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**Subcommittee on Commerce, Manufacturing,
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Chairman Terry, Ranking Member Schakowsky, and Members of the Subcommittee, I am honored and delighted to have the opportunity to appear before you today. The specific subject of my remarks will be the overall nature of Section 5 of the FTC Act. I will discuss how this law should be interpreted in a broad and flexible manner, as Congress intended. I also will discuss why any Section 5 Guidelines should center around the goal of protecting consumer choice, rather than Commissioner Wright's proposed economic efficiency orientation. Finally, I will list some areas that should become higher priorities as part of an affirmative agenda for the Commission in its second century.

There is no doubt that when Congress enacted the FTC Act it intended this law to be more expansive and more vigorous than the Sherman Act.¹ Even though the Sherman Act had already been enacted, Congress affirmatively decided that additional, enhanced legislation was needed. The FTC Act's legislative history makes it clear that Section 5 was intended to prohibit not only every violation of the other antitrust laws, but also incipient violations of these laws, conduct violating the spirit of the other antitrust laws, conduct violating recognized standards of business behavior, and conduct violating competition policy as framed by the Commission.² The Supreme Court has explicitly adopted this interpretation of the nature of the FTC Act.³

¹ See 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, passim (1980).

² *Id.* at 299-300.

³ See, e.g., *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-240 (1972).

I. Types of Cases That Should be Brought Under The FTC Act

There are a number of ways the FTC could carry out this Congressional intent that would be in the public interest. I will briefly discuss three specific categories of appropriate cases. Each is discussed in more detail in the attached article.⁴

1. Invitations to Collude

Invitations to collude can violate Section 2 of the Sherman Act. However, for enforcers to prove a Sherman Act violation they must undertake a large number of formidable tasks, including proving a relevant market, a complex and time-consuming undertaking. Then the enforcers must prove that the challenged conduct was anticompetitive (as that term has been defined) and that it would result in either the respondents achieving or maintaining monopoly power or the “dangerous probability” of achieving monopoly power. Lastly, claimed efficiencies associated with the practices would have to be litigated. Like every successful Section 2 action, these cases would be complex, lengthy, and costly.

By contrast, naked collusion cases are much less complicated. The enforcers do not have to define markets, prove difficulty of entry into the market or any form of market power, litigate efficiencies, or establish actual anticompetitive effects. Invitation to collude cases should be as easy to prove as collusion cases. The same jurisprudential reasons that permit the enforcers to dispense with the complex, costly and lengthy market definition and market power issues in collusion cases also apply to invitations to collude cases. As the Commission has concluded, they should violate Section 5 of the FTC Act.

⁴ See generally Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using 'Consumer Choice' Analysis*, 8 ANTITRUST SOURCE, no. 3, Feb. 2009, at 1, available at <http://ssrn.com/abstract=1287218>.

2. Incipient Exclusive Dealing and Tying Cases

There currently is substantial uncertainty over the minimum market shares required to establish a tying violation and the amount of foreclosure necessary for an exclusive dealing violation. Regardless of how high these requirements are under the Sherman Act, they should be relaxed whenever the case involves a defendant with a significantly larger market share than those of the victims. In these “incipient” tying or exclusive dealing situations, incumbents often will be able to significantly disadvantage smaller competitors and potential market entrants because of their relatively larger market shares. This is true even in cases where the incumbents do not hold large enough market share to trigger a traditional Sherman Act violation.⁵

Suppose, for example, a company introduces a new brand of super-premium ice cream. Suppose also that an existing seller of super-premium ice cream has 30 percent of this market as well as another 30 percent of the premium and non-premium ice cream markets. Then suppose the incumbent firm tells supermarkets they have to choose between the established firm’s products and the newcomer’s products. No efficiencies would arise if the established firm’s demands were met. Suppose also that the supermarkets agree to the incumbent firm's demands.

These facts, including in particular the incumbent's 30% market share, would be unlikely to be found to constitute either an unlawful tying agreement or an unlawful exclusive dealing agreement under the Sherman Act. However, if the incumbent’s exclusionary strategy succeeded consumer choice in terms of varieties of ice cream on

⁵ See Lande, *supra* note 4, at 6.

the market would be diminished, and prices would be likely to increase. This conduct should violate Section 5 as an incipient exclusive dealing or tying arrangement.

3. Cases Similar to N-Data.

The FTC's action in the *Negotiated Data Solutions (N-Data)* case should be applauded, and the Commission commended for condemning the opportunistic behavior at issue and affirming that this conduct can be an antitrust violation of the FTC Act even if it does not violate the Sherman Act.⁶

The facts of this case are exceptionally complicated, and it is not completely clear that the conduct at issue would have violated the Sherman Act. One could argue that the conduct only constituted the exploitation of intellectual property rights, in which case it might not have violated the Sherman Act. It could also be argued that the case does not clearly involve an act of monopolization in violation of Section 2 of the Sherman Act because the original patent holder adhered to its agreement and the successor holder was just exploiting its newly acquired patent rights rather than taking improper steps to acquire or maintain monopoly power. In light of this uncertainty, it is fortunate the Commission was able to use Section 5 of the FTC Act to challenge the anticompetitive conduct at issue.

II. Commissioner Wright's Section 5 Guidelines Proposal

⁶ See *Negotiated Data Solutions, LLC.*, FTC File No. 051 0094, 2008 WL 4407246 (Sept. 22, 2008) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

Last year FTC Commissioner Joshua Wright proposed that the Commission adopt Section 5 Guidelines.⁷ Unfortunately this proposal contain a fatal flaw. It directly contradicts Congressional intent. This is because Section 5 of the FTC Act prohibits "unfair methods of competition", a prohibition that, as noted above, Congress intended to be quite broad. His proposal would effectively eliminate this term and substitute for it a very narrow prohibition, one against "inefficient methods of competition".

Contrary to what Congress intended, this proposal reaches less anticompetitive conduct than the other antitrust laws. For example, the proposed central test of illegality is whether a practice "generates harm to competition as understood by the traditional antitrust laws and generates no cognizable efficiencies."⁸ This test is contrary to current law and much narrower. The prevailing test of legality under the Sherman Act balances a practice's efficiency and market power effects under a rule of reason.⁹ The existing law most certainly does not follow the proposal's suggestion to immunize conduct that leads to a significant amount of monopoly power simply because it results in a cognizable

⁷ See, e.g., Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission's Section 5 Unfair Methods of Competition Authority*, 2013 CONCURRENCES: COMPETITION L.J. no. 4, at 1.

⁸ Id. at 3.

⁹ For a discussion of the rule of reason in various contexts see John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211-33 & 240-43 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113927; See also Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134820&download=yes

efficiency. Almost every corporate action leads to some efficiencies.¹⁰ The crucial legal question is - and should be - whether these efficiencies are outweighed by the harm caused by these practices. Thus, this proposed interpretation of the FTC Act would not apply to a considerable amount of conduct that currently violates the Sherman Act - the opposite of the broad prohibition that Congress intended. The proposal should be rejected.

Commissioner Wright certainly is correct that it could be desirable if the FTC issues comprehensive Section 5 antitrust Guidelines. As he points out, this could help increase business certainty and enhance the predictability of government enforcement actions. However, bad Guidelines would be worse than no Guidelines at all.

By analogy, years ago the United States wanted to negotiate arms control agreements with the Soviet Union. A good arms control agreement would have had many benefits. However, an agreement that would have forced the United States to unilaterally disarm would have been far worse than no agreement at all.

The suggested proposal effectively would disarm the FTC by restricting Section 5 to an enforcement program narrower than that of the Sherman Act or Clayton Act. For this reason, the proposal should not be taken seriously by anyone who wants to carry out Congress's desire that the FTC Act be enforced vigorously. The proposal does not even contain token concessions towards Congress's preferred position. Rather, it is a step backwards. Returning to the arms control analogy, suppose the Soviet Union's opening position on an issue was 50 and the position of the United States was 100. Suppose the

¹⁰ For examples of rule of reason cases involving anticompetitive conduct that would be immunized from Section 5 scrutiny by this proposal, *see* the cases discussed in the sources cited in note 9 *supra*.

parties might have had a chance of compromising at somewhere between 70 and 80. Then, suppose the Soviet Union offered proposed Guidelines that called for only a 30. The United States would have been justified in concluding that the Soviet Union was not negotiating seriously. This is exactly what Commissioner Wright has done. The FTC Act was written to proscribe "unfair methods of competition", not "inefficient methods of competition".

III. An Alternative Framework For Section 5 Guidelines: Consumer Choice

The Commission instead could formulate sound Section 5 antitrust Guidelines that properly reflect Congressional intent. I believe this only could be accomplished if these Guidelines were written in terms of the fundamental concept that the FTC Act should enhance "consumer choice".¹¹ The attached article explains how antitrust Guidelines that utilize the consumer choice framework would be both faithful to Congressional intent and likely to enhance certainty and predictability for business.¹²

IV. Areas for Increased FTC Scrutiny

If Section 5 of the FTC Act were interpreted in terms of the consumer choice framework this would have a number of advantages in addition to providing a sound,

¹¹ For a general explanation of the consumer choice approach to antitrust law, see Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175 (2007), available at <http://ssrn.com/abstract=1121459>.

¹² For additional situations that might be especially appropriate for the application of the consumer choice framework see Neil W. Averitt, *Consumer Choice on the Menu at FTC*, 2013 FTC:WATCH, no. 837, Oct. 17, 2013, at 1 (on file with the author), available at <http://www.ftcwatch.com/neil-averitt-commentary-consumer-choice-on-the-menu-at-ftc/>.

clear, and predictable basis for Section 5 antitrust Guidelines. There are a number of areas that would be affected:

- Media consolidations and joint ventures should receive increased scrutiny to determine whether they affect consumer choice. This analysis should be in addition to the traditional antitrust concerns over the effects of media transactions on prices. A media sector transaction that significantly reduces the choices available to consumers should be challenged even if it does not result in price increases.
- Health Care consolidations and joint ventures should also receive enhanced scrutiny to determine whether they affect consumer choice. Price effects should of course continue to be crucial considerations, and it is certainly possible that the arrival of Obamacare will lead to an increased number of anticompetitive consolidations and joint ventures in this sector, especially in cases involving hospital mergers and hospitals purchasing physician practices. All of these transactions should be analyzed carefully for both price and choice effects on consumers.
- Food and agricultural industry consolidations, collusion, joint ventures, and exclusionary conduct should merit similarly higher levels of FTC attention.¹³ These are areas where the practices in question might not rise to the level where they constitute monopsony or monopoly, or give rise to a traditional Sherman Act violations. For the reasons given above as to why Section 5 should enable the Commission to more beneficially scrutinize exclusive dealing and tying situations, Section 5 also might be used appropriately to guard against a variety of incipient anticompetitive practices in the food and agricultural sectors.

I welcome your questions about any of these topics

¹³ For example, see *Letter from the American Antitrust Institute to the FTC concerning the proposed merger of Sysco and U.S. Foods* (Am. Antitrust Inst., Washington, D.C.), Feb. 25, 2014, available at http://www.antitrustinstitute.org/sites/default/files/AAISyscoUSFoodsMergerLetter_0.pdf

Revitalizing Section 5 of the FTC Act Using “Consumer Choice” Analysis

Robert H. Lande

The ongoing debate over the breadth and nature of Section 5 of the FTC Act has intensified due to the outcome of the recent Presidential election. Some call for or predict a much broader and more aggressive approach to Section 5. Others caution that reviewing courts will not permit an overly expansive interpretation of Section 5 unless it is clearly bounded by a structure that will prevent it from becoming untethered and standardless.

In this article, I propose that the use of the consumer choice framework would be the best and perhaps the only way to revitalize Section 5 in a manner that is definite, predictable, principled, and clearly bounded. This approach would focus attention on the factors that are important for a market to function competitively, including variety and quality, as well as price. It also would provide a relatively clear way for businesses and courts to distinguish anticompetitive conduct from procompetitive or benign conduct. If the Commission were to adopt the consumer choice limitations, the Act would be given the broad interpretation Congress intended, and this reinvigorated interpretation would be likely to be sustained by reviewing courts.

Section 5 of the FTC Act Is Significantly Broader than the Other Antitrust Laws

There is no doubt that when Congress enacted Section 5 of the FTC Act, it intended the law to be more aggressive than the Sherman and Clayton Acts.¹ The legislative history and Supreme Court decisions² demonstrate that Section 5 was intended to cover incipient violations of the other antitrust laws, conduct violating the spirit of the other antitrust laws, conduct violating recognized standards of business behavior, and conduct violating competition policy as framed by the Commission.³ Even though reasonable people may differ as to whether the FTC Act should be more expansive than the other antitrust laws, congressional intent concerning this point is clear.⁴ Some might question the propriety of subjecting conduct to a different, tougher legal standard when it is challenged under Section 5 of the FTC Act. For example, one might ask why an exclusive dealing arrangement should be evaluated under an incipency standard when it is challenged under the FTC Act, but not when challenged under the Sherman Act? ⁵ One answer is that Sherman Act violations lead to automatic treble damages and award of attorneys' fees to victorious plaintiffs.⁶ By contrast, there is no private right of action under the FTC Act, and FTC Act vio-

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¹ See 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, 233, 251, 271 (1979-1980).

² See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972).

³ See Averitt, *supra* note 1, at 228-29, 242, 251, 271, 275.

⁴ See *id.* at 229-38.

⁵ For the current legal treatment of exclusive dealing arrangements under the Sherman Act, see the sources cited *infra* note 31.

⁶ See 15 U.S.C. §15(a).

lations are not precedents that lead to private litigation unless an FTC decision specifically finds a Sherman Act or Clayton Act violation; a “pure” FTC Act violation would not do this.⁷ Moreover, mergers already are judged under two different laws that employ two different standards. Mergers can potentially violate Section 2 of the Sherman Act,⁸ but only if they violate a monopolization standard.

Mergers also can violate Section 7 of the Clayton Act, where they are scrutinized under a much stricter incipency standard.⁹ In other words, despite the existence of the 1890 Sherman Act, Congress wanted mergers challenged more aggressively, so in 1914 it enacted the Clayton Act. Similarly, Congress believed that the Sherman Act was not aggressive, flexible, or broad enough,¹⁰ so in 1914 it enacted the FTC Act.

However, the Supreme Court case law addressing Congress’ intent in enacting Section 5 is relatively old.¹¹ There is no guarantee today’s more conservative¹² Court would interpret Section 5 expansively today. If the Commission were to attempt to promulgate an approach to the FTC Act that was vague, insufficiently bounded, or that gave it undue discretion, more conservative reviewing courts today might well restrict the scope of Section 5 and make it coterminous with the other antitrust laws, no matter how clear the congressional intent and no matter what the older case law holds. A narrower interpretation of Section 5 would be especially likely if the Commission were to articulate the scope of Section 5 in non-economic terms, such as by forbidding conduct that is “unjust,” “oppressive,” or “immoral.” Fortunately, the Commission does have a way to minimize the risk of reversal on appeal.

Section 5 Can Be Expansive If, But Only If, It Is Constrained by the Choice Framework

Section 5 prohibits conduct that constitutes “unfair methods of competition” (which, in this article, I call Section 5 antitrust violations) as well as conduct that constitutes “unfair or deceptive acts or practices” (which, in this article, I call Section 5 consumer protection violations).¹³ The choice framework would impose a threshold requirement that every Section 5 antitrust violation significantly impairs the choices that free competition brings to the marketplace.¹⁴ The choice framework also would impose the requirement that every Section 5 consumer protection violation significantly impairs consumers’ ability meaningfully to choose from among the options the market provides. Construed this way, the two halves of Section 5, operating together, ensure that consumers have

⁷ See Averitt, *supra* note 1, at 251 n.112; see also *id.* at 253 n.116, 299 n.303.

⁸ Section 2 of the Sherman Act provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . .” 15 U.S.C. § 2. Illegal conduct can include corporate mergers. See LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:41 (4th ed. 2003).

⁹ See Robert H. Lande, *Resurrecting Incipency: From Von’s Grocery to Consumer Choice*, 68 ANTITRUST L. J. 875, 876 (2001).

¹⁰ See Averitt, *supra* note 1, at 228–29, 233, 242, 251, 271, 275.

¹¹ The Supreme Court’s most recent expansive interpretation of Section 5 occurred more than twenty years ago in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), where the Court characterized Section 5 to include traditional antitrust violations and also “practices that the Commission determines are against public policy for other reasons.”

¹² See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 6, tbl.3 (U. Chi. Law & Economics, Olin Working Paper No. 404, May 23, 2008), available at <http://ssrn.com/abstract=1126403> (documenting that a large proportion of the most conservative Supreme Court justices of recent decades are serving on the Court today).

¹³ See 15 U.S.C. § 45.

¹⁴ See Neil W. Averitt & Robert H. Lande, *Using The “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 182 (2007) [hereinafter *Using the “Consumer Choice” Approach*]; see also Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust And Consumer Protection Law*, 65 ANTITRUST L.J. 713, 718–20 (1997) [hereinafter *Consumer Sovereignty*].

the two ingredients needed to exercise effective sovereignty—a competitive array of options and the ability to choose meaningfully from among these options.¹⁵ Antitrust law prevents restraints that would restrict the competitive array of options in the marketplace, ensuring these competitive options are undiminished by artificial restrictions, such as price fixing or anticompetitive mergers. Consumer protection law then ensures that consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints, such as deception or the withholding of material information. In this way, the two halves of Section 5 together protect a free market economy.

By contrast, conduct not causing either type of problem should not violate Section 5 of the FTC Act. Conduct not unduly restricting the options available in the marketplace should not be an antitrust violation, and conduct not unduly restricting consumers' ability to choose from among these options should not constitute a consumer protection violation.

The choice approach to antitrust, instead of a price or efficiency approach,¹⁶ has the advantage of explaining accurately, simply and intuitively, in a way that is easy to understand, why antitrust is good for consumer welfare.¹⁷ Under a consumer choice standard, factors like innovation, perspectives,¹⁸ quality and safety would in effect be moved up from the footnotes, where they are all too-often forgotten, into the text, where they would play a more prominent role in the antitrust evaluation. When antitrust law is construed and applied within the consumer choice framework, it will change some antitrust analysis because it will give greater emphasis to such short term issues as quality and variety competition, and to such long term issues as competitive innovation, ideas, and perspectives. It would make a difference in several broad categories of cases where a price or efficiency approach to antitrust often would lead to the wrong result.¹⁹ The consumer choice framework could also lead to more aggressive enforcement,²⁰ but would do so in a predictable, principled manner.

¹⁵ The converse, however, is not correct. It is not true that everything that reduces consumer choice is an antitrust violation, or that everything that reduces consumers' ability to choose from among the options the market provides is a consumer protection violation. What is true is that every antitrust violation reduces or distorts the choices that are on the market. It also is true that every consumer protection violation reduces or distorts consumers' ability to choose from among the options the market provides. Averitt & Lande, *Consumer Sovereignty*, *supra* note 14, at 715–22.

¹⁶ For specific differences between the consumer choice, price and efficiency approaches, see Averitt & Lande, *Using the "Consumer Choice" Approach*, *supra* note 14, at 185–89.

¹⁷ The choice framework should also be applied to Sherman Act and Clayton Act cases. Fortunately, there is reason to believe that all antitrust jurisprudence is slowly evolving in this direction. *Id.* at 263–64.

¹⁸ Competition in terms of perspectives arises most meaningfully in the media contest. *See id.* at 206–12.

¹⁹ There are several categories of cases where courts have reached the wrong results, and would be likely to reach the right results if they had used the choice approach. The first category involves conduct in markets with little or no price competition, as may occur with certain types of regulation. In these situations, no avenues exist for properly assessing consumer welfare without focusing explicitly on non-price issues. For these markets a price standard would be inadequate because our main concern is artificially diminished consumer choice. *See id.* at 196–99

A second category of cases for which the consumer choice approach would work better involves conduct that increases consumers' search costs or otherwise impairs their decision-making ability. Such conduct tends to cause consumers to obtain products or services less suited to their needs, as well as to produce adverse effects on price. There are a large number of examples, including the advertising restriction cases and similar cases that involve collusion to raise consumer search costs. *Id.* at 199–201.

Finally, there are cases involving markets in which firms compete primarily through independent product development and creativity, rather than through price. These markets may involve high-tech innovation or editorial independence in the news media. *Id.* at 201–22.

²⁰ *Id.* at 196–222.

Three Examples: Cases Similar to *N-Data*, Invitations to Collude, and Incipient Exclusive Dealing and Tying Violations

In this section I provide three examples of ways that Section 5 usefully could be construed and applied more expansively than the other antitrust laws. I will also briefly show how the choice framework would beneficially assist in the analysis of each example, and raise the probability of a reviewing court sustaining a decision by the Commission.

1. Cases Similar to *N-Data*.

The FTC's action in the *Negotiated Data Solutions (N-Data)* case should be applauded,²¹ and the Commission commended for condemning the opportunistic behavior at issue and affirming that conduct can be an antitrust violation of the FTC Act even if it does not violate the Sherman Act.²²

The issues in *N-Data* never reached a reviewing court, but the next time the Commission decides a similar case the issues could be appealed. The FTC's approach to such cases would be more likely to be sustained if it were supplemented by "consumer choice" limitations that make it clearer and more predictable why the conduct at issue was challenged.

It is not completely clear that the conduct at issue in *N-Data* would have violated the Sherman Act. It could be argued that the conduct only constituted the exploitation of intellectual property rights, in which case it might not have violated the Sherman Act. It could also be argued that the case does not clearly involve an act of monopolization in violation of Section 2 of the Sherman Act because the original patent holder adhered to its agreement, and the successor holder was just exploiting its newly acquired parent rights, rather than taking improper steps to acquire or maintain monopoly power.²³ In light of this uncertainty, it is fortunate the Commission was able to use Section 5 of the FTC Act to challenge the anticompetitive conduct at issue.

Even though the Commission's *N-Data* decision came to the right result, the majority opinion's overall articulation of its "unfairness" standard risks attack for being unduly indefinite. The Commission correctly noted: "The legislative history from the debate regarding the creation of the Commission is replete with references to the types of conduct that Congress intended the Commission to challenge" including conduct that is "unjust, inequitable or . . . contrary to good morals."²⁴ Despite the clear legislative intent to give the Commission the power to define, challenge, and condemn such conduct, doing so arguably would give the Commission too much discretion.

Any Commission assertion that conduct violates Section 5 because it is "unjust, inequitable or . . . contrary to good morals" also could be criticized as not providing sufficient notice to businesses as to what specific conduct is illegal.

²¹ See *Negotiated Data Solutions LLC*, FTC File No. 051 0094, 2008 WL 4407246 (Sept. 22, 2008) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

²² *Id.*

²³ There was free and fair competition at the time presentations were made in the early 1990s by owners of different technologies to the Institute of Electrical and Electronics Engineers (IEEE), a standard-setting organization, in connection with the selection of a standard to facilitate interoperability between Ethernet technologies. In that connection the IEEE accepted the offer of National Semiconductor in 1994 to license its technology (which accomplished the desired objective) for a one-time fee of \$1000 (a price far below the monopoly level). After roughly eight years, following transfer of the pertinent patents to a new owner, the new owner increased its royalty demand. Rather than honor the price that had been established through the competitive standard-setting process, due to lock-in effects consumers purchasing from licensees were forced to pay higher prices to cover the increased licensing fees. This was a significant change to the (price) choice that competition had brought to the marketplace roughly eight years earlier. The conduct therefore quite properly was found to violate Section 5 of the FTC Act. See *N-Data*, 2008 WL 4407246.

²⁴ See Statement of Commission at 1–2, *N-Data*, available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf> (citations omitted).

However, *N-Data*'s conduct did artificially remove important consumer choices that would have arisen if competition had been set by the free market.²⁵ For this reason, it would have been condemned if the Commission had utilized the choice approach. Moreover, because the choice framework carefully relies upon an extensive body of earlier Commission "unfairness" policy statements and opinions, as well as court decisions, it would have helped inoculate the Commission's opinion against the charge that it provided inadequate notice that the conduct in question was illegal. Additionally, the consumer choice limitation would help reassure the antitrust and business communities that the Commission is not evaluating conduct on an ad hoc, unprincipled basis. When a case like *N-Data* is appealed, the reviewing courts would be more likely to give deference to the FTC's interpretation of Section 5 if "unfairness" were limited to practices that significantly interfere with consumer choice, rather than if the Commission uses "fuzzier" concepts such as "unjust," "inequitable," or "contrary to good morals." The consumer choice limitation also would provide bounds that would demonstrate that the Commission was not seeking open ended powers. This should help convince reviewing courts to give the Commission the considerable deference it deserves when it goes beyond traditional Sherman Act violations.

2. Invitations to Collude.

Invitations to collude can violate Section 2 of the Sherman Act.²⁶ However, for enforcers to prove a Sherman Act violation they must undertake several formidable tasks.²⁷ First, they must prove a relevant market, a complex and time-consuming undertaking. Then the enforcers must prove that the challenged conduct was anticompetitive (as that term has been defined) and that it would result in either the respondent's achieving or maintaining monopoly power or the "dangerous probability" of its achieving monopoly power. This analysis would have to show harm to competition, including a careful analysis of barriers to entry. Lastly, claimed efficiencies associated with the practices would have to be litigated.²⁸ Like every successful Section 2 action, these cases would be complex, lengthy, and costly.

By contrast, naked collusion cases are much less complicated. In these cases the enforcers do not have to define markets, prove difficulty of entry or any form of market power, litigate efficiencies, or establish actual anticompetitive effects.²⁹

Invitation to collude cases should be as easy to prove as collusion cases. The same jurisprudential reasons that permit the enforcers to dispense with the complex, costly and lengthy market definition and market power issues in collusion cases also apply to invitations to collude cases. Moreover, invitations to collude can comfortably be characterized as conduct that significantly risks impairing the price or other choices that the marketplace otherwise would provide to consumers, and thus fit comfortably within the consumer choice framework. They should, as the Commission has concluded,³⁰ violate Section 5 of the FTC Act without requiring the Commission

²⁵ If the Commission adopted the self-limiting principle that every antitrust violation must significantly impair the choices that free competition would have brought to the marketplace, in the *N-Data* case the choice option of concern would have been the price of the products in question. At the time of the original presentations to the IEEE, the presentations should have been forced to fully compete with each other in terms of price options (as well as quality options). The IEEE should have been free to select as its preferred technological option the one with the lowest long term cost.

²⁶ *United States v. American Airlines*, 743 F.2d 1114, 1121 (5th Cir. 1984) ("attempted monopolization may be established by proof of a solicitation along with the requisite intent").

²⁷ See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* ch. 3 (2006).

²⁸ *Id.* at 73–74.

²⁹ *Id.* at 228–29. This is not to suggest that collusion cases are simple. Collusion cases are, however, far less complex than Section 2 cases.

³⁰ *Valassis Comm'ns, Inc.*, FTC File No. 051 0008 (Mar. 14, 2006) (Analysis to Aid Public Comment), available at <http://www.ftc.gov/os/caselist/0510008/060314ana0510008.pdf>.

to undertake the Herculean tasks of proving the traditional Sherman Act requirements. This would save money for the taxpayer and also lead to faster and more reliable results.

3. Incipient Exclusive Dealing and Tying Violations.

There is substantial uncertainty over the market share required to establish a tying violation, and the amount of foreclosure necessary for an exclusive dealing violation.³¹ Similar uncertainty exists over how much pressure or inducement, in the form of a discount or other conduct, must exist before an arrangement will be termed a “tying” or “exclusive dealing” arrangement.³²

The traditional market share requirements and degree of certainty over whether an effective tie or exclusive dealing arrangement should be found to exist should be relaxed when the case involves a defendant with a significantly larger market share than that of the plaintiff. In these “incipient” tying or exclusive dealing situations, incumbents often will be able to disadvantage significantly smaller competitors or would-be entrants because their market share is larger, even if it is not large enough for a traditional Sherman Act violation. Suppose, for example, a company introduces a new brand of super-premium ice cream. Suppose also that an existing seller of super-premium ice cream has 30 percent of this market, and also another 30 percent of the premium and non-premium ice cream markets. Then suppose the incumbent firm tells supermarkets that they have to choose between the established firm’s products and the newcomer’s products. No efficiencies would arise if the established firm’s demands were met.

These facts, including defendant’s low market share, would be unlikely to constitute either a tying or exclusive dealing case.³³ Moreover, market definition and market power or foreclosure issues would be extremely difficult, lengthy, and costly to litigate. However, if the incumbent’s exclusionary strategy succeeded, consumer choice in this market, in terms of varieties of ice cream on the market, would be diminished for the short term. Moreover, successful exclusion would risk diminishing incentives to innovate and enter by non-incumbents in the long term. This conduct should violate Section 5 as an incipient exclusive dealing or tying arrangement.³⁴ The consumer choice framework helps explain why incipient tying and exclusive dealing arrangements should violate Section 5. Its focus on actual or potential choice in the marketplace should also increase predictability for the business community and make it more likely that reviewing courts would uphold the Commission’s determinations. Moreover, treating incipient exclusive

³¹ See Sullivan & Grimes, *supra* note 27, §§ 7.2, 7.3; HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ch. 10 (3d ed. 2005). The market shares and market power required can be similar to those required for Section 2 violations as some commentators suggest: “courts require a significantly lower foreclosure share in Sherman Act § 2 cases than in Sherman Act § 1 cases.” See EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 530 (2007).

³² See ELHAUGE & GERADIN, *supra* note 31, at 623–33.

³³ For the necessary requirements, *see id.* at 382–87, 404–05, 435–39.

³⁴ A similar exclusive dealing case where a diminution of consumer choice occurred was in *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 485 F.3d 880 (6th Cir. 2007). Although the *Wyeth* case was vastly more complicated than the ice cream hypothetical, the conduct at issue was bundled discounts, in the form of rebates, that were tantamount to an exclusive dealing arrangement. *Id.* at 884–85. The conduct offered no significant efficiencies and resulted in the serious possibility of diminished consumer choice in the conjugated estrogen market. *See id.* at 886 (One of Wyeth’s clients, Express Scripts, wanted to renegotiate its contract with Wyeth because a small group of Scripts’ customers insisted on having the other product, Cenestin, available but defendant refused and reminded Script that 40 million dollars in rebates per year would be at risk if it made the other product available). The defendant’s exclusionary strategy could have significantly diminished an important aspect of consumer choice in the short term, regardless whether prices were affected by its conduct. Moreover, successful exclusion would risk diminishing incentives to innovate and enter by non-incumbents in the long term. Unfortunately, the court focused on price, rather than consumer choice, and did not condemn the conduct in question. *Id.* at 886–91. Regardless whether the conduct should have been found to constitute a Section 2 violation, it should be a violation of Section 5 of the FTC Act.

dealing or tying arrangements as a violation of Section 5 would advance international harmonization in an increasingly globalized economy by beneficially moving U.S. antitrust law in the direction of European Union competition law.

Conclusion

In conclusion, Section 5 of the FTC Act should be interpreted to be significantly broader than the other antitrust laws. But this expansive mandate only should be used within the consumer choice framework.

Witness Background Statement

Robert H. Lande is the Venable Professor of Law at the University of Baltimore School of Law, and also is a Director of the American Antitrust Institute, a public interest organization. Before this he worked at Jones Day and at the Federal Trade Commission.

Professor Lande has testified before the US House of Representatives Judiciary Committee, the US Senate Commerce Committee, the Antitrust Modernization Commission, and the federal antitrust enforcement agencies.

Professor Lande has authored or co-authored more than 75 U.S. and 18 foreign legal publications on antitrust and other subjects. Eleven of his articles have been re-published in books or collections of articles. Professor Lande has been quoted in the media hundreds of times about antitrust issues and has appeared on TV in the United States, France, the United Kingdom and China. He has spoken at national events sponsored by many organizations, including the American Bar Association, Association of American Law Schools, National Association of Attorneys General, American Antitrust Institute, and the American Economic Association.

Professor Lande has given competition advice to enforcement officials from several foreign nations and has given legal talks in Italy, Spain, Japan, England, Belgium, Venezuela, and Peru. He is a past chair of the Association of American Law Schools Antitrust Section and has held many positions in the ABA Antitrust Section. He is an elected member of the American Law Institute and is a member of the District of Columbia Bar.

Professor Lande received his JD and Masters in Public Policy from Harvard University and his BA from Northwestern University.