.C. 944 (1992). *See also* Grand Union Co. v. FTC, 300 F.2d 92 (2nd Cir. 1962) (inducing the grant of discriminatory promotional allowances, which would have been illegal for the supplier to give).

[16] The change in substance means that the gap is no longer merely "technical," and that it can therefore no longer be addressed under this particular narrow application of Section 5. *See* Foremost-McKesson, Inc., 109 F.T.C. 127, 129-30 (1987), *explaining* General Motors Corp., 103 F.T.C. 641, 696, 700-01 (1984). It is still possible that substantively different conditions can be reached through the broader Section 5 purpose of enforcing the underlying policy of the Clayton Act. That will require a more elaborate assessment of whether Congress intended to distinguish between the two situations, as will be discussed below. An extension to leasing situations would not appear to be warranted under either theory, however.

[17] Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court*, 336 U.S. 596 (1949). *See also* FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394-95 (1953) ("It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act – to stop in their incipiency acts and practices that, when full blown, would violate those Acts.").

nature of the underlying reference statute. If a substantive statute already contains an incipiency element, then the Commission will not usually use Section 5 to introduce a different standard of incipiency that will look still further into the future.

> Example 5: After a long and careful study of basing-point prices in the electrical conduit industry, the Commission concludes that they have harmful effects, one of which is that their unilateral use increases the likelihood of collusion in a market. An injunction against this form of pricing would be appropriate on the basis of that incipient effect.[18]

> Example 6: A coffee manufacturer is charged with using predatory pricing in an effort to attain monopoly power. After investigation, the Commission concludes that the firm is not guilty of attempted monopolization. A charge of incipient monopoly under Section 5 will be dismissed as essentially duplicative.[19]

d. Facilitating practices – Facilitating practices are particular forms of unilateral but parallel conduct that tend to make it easier and more likely for an industry to arrive at a state of profitable oligopoly coordination. This conduct harms competition by materially facilitating interdependent conduct. It becomes legally questionable because it can threaten an incipient violation of the Sherman Act, or can violate the basic Sherman Act goal of preventing horizontal coordination.

The challenge in such cases is less the legal theory than the factual analysis.[20] Many ordinary and beneficial business practices – such as published price lists and standardized product sizes – also tend to make coordination somewhat easier. The enforcement challenge is to identify the conduct in which the anticompetitive effects predominate with the necessary clarity.

> Example 8.5: Competing hotel operators use the same computerized consulting program to set their room prices. The program considers factors such as costs and current occupancy rates, and produces recommendations that are higher than past prices. The program does not demand compliance, but most users follow its recommendations. Even if this conduct does not rise to the level of a Sherman Act conspiracy in a particular context, it may still be a facilitating practice under Section [5].

> Example 9: In the interval before a competitive bidding process begins, a large supplier of goods to a state government informs government employees of its likely bid price. The firm anticipates that state employees will inform its competitors of that price, and this in fact happens.[21] The FTC may challenge this conduct under Section

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[18] *Cf.* Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948) (alternative ground). This case is offered to illustrate the general scope of the statute; the substantive assessment of basing-point prices is a much-debated topic, on which no position is taken here.

[19] In principle one might believe that the "incipiency" application of Section 5 was intended to look further into the future than the "attempt" provisions of the Sherman Act. The Commission has decided, however, that this distinction is too subtle for practical counseling. *See* General Foods Corp., 103 F.T.C. 204, 366 (1984) (distinguishing between these two theories would require "engaging in such fine distinctions as to challenge the legal philosopher, let alone the competitor trying to conform its conduct to the law").

[20] *See* Boise Cascade Corp. v. FTC, 637 F.2d 573, 578 (9th Cir. 1980) ("there is not substantial evidence in the record, considered as a whole, to sustain the Commission's finding that petitioners' delivered pricing methods stabilized prices in the plywood industry at supra-normal levels").

[21] If the state employees do not pass the information to other competitors, then no Section 5 action should

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Example 10: The firms selling a gasoline additive independently offer their refiner customers a number of similar pricing terms. These include delivered pricing, long advance notice of price increases, and most-favored-nation clauses. Such features may sometimes tend to stabilize prices. However, many of these features are offered here at the customers' request, and service and safety competition is also important, so it is not clear that the practices have substantially harmed the net terms of sale. A Section 5 case would not be made out.[22]

e. Violations of the policy of the Sherman or Clayton Acts – Some conduct takes forms that are similar to Sherman and Clayton Act violations, and may operate through similar mechanisms and have similar consequences, but does not quite reach the thresholds required for violation of those prohibitions. For example, a firm may be dominant but not have the market share required for a finding of monopolization. These situations are different from those discussed under previous subheadings, because here there is no reason to predict that the conduct will come to result in a direct violation of the Sherman and Clayton Acts.

Section 5 can still apply, if doing so will fulfill the policy or purposes of the underlying statute. The case law establishing this power is clear.23

The Commission will nonetheless be sparing in applying Section 5 to such conduct. Aggressive pursuit of these theories will result in situations where the same conduct, not intrinsically problematic, is judged differently, depending on which antitrust agency handles the matter. That is a part of the congressional plan. But it nonetheless makes for difficulties in business planning and counseling, and it will be appropriate in only a finite number of cases, because the Sherman and Clayton Acts have been judicially expanded over the years so that they now reach most situations of real concern to those statutes.

Where the anticompetitive purposes and consequences are sufficiently clear, however, some under-threshold conduct can be condemned as an unfair method of competition. In one such case, for example, a firm had made a potentially anticompetitive acquisition through a series of transactions so structured so that there may have been no horizontal overlap at the time of the final closing. The conduct successfully challenged as a violation of the policy of the Clayton Act merger provisions.[24]

A more important role for Section 5 is to reach forms of competitive harm that are different in *kind* from Sherman and Clayton Act violations, rather than different in *degree*. These can include situations in which competition, while remaining intense in some respects, has been diverted into channels that are less beneficial to consumers, as discussed under the two following subheadings.

f. Diversion of competition into less desirable channels – Competition may be harmed in a cognizable way if the primary terms of rivalry are shifted into some improper alternative form that is less beneficial or desirable to purchasers, such as through the use of misrepresentations, abuse of a legal process,

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be brought. One might consider challenging the firm's conduct as an improper attempt at direct coordination, rather than as a facilitating practice. However, the conduct of independent state agents seems sufficiently unpredictable, especially when compounded by the further unpredictability of the competitors' responses, to preclude an inference of attempt in the absence of actual effects.

[22] *Cf.* E.I. duPont de Nemours & Co. v FTC ("Ethyl"), 729 F.2d 128, 140-41 (2nd Cir. 1984).

23 *See* FTC v. Cement Institute, 353 U.S. 683 (1948); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941)

[24] *See* The Vons Companies, FTC Complaints and Orders [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) Para. 23,200 (FTC Aug 7, 1992) (consent).

commercial bribery, or industrial espionage. This is unlikely to be an antitrust problem if the action is taken by just a single firm. If other firms are forced to adopt similar behavior in self-defense, however, then industry-wide competition may be damaged.[25]

Thus if firms begin to compete with one another through bribery of purchasing agents or industrial espionage, for example, and to present fewer new offerings in terms of price and quality, then competition may be harmed in the sense that the menu of options in the marketplace has been diminished. Competition may also be diminished in the sense that allocative efficiency has been harmed, by shifting business away from firms offering more highly valued products or lower prices, and toward those using illicit means of gaining competitive advantage. Both these effects may occur even if the firms are still competing against each other intensely within the altered terms of rivalry.

> Example 11: A major manufacturer of municipal power generators bribes a city official to give its next contract to the firm. This payment effectively excludes the firm's competitors in the short run, and places them under great pressure to adopt similar practices in the future. The Commission may challenge this conduct as a violation of Section 5.[26]

> Example 12: A firm misrepresents the quality of the material used in its clothing. By itself that is an instance of consumer deception. If enough other firms in the industry come under pressure to compete through making similar misrepresentations, however, the conduct could become an unfair method of competition as well.[27]

g. Evasion of regulatory requirements – Firms can also gain a competitive advantage by avoiding the costs and burdens of regulatory standards. Preventing these evasions is a suitable use of Section 5 for several reasons. It addresses an important source of improper competitive advantage, and it can lead to a beneficial integration and strengthening of business laws.

Such matters will lead the Commission to refer to other bodies of externally established law, such as federal regulations, state statutes, or contract law. Congress anticipated that the Commission would make reference to "the decisions of the courts,"[28] and the Supreme Court has noted that the agency can take account of "the common law and criminal statutes."[29]

This theory is subject to an important limitation, however. The Commission will not ordinarily take account of conduct that is already within the enforcement jurisdiction of another agency. Doing so might of create conflict with another, specialized enforcement regime that may have its own interpretation of a statute or a different sense of how various terms should be prioritized. For similar reasons the Commission will not ordinarily refer to state policies on topics where there are significant differences among the states.

> Example 13: The laws of virtually all states prohibit using gambling techniques to sell candy to children. However, there is no agency responsible for systematically enforcing these laws. The FTC may prohibit the conduct as a violation of Section 5.30

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25 *See* FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 312-13 (1934) ("a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade").

26 *Cf.* Lockheed Corp., 92 F.T.C. 968 (1978). The undesirability of such conduct was confirmed by a legislative judgment. *Cf.* 15 U.S.C. 78dd-1 *et seq.* (Foreign Corrupt Practices Act).

27 *Cf.* FTC v. Winstead Hosiery, 258 U.S. 483, 493 (1922).

28 5l CONG. REC. 13048 (remarks of Senator Cummins).

29 FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 313 (1934).

30 *Cf.* R.F. Keppel & Bro., *supra*.

Example 14: A mining company decides not to install required but expensive pollution-control equipment. This cost evasion confers a competitive advantage on it, and may be replicated by others. The conduct could therefore be a violation of Section 5. As a matter of prosecutorial discretion and primary jurisdiction, however, the FTC will not usually challenge such conduct as an unfair method of competition, because doing so would create too great a risk of confusion or inconsistency with the work of the Environmental Protection Agency. Antitrust action may still be appropriate, however, if the EPA joins in the competition case.

h. Cumulative harm to competition – Sometimes business strategies do not rely on a single, readily-identifiable anticompetitive action, but instead harm competition through long-term combinations of methods. These strategies may rely on the cumulative effect of many small but persistent repetitions of the same technique, or on the cumulative effects of differing but mutually-reinforcing techniques.

The introduction of such strategies may be a natural consequence an increasingly complex economy in which firms relate to each other in multiple ways. It may also reflect a calculated effort by some firms to pursue anticompetitive goals through complex new methods that are more difficult for the enforcement agencies to detect, characterize, and prosecute.

Cumulative harm to competition may result from many kinds of inappropriate conduct. It may make use of conventional antitrust violations, contract breaches, deception, or exclusionary misuse of the regulatory process.[31]

Example 15: A dominant manufacturer of automotive electronics engages in a series of exclusionary practices. These include making misleading statements about the market readiness of its own products, incorporating certain hidden software to degrade the performance of its rivals' components, and engaging in bundled pricing and tying arrangements. The Commission may challenge the cumulative effects of this conduct as a violation of Section 5.[32]

i. Other conduct harmful to competition – Finally, the Commission has the ability to identify and challenge any other, new form of conduct that becomes harmful to competition.[33] These occasions should not be numerous, however. The well-established applications of unfair competition, discussed above, are sufficient to reach the great majority of situations that need attention, and the agency does not pursue innovation for its own sake.

Element 2: Use of wrongful techniques

To make out an unfair method of competition, it is not enough to simply show that the conduct has been harmful to competition. Many legitimate and beneficial business practices may also

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[31] A business strategy of cumulative harm is particularly suitable for assessment under Section 5, which allows the Commission to study new industrial trends. And it lends itself to the Commission's distinctive use of injunctive remedies that do not create an undue risk of private damage actions before the industry has become familiar with the relevant standards. *See* FTC v. Gratz, 253 U.S. 421, 435 (1920) (Brandeis, J., dissenting) (in novel cases, the Commission's remedies ought to be limited to "prophylactic" measures).

[32] *Cf.* Intel Corp., FTC Dkt. No. 9341, Complaint (Dec. 16, 2009); *see also id.*, Concurring and Dissenting Statement of Commissioner J. Thomas Rosch. This case was eventually settled by consent (Aug. 4, 2010).

[33] *See* FTC v. Cement Institute, 333 U.S. 683, 693 (1948) (Section 5 was intended to hit at every anticompetitive trade practice, "then existing or thereafter contrived").

have that effect. For example, a firm that properly obtains a patent has excluded competition. A firm that achieves a monopoly through luck or superior competence may have done the same. Indeed, any firm that makes a unilateral decision to drop a product line or to close a local outlet has to some degree diminished competition in that particular area, yet that kind of exercise of business discretion has never been considered actionable. There must also be some element in the conduct that makes it wrongful, or not properly competition on the merits.

"Competition on the merits" is the end result contemplated by the consumer choice structure of the unfairness statutes. It is the process whereby sellers make products or services available, and purchasers decide freely, based on accurate information, which they consider to be the best available offer, thereby rewarding the sellers who offer the more appealing products or services.

Conduct may be determined to be wrongful – in the sense of not being this kind of competition on the merits – by reference to a number of different sources of guidance:

a. The letter of the antitrust statutes – Many unfair competition actions involve legal theories that simply apply the letter of the Sherman and Clayton Acts. The wrongful nature of conduct violating those statutes is well established. The proper application of these principles to a particular situation can always be disputed, of course. That is an issue involving the litigation of individual cases, however, rather than something that casts doubt on the general wrongfulness of statutory violations in principle.

b. Extensions of Sherman and Clayton Act principles – Many other Section 5 cases are also grounded, in some less direct way, in the jurisprudence of the Sherman and Clayton Acts. They involve technical gaps in those statutes, or incipient violations of their terms, or conduct that facilitates such violations. In each such case the principles being applied from the underlying laws are still principles of competition, and so a violation of them is likely to involve conduct that is not competition on the merits.

c. External standards of business conduct – Wrongfulness may also be suggested by the violation of other, non-antitrust standards of business conduct.[34] These will include such external references as deception and unfairness law from the consumer protection side of the FTC,[35] contract law,[36] standards of honesty before other administrative agencies,[37] and state business-tort law.[38] The legislative history of the FTC Act makes clear that Congress expected the Commission to also refer to these kinds of sources when defining unfair methods of competition.[39]

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[34] The Commission will refer most frequently to external standards that bear on the proper relationships among market participants, and less frequently to regulatory laws on other subjects.

[35] *Cf.* Intel Corp., Complaint (Dkt. No. 9341) (Dec. 16, 2009) (alleged intentional misrepresentation of product performance); Xerox Corp., 86 F.T.C. 364 (1975) (misrepresentation of dates when new products will be introduced). As a matter of resource allocation, the Commission most often uses its consumer protection authority to protect small businesses and individual persons as purchasers. The Commission's mission under the FTC Act is to protect the integrity of market processes for all participants, however. Larger corporations also depend on the integrity of those processes, and Commission action may sometimes be needed to protect even those firms in their role as purchasers.

[36] *Cf.* Orkin Exterminating Co., 108 F.T.C. 263 (1986), *aff'd,* 849 F.2d 1354, 1367 (11th Cir. 1988) (firm breached over 200,000 service contracts, supporting a finding of consumer unfairness).

[37] *Cf.* Unocal, 140 F.T.C. 123 (2005) (misrepresentations to state air-quality board put firm in position to charge monopoly prices) (consent).

[38] *Cf.* Americo, Inc., 109 F.T.C. 135 (1987) (frivolous legal claims intended to delay a competitor's reorganization in bankruptcy) (consent).

[39] "[I]t will be the duty of the [Commission] to consult the decisions of the courts, the learning of the time, the custom of merchants, the habits of trade, the writings of studious and thoughtful men, all of which go to make up

These external standards were not necessarily written to serve competition goals, and so a violation of them does not automatically make out a violation of Section 5. The conduct must also contribute to anticompetitive results within the meaning of the FTC Act. When it does so, however, then the fact that the conduct violates external standards will strongly suggest that it was a wrongful form of competition.

d. Other – Finally, some conduct may not fit neatly into any of the previous categories, but may be found to be wrongful by reference to the underlying principle that it does not involve competition on the merits.

Element 3: Harm to consumers in net effect

The third element in finding an unfair method of competition should be that the conduct is harmful to competition and consumers (or suppliers) in its net effects. It is a showing that the conduct is harmful under a rule of reason balancing test.

The Commission has long recognized that many business techniques produce both costs and benefits to consumers. A merger may initially lessen competition but also increase productive efficiency to such a degree that it eventually leads to lower competitive prices to consumers. A vertical restraint may lessen competition within one distribution channel, but enhance competition with other firms that utilize other channels. In enforcing Section 5 under this framework, the Commission should consider all relevant costs and benefits, and condemn only those practices that are harmful in their net effects.

When efficiencies are presented as part of this analysis, the Commission considers them to be highly relevant. They must therefore be supported by appropriate empirical evidence, when such evidence is available. The Commission ordinarily requires that the firm engaging in the challenged conduct demonstrate something beyond a theoretical possibility that efficiencies will be realized.

The small exceptions to the rule of reason only streamline and clarify the general principle. Some conduct may be condemned on a per se basis, not through the operation of Section 5, but rather through the operation of some other, underlying statute. Thus if the Commission were to pursue a price-fixing case, applying the letter of the Sherman Act, it could apply the per se condemnation of the Sherman Act.[40] This treatment really only reflects the judgment, based on the long experience of others as well as of the Commission, that such conduct will always or almost always be harmful in its net effects.

A fourth consideration: Predictability

Predictability is not, strictly speaking, an element in defining an unfair method of competition. Congress anticipated that the Commission might have to address new forms of conduct and establish new, unanticipated principles of competition. It did not intend the Commission to consider itself constrained by the *de novo* nature of an action. Senator Cummins was opposed the inclusion of criminal

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our understanding of the words 'unfair competition.'" 51 CONG REC. 13048 (remarks of Senator Cummins).

[40] *See* North Texas Specialty Physicians, 140 F.T.C. 715, 719 (2005) (case applied an "inherently suspect" standard, but could have used per se theory). *See also* Grand Union Co. v. FTC, 300 F.2d 92, 99 (2nd Cir. 1962) (when using Section 5 to fill a technical gap in the Robinson-Patman Act, the FTC should apply a per se standard if the underlying statutory provision is itself per se).

penalties in Section 5 precisely because it might "become[] necessary in order to preserve competition that we shall prohibit acts which have heretofore been regarded as moral, which have heretofore prevailed in every industrial society in the world."[41]

Even if not required in every case, however, predictability is an important goal, and one that the FTC strives to advance in its actions. Fostering predictability contributes to sound governance in several ways. It assists the majority of law-abiding firms in their efforts to comply voluntarily with the law.[42] It also recognizes that even injunctive remedies, without penalties or damages, can still impose real costs on the firms involved, either in the form of harm to reputation, or in the transactions costs involved in changing to a different mode of doing business. For many decades the FTC included a section in its annual reports that listed for public information the particular forms of unfair competition that it had challenged.[43]

The Commission currently frames its actions so as to make them predictable in one or more of several ways:

a. Letter of the Sherman and Clayton Acts – A challenge to conduct violating one of these statutes is predictable. Such conduct could be challenged by private parties or by other government entities directly on the basis of those statutes; and so the possibility of a challenge from some direction is not a substantive surprise.

b. Extensions of Sherman and Clayton Act principles – Commission actions based on extensions of Sherman and Clayton Act principles may also be predictable, especially when the principle is a central one and it is being extended only a short distance. The facts of many such cases might have made it possible to allege a violation of the letter of those statutes as well, and so a firm that was alert to Sherman Act issues would see the risk that the conduct might be challenged.[44] Even where such an action could only be brought under Section 5, moreover, it may be brought to address the kinds of familiar anticompetitive effects whose presence should be sufficient to alert firms to the existence of a litigation risk.[45]

Where the extension is greater than this, however, then business unpredictability is a real possibility, and caution is in order.

c. External standards of business conduct – If a firm is in violation of one of these external standards, then it is already on notice that it may be sued, because the external standards themselves usually

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[41] 51 CONG. REC. 11539. Even the circuit court cases that expressed concern about predictability also suggested that, if the facts had more clearly shown an actual harm to competition, then the factor of predictability would not necessarily have prevented a challenge. *See, e.g.,* E.I duPont de Nemours & Co. v. FTC ("Ethyl"), 729 F.2d 128, 141 (2nd Cir. 1984) ("Perhaps this argument would be acceptable if the market were clearly as described and a causal connection could be shown between the practices and the level of prices.").

[42] This factor was important in several circuit court opinions in the 1980s. *See* Ethyl, *supra*, 729 F.2d at 139; Boise Cascade Corp. v. FTC, 637 F.2d 573, 582 (9th Cir. 1980); Official Airline Guides v. FTC, 630 F.2d 920, 927 (2nd Cir. 1980).

[43] *See, e.g.*, FEDERAL TRADE COMMISSION, ANNUAL REPORT 88-91 (1929); ANNUAL REPORT 70-75 (1938); ANNUAL REPORT 81-86 (1958).

[44] For example, it is only a short step from a theory of actual but tacit agreement, proved through the circumstantial evidence of conduct (Sherman Act), to a theory to parallel unilateral facilitating practices that lead to oligopoly outcomes (Section 5).

[45] At some point, an action bottomed on a Sherman Act theory may represent such an extension from the letter of that statute that the Section 5 action is no longer predictable. That is not the case with recent Commission actions on these theories, however. They have adhered closely enough to established antitrust concepts to put firms on fair notice that the conduct is at least questionable.

contain their own enforcement mechanisms.

A firm could not then claim that it had conducted a good-faith review of its business model under the Sherman Act, concluded that it passed muster, and was surprised by a challenge under Section 5. Conduct that also violates the external standard would be known to be legally impermissible, and if the only surprise is one over the particular legal authority on which a challenge is based, that is not an unfair surprise.[46]

d. Conduct not previously questioned – There always remains the possibility that changing business conditions will make it advisable to challenge some form of conduct that had previously been considered legitimate and proper.

The Commission can draw on several techniques in order to deal fairly with this circumstance. It may give the business community advance notice of its thinking through informal avenues such as speeches, articles, and congressional testimony. Or it may rely on the intrinsic characteristics of the challenged conduct to provide notice. For example, if conduct tends to lead to anticompetitive coordination or exclusion, and if it was undertaken without the sort of valid business purpose or efficiency benefit that might justify it in a balancing test, then firms and their counsel should generally be aware that the conduct is questionable. Or if these intrinsic characteristics seem unlikely to give fair notice with respect to a particular business practice, then the Commission may delay formal action until it has had a chance to make its views known in some other way.

IV. Interpretation of "unfair acts or practices"

Section 5 of the FTC Act also prohibits "unfair acts or practices." This part of the statute is sometimes referred to as the "consumer unfairness" or the "consumer protection" power. It comes into play after the competition provisions have ensured that the markets present a full array of competitive options. It then ensures that consumers are able to make a free, independent, and effective choice from among those options. As was the case with competitive unfairness, consumer unfairness is also concerned with upstream suppliers and workers. There the agency's mission is to ensure that suppliers can make a free decision on whom to sell to.

This understanding of the consumer unfairness power was crystalized in a series of steps. In 1964 the Commission laid out the basic elements of consumer unfairness law in connection with its Cigarette Rule.47 In 1972 these factors were quoted with apparent approval by the Supreme Court in the case of *Sperry & Hutchinson*.48 In 1980 the Commission issued a formal policy statement on

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[46] The external standards are only a guide to the exercise of the Commission's discretion, however. The breach of the external standard is not something that needs to be formally proved as an element of the Section 5 case.

47 There the Commission's statement of the criteria was as follows:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common- law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

48 *FTC v. Sperry & Hutchinson C..,* 405 U.S. 223, 244-45 n.5 (1972). The Circuit Courts have concluded that this quotation reflected the Supreme Court's own views. *See Spiegel, Inc. v. FTC,* 540 F.2d 287, 293 n.8 (7th Cir. 1976); *Heater v. FTC,* 503 F.2d 321, 323 (9th Cir. 1974).

consumer unfairness, taking the "*S&H* criteria" as its initial point of departure.49 In 1994 Congress added Section 5(n) to the FTC Act, which codified many principles of that policy statement and made some further additions of its own.50

Elements of "unfair acts"

On the basis of this material, the Commission defines "unfair acts or practices" as including two main elements. There must be (1) a serious injury to consumers; and (2) this injury must be brought about through a mechanism that impairs the exercise of consumer decisionmakling. A third relevant element, public policy as declared in other contexts, may be consulted to better understand any likely harm to consumers, but it cannot be an independent basis for a finding of consumer unfairness.

Element 1: Consumer injury

Unjustified consumer injury is the primary focus of the consumer unfairness provision. By itself it can be sufficient to warrant finding a violation of Section 5. This is consistent with the legislative history of that provision, which was to "[make] the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."[51]

The importance of the consumer injury criterion does not mean that every consumer injury is legally "unfair," however. To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be a harm that the consumer could not reasonably have avoided.

(a) *Substantial injury* – First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms.[52] In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services[53] or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction.54 Unwarranted health and safety risks may also support a finding of unfairness.55 So too

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49 *See* https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

50 This new section provides as follows:

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C. Section 45(n).

51 83 Cong. Rec. 3255 (1938) (remarks of Senator Wheeler).

52 An injury may be sufficiently substantial, however, if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm.

53 *See, e.g., Holland Furnace Co. v. FTC*, 295 F.2d 302 (7th Cir. 1961) (seller's servicemen dismantled home furnaces and then refused to reassemble them until the consumers had agreed to buy services or replacement parts).

54 Statement of Basis and Purpose, Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,506, 53522-23 (1975).

55 For an example *see Philip Morris, Inc.*, 82 F.T.C. 16 (1973) (respondent had distributed free-sample razor blades in such a way that they could come into the hands of small children) (consent agreement). Of course, if matters

can a demonstrated breach of privacy.[56] Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers.[57]

(b) Injury in net effect – Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces. Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects.58 The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.[59]

(c) Injury that could not have been reasonably avoided -- Finally, the injury must be one which consumers could not reasonably have avoided.60 Normally we expect the marketplace to be self-correcting, and we rely on consumer choice – the ability of individual consumers to make their own private purchasing decisions without regulatory intervention – to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.

Element 2: Harm to consumer decisionmaking process

However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. The Commission's unfairness matters are brought under these circumstances. They are

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involving health and safety are within the primary jurisdiction of some other agency, Commission action might not be appropriate.

56 *See, e.g.,* PaymentsMD, LLC, Dkt. No. C-4505 (2015).

57 In an extreme case, however, where the injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a finding of unfairness. *Cf.* 15 U.S.C. 1692 *et seq.* (Fair Debt Collection Practices Act) (*banning, e.g.,* harassing late-night telephone calls).

58 *See Pftzer, Inc*., 81 F.T.C. 23, 62-63 n. 13 (1972); Statement of Basis and Purpose, Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614, 59636 n.95 (1978). When making this determination the Commission may refer to existing public policies for help in ascertaining the existence of consumer injury and the relative weights that should be assigned to various costs and benefits. The role of public policy in unfairness determinations will be discussed more generally below.

59 For example, when the Commission promulgated the Holder Rule it anticipated an overall lowering of economic costs to society because the rule gave creditors the incentive to police sellers, thus increasing the likelihood that those selling defective goods or services would either improve their practices or leave the marketplace when they could not obtain financing. These benefits, in the Commission's judgment, outweighed any costs to creditors and sellers occasioned by the rule. *See* Statement of Basis and Purpose, Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53522-23 (1975).

60 In some senses any injury can be avoided--for example, by hiring independent experts to test all products in advance, or by private legal actions for damages-but these courses may be too expensive to be practicable for individual consumers to pursue.

brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates an obstacle to the free exercise of consumer or supplier decisionmaking.[61]

Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. Some may engage in deception, which can be understood as one specialized application of unfairness principles.62 Some may withhold or fail to generate critical price or performance data, leaving buyers with insufficient information for informed comparisons.63 Some others may charge customers for goods or services that they never ordered, or may put crucial qualifications on an offer in small, obscure print.64 Still others may engage in overt coercion, as by dismantling a home appliance for "inspection" and refusing to reassemble it until a service contract is signed.65 And some may exercise undue influence over highly susceptible classes of purchasers, as by promoting complex Internet sales to children or fraudulent "cures" to seriously ill cancer patients.66 Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act.[67]

A third consideration: Violation of public policy

In judging consumer unfairness, the enforcement agencies have long made reference to public policy as it has been established by statute, common law, industry practice, or otherwise. Although public policy was listed by the *S&H* Court as a separate consideration, it does not provide a free-standing proof of unfairness. It is instead used by the agencies as additional evidence on the degree of consumer injury caused by specific practices.

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61 This emphasis on informed consumer choice has commonly been adopted in other statutes as well. *See, e.g.,* Declaration of Policy, Fair Packaging and Labeling Act, 15 U.S.C. 1451 ("Informed consumers are essential to the fair and efficient functioning of a free market economy".)

62 False information given to consumers will tend to harm their ability to make sound decisions and to lead to injury, and thus meets the criteria for unfair conduct. Because the law of deception has been well defined through numerous cases, however, it is the subject of a separate and more specialized policy statement. *See* https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

63 *See, e.g.,* Statement of Basis and Purpose, Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50218, 50222-23 (1979); Statement of Basis and Purpose, Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 36 Fed. Reg. 23871,23882 (1971). *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* Inc., 425 U.S. 748 (1976).

64 FTC v. Fleetcor Technologies, 620 F.Supp.3d 1268 (N.D. Ga. 2022).

65 *See Holland Furnace Co. v. FTC,* 295 F.2d 302 (7th Cir. 1961); *cf Arthur Murray Studio, Inc. v.* FTC, 458 F.2d 622 (5th Cir. 1972) (emotional high-pressure sales tactics, using teams of salesmen who refused to let the customer leave the room until a contract was signed). *See also* Statement of Basis and Purpose, Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22934, 22937-38 (1972).

66 *See, e.g., Travel King,* Inc., 86 F.T.C. 715, 774 (1975). The practices in this rase primarily involved deception, but the Commission noted the special susceptibilities of such patients as one reason for banning the ads entirely rather than relying on the remedy of fuller disclosure. The Commission recognizes that "undue influence" in advertising and promotion is difficult to define, however, and therefore exercises its authority here with caution.

67 These few examples are not exhaustive, but the general direction they illustrate is clear. As the Commission stated in promulgating its Eyeglasses Rule, the inquiry should begin, at least, by asking “whether the acts or practices at issue inhibit the functioning of the competitive market and whether consumers are harmed thereby.” Statement of Basis and Purpose, Advertising of 0phthalmic Goods and Services, 43 Fed. Reg. 23992, 24001 (1978).

For example, the FTC has referred to First Amendment decisions upholding consumers' rights to receive information, to confirm that restrictions on advertising tend unfairly to hinder the informed exercise of consumer choice.68

In Section 45(n) of the FTC Act, Congress has codified this limited role for public policy: "In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination."

To the extent that the Commission relies heavily on public policy to support a finding of consumer unfairness, the policy should be clear and well-established. The policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court. If these two tests are not met the policy cannot be considered as an "established" public policy.

The FTC will not look behind public policies to make its own independent judgements about the morality of business conduct. Some earlier formulations of the consumer unfairness standard had permitted such an inquiry, asking whether the conduct was "immoral, unethical, oppressive, or unscrupulous." This test was included in order to be sure of reaching all the purposes of the underlying statute, which forbids "unfair" acts or practices. The test has proven, however, to be worrisomely subjective. Moreover, it has also proved to be largely duplicative. Conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well. The agency therefore no longer refers to this factor.

V. Conclusion

To sum up, the "unfairness" provisions of Section 5 are intended to compensate for possible gaps in other laws, and enable the Commission to reach all forms of conduct that are unreasonably harmful to consumers and workers in a market economy.

More specifically, the ban on "unfair methods of competition" reaches beyond just the Sherman and Clayton Acts, and condemns any other conduct that may unreasonably diminish the number of options available in the marketplace. The ban on "unfair acts or practices" reaches beyond deception and covers any other conduct that may harm consumers' ability to select effectively from among those options. The legislation is limited to this market-oriented context, and it does not directly address broader social values. However, the act of protecting markets in this way will have beneficial indirect effects in many other areas of our national life.

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68 *See* Statement of Basis and Purpose, Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24001 (1978), *citing* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,* 425 U.S. 748 (1976).