



**FEDERAL TRADE COMMISSION  
Washington, D.C.**

**IN THE MATTER OF NOMI TECHNOLOGIES, INC.**

**File No. 1323251**

**COMMENTS OF THE  
INTERNATIONAL CENTER FOR LAW & ECONOMICS  
AND  
TECHFREEDOM**

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The FTC's consent decree with Nomi Technologies is remarkable for two things. First is what it does *not* do, practically: empower consumers to opt-out of cell phone tracking while shopping in retail stores. Perversely, the settlement may make it *less* likely that consumers will be able to do so, or that they will even be notified about in-store tracking. Second is what it *does* do legally: confirm that the FTC has all-but abandoned the materiality requirement that lies at the heart of the Deception Policy Statement.

Our comments on this matter are embodied in the attached ICLE white paper, *In the Matter of Nomi, Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case* (Appendix A). In general, we find troubling the FTC's continuing use of the so-called "common law of consent decrees" — building *de facto* regulation through unadjudicated settlements, thus largely (if not entirely) avoiding external judicial constraint upon its discretion to apply the requirements of deception and unfairness without the appropriate analytical rigor required by judicial review. In particular, we object to the quasi-precedential standards set by this settlement: that privacy policies merit the presumption of materiality; that each sentence of a privacy policy can merit the presumption of materiality, even taken in isolation and regardless of the specific circumstances; and that that presumption is effectively irrebuttable.

### **Key Points Made in Our White Paper**

Nomi Technologies offers retailers valuable information about their customers obtained by tracking the MAC addresses broadcast by customers' mobile phones while they shop. This allows brick-and-mortar retail stores to do what websites do all the time: tweak their configuration, pricing, purchasing and the like in response to real-time analytics — instead of just eyeballing what works.

While Nomi allowed anyone to opt-out of all its tracking via its website, the FTC seized upon a promise made within Nomi's privacy policy to provide an additional, in-store opt out. The FTC argued that Nomi's failure to make good on this promise — and/or to notify customers of which stores used the technology — made its privacy policy deceptive. Commissioner Wright dissented, noting that the majority failed to consider evidence that showed that the promise was not material, arguing that the inaccurate statement was not important enough to actually affect the behavior of customers who had in fact seen the promise because, by definition, they could have opted-out on the website anyway. (The FTC did

not bring a material omission case regarding customers who never saw the privacy policy.) In addition, both Commissioners Wright's and Ohlhausen's dissents argued that the FTC majority's enforcement decision in *Nomi* amounted to prosecutorial overreach, imposing an overly stringent standard of review without any actual indication of consumer harm.

The FTC's deception authority is supposed to provide the agency with the authority to remedy consumer harms not effectively handled by common law torts and contracts — but was never intended to be a blank check. Prior to 1983, the FTC had effectively treated *all* misleading statements as deceptive, regardless of materiality. The 1983 Deception Policy Statement does not require the FTC to establish injury in each deception case, it does commit the agency to demonstrate that:

1. There is a representation, omission or practice that is likely to mislead the consumer;
2. A consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and
3. The misleading representation, omission, or practice is material (meaning the inaccurate statement was important enough to actually affect consumers' behavior).

The Deception Policy Statement preserves a presumption of materiality for certain types of claims, but commits the FTC to always “consider relevant and competent evidence offered to rebut presumptions of materiality.”

The *Nomi* majority failed to do exactly that in its analysis of the company's claims, as Commissioner Wright noted in his dissent:

[T]he Commission failed to discharge its commitment to duly consider relevant and competent evidence that squarely rebuts the presumption that *Nomi*'s failure to implement an additional, retail-level opt out was material to consumers. In other words, the Commission neglects to take into account evidence demonstrating consumers would not “have chosen differently” but for the allegedly deceptive representation.

As we discuss in detail in the white paper, we believe that the Commission committed several additional legal errors in its application of the Deception Policy Statement in *Nomi*, over and above its failure to adequately weigh evidence that the sentence at issue was not material.

## Specific Recommendations

Based on the legal and evidentiary infirmities we discuss, we urge the FTC to either drop this case or else return to the drawing board to attempt to build what appears to be the FTC's "real" case: that Nomi's failure to offer in-store transparency constituted a material omission.

We are skeptical that such a case can be effectively mounted — and we suspect that the majority brought the case it did in part because it agrees that such a case would be (even) weaker than the one it did bring. If so, so be it. If the FTC believes that this case highlights a gap in its legal authority over failures to disclose surreptitious data collection that may actually harm consumers, it should clearly explain that gap in a report to Congress and ask for narrow statutory authority to address the problem.

Otherwise, more generally, the case highlights the need for FTC process reforms. Most critically, the case is the most recent example of the increasingly common "sleight of hand" behind the settlements that comprise the FTC's "common law of consent decrees." Collectively, these settlements are taken to be (and are often touted by some Commissioners as) an organic body of decisions on the merits of deception and unfairness. But in fact they are nothing more than preliminary, threshold analyses of each case under Section 5(b), governing not whether a company *actually* violated the FTC Act, nor even whether the settlement would make consumers better off, but whether the FTC had "reason to believe" that a violation occurred and that an investigation, *not the settlement*, would be in the public interest. Here, on the key doctrinal question, the FTC simply asserts that "we have ample reason to believe that Nomi's opt-out representations were material."<sup>1</sup>

Such conclusory assertions are not what the Deception Policy Statement contemplates. First, the FTC applies the presumption of materiality developed for express statements in traditional advertising cases in a completely different context. Second, the FTC dismisses evidence that might rebut that presumption, in-

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1. Majority statement at 2, [https://www.ftc.gov/system/files/documents/public\\_statements/638351/150423nomicommissionstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/638351/150423nomicommissionstatement.pdf).

sisting that it need only have “reason to believe” that the core elements of the claim were satisfied. Thus, the FTC pays lip-service to one of its foundational policy statements while, in actuality, politely ignoring it.

The FTC can and should do better. While we agree with Commissioner Wright that the FTC “has not met the relatively low ‘reason to believe’ bar because its complaint does not meet the basic requirements of the Commission’s 1983 Deception Policy Statement,”<sup>2</sup> we also believe that the Commission should, on its own motion (perhaps through something like an Enforcement Policy Statement applicable to both deception and unfairness cases), define a standard for settling cases. As Commission Wright notes, “that threshold should be at least as high as for bringing the initial complaint.”<sup>3</sup> At a minimum, that means that the FTC should stop relying on the “reason to believe” shortcut altogether in its settlements, and instead comport with something like the standard for motions for summary judgment under Federal Rule 56. In other words, the FTC should bear a similar burden of showing, based on the facts in the record, that it can establish a violation of Section 5 “as a matter of law” — not that it merely has reason to believe a violation occurred.

Ideally, of course, the FTC would litigate whenever difficult doctrinal issues are present, such as those involving the appropriateness of the evolving understanding of materiality. But we recognize that the Commission cannot compel companies to litigate, and that settlement may be the only option. To that extent, we urge the FTC to use its prosecutorial discretion to focus on cases where consumers are clearly harmed — and to avoid setting major doctrinal precedents in adjudicated settlements. At the same time, we urge the FTC to offer businesses more formal guidance on how Section 5 deception applies to privacy promises made online.

That, in turn, suggests that the FTC should consider holding a workshop on each of its policy statements to explore the open legal questions that have been left unresolved by the FTC’s “common law of consent decrees.” Among other things, the FTC should carefully examine whether it makes sense to apply the presump-

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2. Wright statement at 2.

3. *Id.*

tion of materiality to *all* express statements, even those made outside the context of marketing claims intended to persuade a consumer to buy (or otherwise use) a product. Any revision of either policy statement should be undertaken with the utmost care, and treated like a rulemaking process — beginning first with a Notice of Inquiry, followed by the workshop, and then the issuance of any proposed revisions to the Policy Statements (or drafts of new policy statements or other guidance), allowing affected parties the opportunity to provide comment.

Lest there be any doubt, we believe that both policy statements remain sound. Other than the fact that the Deception Policy Statement’s discussion of express statements can now be read to apply to statements that are fundamentally different than those contemplated by the Commission at the time it was written (either advertisements or other documents, like warranties, intended to convince consumers to purchase a product), we do not currently have in mind any other revision to either statement. Rather, our concerns lie generally with the *application* of these statements — in that we believe the Commission has, through the iterative process of settlements-upon-settlements, strayed from them significantly. Thus, what may be needed is more the kind of guidelines that the FTC and the Department of Justice issue in antitrust law: retrospective examinations of past cases to explain doctrinal trends. Such guidelines would attempt to explain the FTC’s understanding of the Policy Statements, rather than to correct or amend them. Where the FTC identifies that its pseudo-common law approach has led it astray from either Policy Statement, it should not hesitate to admit that it erred in its past settlements; there should be no shame in such reversals. For example, after the Supreme Court ruled in 2007 that resale price maintenance should be subject to a rule of reason rather than a per se rule (as a form of price fixing), the Department of Justice issued informal guidance regarding the “litigation structure” by which RPM cases should be resolved (i.e., which parties should bear the burdens of proof and how they should shift).<sup>4</sup> At a minimum, in such cases, the FTC should acknowledge that past settlements under Section 5(b) do not necessarily constitute adequate resolutions of important doctrinal questions.

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4. Remarks of Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dept. of Justice, *Antitrust Federalism: Enhancing Federal/State Cooperation* (Oct. 7, 2009), available at <http://www.justice.gov/atr/public/speeches/250635.pdf>.

In sum, we believe that the answer to our concerns lies primarily in *process* reforms designed to promote substantive analysis, rather than in changes to the substantive standards of either policy statement. Thus, we also encourage the FTC to hold a public workshop on its enforcement practices, aimed primarily at understanding why companies feel such pressure to settle, and how the FTC's processes, especially involving investigations, could be revised to ensure that difficult legal issues are actually adjudicated. Such a workshop could also explore how to make settlements more meaningful in their legal analysis without improperly giving them undue precedential effect. We raised many of these questions in our December 2013 report, *Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission*, attached here as Appendix B.<sup>5</sup> We will continue to study specific reforms, and we look forward to ongoing discussions with the Commission and the broader legal community around these important issues.

Respectfully Submitted,

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5. [http://docs.techfreedom.org/FTC\\_Tech\\_Reform\\_Report.pdf](http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf).

***IN THE MATTER OF NOMI TECHNOLOGIES, INC.: THE DARK SIDE OF  
THE FTC'S LATEST FEEL-GOOD CASE***

*Geoffrey A. Manne, R. Ben Sperry & Berin Szoka*

ICLE Antitrust & Consumer Protection Research Program !  
White Paper 2015-1 !

## Introduction

Last week the Federal Trade Commission (FTC) settled a privacy case – *In the Matter of Nomi Technologies, Inc.* – that, on its face, will seem banal, but actually raises significant questions about the FTC’s understanding of its broad consumer protection authority, especially as applied to cutting-edge technologies. *Nomi* is the latest in a long string of recent cases in which the FTC has pushed back against both legislative and self-imposed constraints on its discretion. By small increments (unadjudicated consent decrees), but consistently and with apparent purpose, the FTC seems to be reverting to the sweeping conception of its power to police deception and unfairness that led the FTC to a titanic clash with Congress back in 1980.

Specifically, the *Nomi* case illustrates that the FTC doesn’t think it needs to establish that a misrepresentation was “material” to consumers before finding a statement deceptive under Section 5 of the FTC Act — the very thing that the FTC’s 1983 Deception Policy Statement (DPS) was intended to prevent. Effectively nullifying the materiality requirement at the core of the DPS means the FTC is more likely to mis-prioritize its limited enforcement resources, proscribe conduct that actually benefits consumers, and impose remedies that make consumers worse off.

Indeed, that appears to be precisely what will happen here: Out of a desire to encourage — effectively require — companies to disclose data collection, the FTC is actually discouraging companies from doing so (at least in the short run), as Commissioners Ohlhausen and Wright note in their dissents. The FTC majority’s blindness to this obvious, but perverse, result suggests that the real purpose of the settlement is strategic: to set a quasi-precedent<sup>1</sup> that the Commission will leverage in the future – probably in harder cases involving more ambiguous conduct – and perhaps also to advance a larger political agenda.

Indeed it is not difficult to guess at what the majority’s real agenda is: changing what counts as “reasonable consumer expectations” with regard to tracking and data collection activities generally in order to justify even more aggressive use of Section 5 in the future. Specifically:

1. With this case the FTC is trying to change what it asserts are reasonable consumer expectations about whether consumers are being tracked *without notice* — here, specifically offline, in retail stores, but the same principle could extend to online contexts as well. The majority likely sees *Nomi* as a wedge in this regard, because it believes that it can plausibly (although, as we discuss below, erroneously) make the assertion that “for users who were on notice that tracking might occur, it is reasonable to expect *not* to be tracked without notice.”
2. If the FTC enshrines this assertion in enough consent decrees, eventually it will plausibly support a broader assertion that *overall* consumer expectations are that tracking will not occur

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<sup>1</sup> Settlements are not, of course, binding precedent, *see, e.g.*, *Altria Group, Inc. v. Good*, 555 U.S. 70, 89 n. 13 (2008) (noting that an FTC “consent order is... only binding on the parties to the agreement”), but they do have a quasi-precedential effect. *See* CONSUMER PROTECTION & COMPETITION REGULATION IN A HIGH-TECH WORLD: DISCUSSING THE FUTURE OF THE FEDERAL TRADE COMMISSION, REPORT 1.0 OF THE FTC: TECHNOLOGY & REFORM PROJECT 24 (Dec. 2013), *available at* [http://docs.techfreedom.org/FTC\\_Tech\\_Reform\\_Report.pdf](http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf).

without express notification, regardless of whether consumers were specifically put on notice about a *particular* tracking service.

3. Once that asserted transition in consumer expectations occurs, the Commission will be able to bring omission cases against any retailer or any tracking service that engages in data collection (online *or* offline) without conspicuous notice. And once that happens, retailers will also demand that services like Nomi provide notice.
4. In the end, with everyone providing notice all the time, the FTC will eventually bring cases challenging the efficacy of the very opt-out notices it required, and will effectively require *opt-in* to ensure that consumers are not deceived and/or a technological solution that will “push” notifications to consumers’ devices in real time (in addition to passive notification like online privacy policies and in-store signage).
5. As a practical matter, the FTC will likely outsource implementation of such a system, which would be difficult to design through the settlement process, to the multistakeholder processes convened by the National Telecommunications and Information Administration (NTIA).

In short, this case is about (i) planting the flag for “proving” that consumer expectations have changed, (ii) getting intermediaries (like retailers) on the hook, (iii) ultimately demanding opt-in for all data-collection and (iv) forcing technological intermediaries like Google and Apple to figure out how to make it all work seamlessly. In effect, the FTC is trying to create, *de facto* and without complicity from Congress, exactly what the Administration’s proposed privacy legislation would mandate.<sup>2</sup>

Whatever one thinks about this ultimate outcome, the *process* by which the FTC arrives there should be troubling to everyone. If we are right about what is really going on, that process entails:

- Generously employing the DPS’s presumption of materiality to skip ever having to show materiality;
- Subverting the limitations in the DPS by interpreting the presumption of materiality never to require consideration of context, proof of intent or to allow for evidence to rebut the presumption;
- Using case-by-case enforcement (as opposed to industry-wide regulation) to truncate the analysis of key claims to produce “rough cut” (“close enough for government work!”) approximations of what the law is; and
- Relying on the propensity of FTC defendants to settle in order to bootstrap those assertions from previous cases into effective “established truths” in subsequent cases without any judicial review.

This would be perhaps the very definition of “abuse of discretion.” It would put the “National Nanny” FTC of the 1970s to shame.

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<sup>2</sup> See Administration Discussion Draft: Consumer Privacy Bill of Rights Act of 2015, THE WHITE HOUSE (Feb. 27, 2015), available at <https://www.whitehouse.gov/sites/default/files/omb/legislative/letters/cpbr-act-of-2015-discussion-draft.pdf>.

## The Nomi Case

Nomi Technologies offers retailers an innovative technological means to observe how customers move through their stores, how often they return, what products they browse and for how long (among other things) by tracking the MAC (Wi-Fi) addresses broadcast by customers' mobile phones. This allows stores to do what websites do all the time: tweak their configuration, pricing, purchasing and the like in response to real-time analytics — instead of just eyeballing what works. Nomi anonymized the data it collected through a one-way hash, so that retailers couldn't track specific individuals. Recognizing that some customers might still object, even to “anonymized” tracking, Nomi allowed anyone to opt-out of all Nomi tracking on its website.

Nomi's website promised to “[a]lways allow consumers to opt-out of Nomi's service on its website as well as at any retailer using Nomi's technology.” But Nomi never actually offered an opt-out in-store — and Nomi's retail partners never posted notices in their stores to inform consumers that they were using Nomi, or that they could exercise the opt-out. Instead of suing the retailers for failing to disclose this data collection, the FTC alleged that Nomi had committed two deceptive practices:

- Count I (Express Claim): Failing to offer an in-store opt-out
- Count II (Implied Claim): Failing to offer in-store notices

*Nomi* marks the first time the FTC has made such claims regarding in-store tracking, or regarding an alleged failure to provide an in-store opt-out. Because the case was settled out of court, the majority did little to explain its analysis. In fact, both claims stand on shaky legal ground.

## Materiality under the FTC's Deception Policy Statement

In theory, the FTC's Section 5 authority is supposed to be used to protect consumers by reaching conduct in interstate commerce not sufficiently handled by common law and contract remedies.<sup>3</sup> In the 1970s, a broadly worded Supreme Court decision combined with Naderite criticism of the agency inspired a frenzy of activity.<sup>4</sup> That, in turn, provoked a backlash from the deregulatory Carter-era Democrats. Congress forced the agency to set boundaries on both unfairness (1980)<sup>5</sup> and deception (1983).<sup>6</sup> But the FTC has effectively circumvented those constraints little by little through enforcement actions such as that against Nomi.<sup>7</sup>

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<sup>3</sup> See, e.g., Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 590-606 (2013).

<sup>4</sup> See J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (speech given at the Marketing and Public Policy Conference, May 30, 2003), available at <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection>; *FTC v. Sperry & Hutchinson Trading Stamp Co.*, 405 U.S. 233 (1972).

<sup>5</sup> See Letter from Michael Pertschuk, Chairman, FTC, to Hon. Wendell H. Ford, Chairman, Senate Comm. on Commerce, Science and Transportation (Dec. 17, 1980), *appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984), available at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

<sup>6</sup> See Letter from James C. Miller III, Chairman, FTC, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Commerce (Oct. 14, 1983), *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984)

The 1983 Deception Policy Statement (DPS) requires the FTC to show that:

1. There is a representation, omission or practice that is likely to **mislead** the consumer;
2. A consumer's **interpretation** of the representation, omission, or practice is considered **reasonable** under the circumstances; and
3. The misleading representation, omission, or practice is **material**.<sup>8</sup>

Back in 1965, in *Colgate-Palmolive*, the Supreme Court had essentially abolished the materiality requirement previously recognized by the FTC, allowing the FTC to presume that any statement or omission that a reasonable person would find misleading was deceptive<sup>9</sup> — just as the Court's 1972 decision in *Sperry v. Hutchinson* essentially deleted the injury requirement of unfairness.<sup>10</sup> The 1983 DPS was, like the 1980 Unfairness Policy Statement, a compromise — walking the Commission back from its unconstrained activism of the 1970s, but not going as far in constraining the agency as some of its critics wanted.

In Congressional testimony in 1982, FTC Chairman Miller proposed that materiality should require some proof of consumer harm, which would have made deception harder to establish and more like the common law (*e.g.*, the torts of deceit or fraud).<sup>11</sup> In the end, the DPS said instead that materiality was a *proxy* for harm, which generally the FTC would not separately need to prove: “if the practice is material, [then] consumer injury is likely, because consumers are likely to have chosen differently but for the deception.”<sup>12</sup> This allowed the FTC to retain authority over misleading practices that would not necessarily violate any common law standard.<sup>13</sup>

At the same time, the FTC retained *some* of the prior presumption of materiality, but the DPS narrowed the scope of the presumption: “[i]n many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.”<sup>14</sup> The DPS left somewhat unclear just how broad the remaining presumption should be. It left even less clear how one could rebut that presumption, and how conflicting evidence about materiality should be resolved without the presumption.

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(decision & order), available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> [hereinafter “Deception Policy Statement” or “DPS”].

<sup>7</sup> See FTC, *Retail Tracking Firm Settles FTC Charges it Misled Consumers About Opt-out Choices* (Apr. 23, 2015) (press release), <https://www.ftc.gov/news-events/press-releases/2015/04/retail-tracking-firm-settles-ftc-charges-it-misled-consumers>.

<sup>8</sup> See Deception Policy Statement, *supra* note 6, at 175-76.

<sup>9</sup> *FTC v. Colgate-Palmolive Co.* 380 U.S. 374 (1965); see generally Jef I. Richards & Ivan L. Preston, *Proving & Disproving Materiality of Deceptive Advertising Claims*, 11(2) J. PUB. POL'Y & MARKETING 45, 49 (1992).

<sup>10</sup> See *FTC v. Sperry & Hutchinson Trading Stamp Co.*, 405 U.S. 233 (1972).

<sup>11</sup> See Richards & Preston, *supra* note 9, at 49-50.

<sup>12</sup> Deception Policy Statement, *supra* note 6, at 176.

<sup>13</sup> See Richards & Preston, *supra* note 9, at 49-50.

<sup>14</sup> Deception Policy Statement, *supra* note 6, at 176.

The DPS says that “express claims are material,” and quotes the Supreme Court’s landmark 1980 *Central Hudson* decision (which extended First Amendment protection to commercial speech for the first time):

In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.<sup>15</sup>

The Court was talking about the societal value of the speech, but the FTC extended the logic: an advertiser’s willingness to make an express claim became a proxy for materiality, which is *itself* a proxy for harm.

In traditional advertising, this “express claim => materiality => harm” formulation may make sense: who knows better than the advertiser whether a claim is likely to influence consumer behavior (*i.e.*, be “material”)? But this presumption doesn’t *always* make sense, as the Supreme Court noted. Unfortunately, the FTC seems to have forgotten this caveat, and has slipped back into a presumption of materiality that is both sweeping and, in practice, not rebuttable — just as in the pre-1983 era.

The DPS *does* require evidence when claims are merely implied.<sup>16</sup> The FTC must prove either that a seller *intended* to convey an implied claim,<sup>17</sup> or, if the FTC cannot prove intent, it must instead prove materiality, and cannot rely on the presumption.<sup>18</sup>

The DPS extends the presumption of materiality to several other scenarios, such as (i) misleading information or omissions ordinary consumers need to evaluate a product or service or (ii) omissions with which the reasonable consumer would be concerned, such as health or safety.<sup>19</sup> In both cases, though, the FTC must at least present evidence that the omitted information is “necessary” to ordinary consumers or of “concern” to reasonable consumers before the materiality presumption attaches.

Finally, even where the DPS allows the FTC to presume materiality, it makes clear that, contrary to the 1965–1983 period, that presumption is rebuttable: “The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.”<sup>20</sup> In few

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<sup>15</sup> *Id.* at 189 n.49 (quoting *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980)).

<sup>16</sup> Deception Policy Statement, *supra* note 6, at 190 (“Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.”).

<sup>17</sup> *See id.*

<sup>18</sup> *See id.* at 191.

<sup>19</sup> *See id.* at 189 (“Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false”); *id.* at 190 (“The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned.”).

<sup>20</sup> *Id.* at 189 n.47.

cases, however, has the Commission actually weighed conflicting evidence,<sup>21</sup> and never has the FTC published guidance on what evidence might qualify as “relevant or competent” to rebut the presumption of materiality. And those cases that do exist concern traditional marketing claims, not the kinds of novel fact patterns created by cutting-edge companies like Nomi.

Thus, lawyers advising clients facing a deception enforcement action, or trying to avoid one in the future, must rely primarily on complaints, consent decrees, and agency statements to attempt to predict how the FTC might weigh materiality. Unfortunately, the FTC has, under this Administration, effectively stopped issuing closing letters to explain why it decided *not* to bring an enforcement action,<sup>22</sup> so there is essentially no body of law showing how the FTC decides *not* to bring an enforcement action regarding a claim (or omission) that was misleading but that the FTC decided was *not* actually material. Thus, it is hardly surprising that companies settle essentially all cases the FTC brings — which further compounds the problem, by denying other practitioners litigated cases where the issue has been explored.<sup>23</sup>

## Applying the Deception Policy Statement to Nomi

Applying the DPS framework to *Nomi* requires first assessing whether the presumption of materiality should apply.

### Nomi’s Express Promises: The Presumption of Materiality Was Misapplied

Count I of the FTC’s *Nomi* complaint rests on applying the presumption of materiality to the following express claim made in the privacy policy on Nomi’s website:

Nomi pledges to... Always allow consumers to opt-out of Nomi’s service on its website as well as at any retailer using Nomi’s technology.<sup>24</sup>

Everyone agrees that Nomi complied with the first half of this promise by allowing consumers to opt-out on its website.<sup>25</sup> But the FTC alleges that the second half was deceptive because:

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<sup>21</sup> See, e.g., *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); *Kraft Inc. v. FTC*, 970 F.3d 311 (7th Cir. 1992).

<sup>22</sup> See Geoffrey A. Manne & Ben Sperry, *FTC Process and the Misguided Notion of an FTC “Common Law” of Data Security 4* (ICLE Working Paper), available at <http://bit.ly/1byrNS2> (“In order to get a better handle on the universe of [data security] cases at the FTC that didn’t result in settlements, we filed a FOIA request with the agency. It showed only seven closing letters and three emails closing investigations without bringing a case.”).

<sup>23</sup> See generally *id.*; Berin Szoka, *Indictments Do Not a Common Law Make: A Critical Look at the FTC’s Consumer Protection “Case Law”* (2014 TPRC Conference Paper, Aug. 22, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2418572](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418572).

<sup>24</sup> In the Matter of Nomi Technologies, Inc., Complaint, at ¶12 (Apr. 23, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150423nomicmpt.pdf> [hereinafter “Nomi Complaint”].

<sup>25</sup> See In the Matter of Nomi Technologies, Inc., Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, at 1-2 (Apr. 23, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/638351/150423nomicommissionstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/638351/150423nomicommissionstatement.pdf) [hereinafter “Majority Statement”]; In the Matter of Nomi Technologies, Inc., Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 1 (Apr. 23, 2015), available at

1. Nomi failed to make sure that each retailer in fact offered an in-store opt-out mechanism; or
2. Nomi failed to identify the retailers that used its technology (or failed to cause the retailers to identify themselves).<sup>26</sup>

The first claim appears straightforward: Nomi did not, in fact, offer an in-store opt-out mechanism, in violation of its express promise to do so.<sup>27</sup> For the majority, this is the end of the matter: even though the website portion of the promise was fulfilled, Nomi's failure to comply with the in-store promise portion amounts to an actionable deception.

But bifurcating the privacy policy in this way seems to violate the DPS's requirement that all statements be evaluated in context:

[T]he Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine "the entire mosaic, rather than each tile separately."<sup>28</sup>

Courts have suggested much the same thing:

[T]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.<sup>29</sup>

The majority dodges the key question: whether the evidence that Nomi accurately promised a *website* opt-out, and that consumers could (and did) opt-out using the website, rebuts the presumption that the inaccurate, in-store opt-out portion of the statement was material, and sufficient to render the statement *as a whole* deceptive. As Stanford Law Professor Richard Craswell has pointed out:

[S]ome method will have to be devised for determining when a statement that accurately informs in one respect while misleading the listener in another should properly be regarded as deceptive. This determination can be made without any trade-offs only if we are willing to say that any deception of the listener is enough to label the

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[https://www.ftc.gov/system/files/documents/public\\_statements/638361/150423nomiohlhausenstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf) [hereinafter "Ohlhausen Dissent"]; In the Matter of Nomi Technologies, Inc., Dissenting Statement of Commissioner Joshua D. Wright, at 3 (Apr. 23, 2015), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/638371/150423nomiwrightstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf) [hereinafter, "Wright Dissent"].

<sup>26</sup> *Cf.* Nomi Complaint, *supra* note 24, at ¶14 ("Nomi represented, directly or indirectly, expressly or by implication, that consumers could opt-out of Nomi's Listen service at retail locations using this service"); *id.* at ¶16 ("Nomi represented, directly or indirectly, expressly or by implication, that consumers would be given notice when a retail location was utilizing Nomi's Listen service").

<sup>27</sup> *Id.* at ¶15.

<sup>28</sup> Deception Policy Statement, *supra* note 6, at 183 n.31 (quoting *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963)).

<sup>29</sup> *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

statement itself deceptive, analogous to holding that an advertisement should be deemed deceptive if it deceives even a single consumer.<sup>30</sup>

Here, as Commissioner Wright argues,

the Commission failed to discharge its commitment to duly consider relevant and competent evidence that squarely rebuts the presumption that Nomi's failure to implement an additional, retail-level opt-out was material to consumers. In other words, the Commission neglects to take into account evidence demonstrating consumers would not "have chosen differently" but for the allegedly deceptive representation.<sup>31</sup>

As Commissioner Wright points out, the available evidence suggests that consumers were apparently not particularly affected by the inaccurate portion of the statement. He cites evidence that 3.8% of consumers used Nomi's website to opt-out of data collection — a number considerably higher than the less than 1% who opt-out from data collection online more generally.<sup>32</sup> From this, Wright notes, it may be inferred that the consumers who read Nomi's policy and who cared to avoid its technology likely opted-out at the website.<sup>33</sup>

It is of course a valid question whether, even in context, the inaccurate statement amounted to a material deception, and whether the evidence offered by Commissioner Wright was sufficient to rebut the presumption of materiality. Nevertheless, the majority's *approach* to answering those questions (*i.e.*, dismissing or ignoring them) and weighing the evidence (*i.e.*, failing to) betrays the majority's implicit rejection of the DPS's admonishment that context and contrary evidence are essential — and the DPS's promise that "The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality."<sup>34</sup>

The majority *does* offer some theories as to why the inaccurate in-store opt-out statement might have mattered, even to consumers confronted with the additional, website opt-out. Nonetheless, it essentially rejects the idea that there could be a valid trade-off. Instead, the majority seems content to assert that if *any* consumer might have been misled by the in-store opt-out promise, the statement is material. In reality, what the DPS requires is a weighing of the importance of the inaccurate language against the truthfulness of the statement taken as a whole. In other words, it is not enough to suggest (without evidence, of course, but only supposition) that the inaccurate language could have misled some consumers; the DPS requires a showing that the

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<sup>30</sup> Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 594 (1991).

<sup>31</sup> Wright Dissent, *supra* note 25, at 3.

<sup>32</sup> *Id.* at 3, 4.

<sup>33</sup> *Id.*

<sup>34</sup> Deception Policy Statement, *supra* note 6, at 189 n.47.

entire statement, taken as a whole, *tended* to mislead “a consumer acting reasonably in the circumstances.”<sup>35</sup> This is quite a different assessment, and one that the majority fails to undertake.

### **Nomi’s (Alleged) Implied Promise: No Presumption of Materiality**

In addition to rejecting Commissioner Wright’s evidentiary claims regarding Nomi’s express promises, the majority attempts to bolster its case by asserting that:

the express promise of an in-store opt-out necessarily makes a second, implied promise: that retailers using Nomi’s service would notify consumers that the service was in use. This promise was also false. Nomi did not require its clients to provide such a notice. To our knowledge, no retailer provided such a notice on its own.<sup>36</sup>

As noted above, under the DPS an implied promise merits the presumption of materiality only when there is proof that the implied promise was *intended* by the speaker.<sup>37</sup> In the absence of such proof, the FTC would (at least if it were before a court) have to prove the materiality of the alleged implied promise. In other words, for an implied promise to be deemed material (and thus deceptive) under the DPS, the FTC must adduce *some* proof: either that it was, in fact, *intended*, or that it was, in fact, *material*.

#### **The FTC Failed to Prove Nomi’s Intent to Make the Implied Promise of In-Store Notification**

The majority attempts to “prove” that Nomi intended to make the implied promise by asserting that such a promise was necessary to the express promise of an in-store opt-out.<sup>38</sup>

But why is such a promise “necessarily” implied by Nomi’s statement? One can readily see that in-store opt-out would be *easier* for consumers if stores posted signs or otherwise conspicuously notified their customers that Nomi’s technology was in use. But Nomi doesn’t make any promise as to the particular mechanism by which in-store opt-out would be available.

It would seem to eviscerate the word “proof” if proof of intent could be satisfied here by a simple assertion of “necessity” when *any* other interpretation is possible. Something more convincing *must* be required — whether evidence of actual intent (*e.g.*, “hot docs” clearly stating the intent of the company) or evidence undermining the other possible interpretations (*e.g.*, evidence that no other company *ever* used such language without intending or assuming that notice was required).

But the FTC offers no such evidence here, and other interpretations *are* possible.

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<sup>35</sup> *Id.* at (“If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.”)

<sup>36</sup> Majority Statement, *supra* note 25, at 1.

<sup>37</sup> See Deception Policy Statement, *supra* note 6, at 190.

<sup>38</sup> See Majority Statement, *supra* note 25, at 1 (“Moreover, the express promise of an in-store opt-out necessarily makes a second, implied promise”).

For example, Nomi's technology uses the MAC addresses broadcast by consumers' smartphone Wi-Fi interfaces to track consumers' movements through retail stores.<sup>39</sup> This necessarily means that every tracked consumer was carrying a Wi-Fi equipped mobile device while in-store. It is undisputed that Nomi's website offered the promised opt-out.<sup>40</sup> Thus, its additional promise to make opt-out available "at any retailer using Nomi's technology" could conceivably have been fulfilled by ensuring that the stores' Wi-Fi was connected to the Internet and potentially accessible to consumers — so that consumers could access the website opt-out from their phones while in the store (if they could not already do so from their mobile data connections. If so, consumers planning to avail themselves of in-store opt-out were no more deceived by the absence of in-store notification than were consumers who opted-out at Nomi's website — a claim the majority doesn't make.<sup>41</sup> In either case, they wouldn't have known — or needed to know — which stores used Nomi to exercise the website opt-out.

But even if we assume that the promised in-store opt-out could only reasonably have been assumed to use a different mechanism than the website opt-out, it still doesn't *require* in-store notification that Nomi's technology was in use. Again, while such notification would have made opt-out *easier*, it is not clear that a consumer, having read Nomi's simple, one-page privacy policy, couldn't have been reasonably expected to assume that *every* store might be using Nomi's technology and obligated to ask a store employee if he wanted to use the retail opt-out. The opt-out itself does, after all, require the consumer to engage in an affirmative act to avoid tracking. In fact, in a world in which various forms of tracking, monitoring and surveillance are effectively ubiquitous (not least because government surveillance has made this world a reality), such an assumption might be fairly realistic.

If this harsh truth seems unacceptable, note two things. First, the consumer at issue was not powerless: he was given an easy, comprehensive opt-out, which he could exercise without any special notification and at trivial cost. Second, this case does nothing to avoid the lack of in-store notification — indeed, it probably makes it more likely, by discouraging disclosure generally, as explained below. The FTC could, in theory, have brought an unfairness case against Nomi for failing to disclose its collection to all tracked consumers, or either a deception or unfairness case against retailers for failing to notify their customers that they were being tracked. Any of these cases would have dealt directly with what would seem to be the source of the FTC majority's real discomfort: tracking without conspicuous notification to all consumers. But the Commission brought no such cases. Instead it seems content to try to extend its limited deception authority beyond its legal limits in a misguided effort to locate a generalized disclosure requirement for data collection and tracking activity in that authority.

In recent years, the FTC has brought a series of cases aimed at mandating disclosure and/or dictating how disclosure must be formatted, configured or delivered — without regard for countervailing economic considerations, and with little humility about the FTC's ability to create effective

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<sup>39</sup> Nomi Complaint, *supra* note 24, at ¶4.

<sup>40</sup> *Id.* at ¶11.

<sup>41</sup> See Majority Statement, *supra* note 25, at 2-3.

tive user interfaces from the top down.<sup>42</sup> The FTC considerably stepped up this approach with its recent settlements against Apple, Google, and Amazon regarding precisely how they configured their online stores to prevent children from making app purchases without their parents' authorization.<sup>43</sup> Taken together with *Nomi*, it is difficult not to see in this set of cases an effort by the FTC to bootstrap into its deception and unfairness authority an ability to mandate some form of conspicuous notification for offline consumer tracking — ideally through notifications “pushed” to consumers' mobile devices in real time to notify them of potential tracking.

While that may (or may not) be a desirable policy, it is not one that the FTC's Section 5 authority permits the FTC to mandate. Indeed, the fact that Section 5 does *not* confer such broad authority is a key reason why FTC has sought the authority to mandate specific forms of disclosure as part of “comprehensive baseline privacy legislation” under Democratic Administrations (in 2000, and again more recently).

Only by stretching Section 5 across a series of un-adjudicated settlements can the FTC possibly create such a legal disclosure requirement. Whatever the merits of such an outcome, contorting Section 5 to reach it creates a host of problems. The constraints of the DPS (like those of the UPS and Section 5(n)) are not simply legalistic obstacles to be overcome: they help to ensure that the FTC doesn't run roughshod over innovative technologies, micro-manage design choices, and unduly intrude on companies' reasonable economic decision-making. To be sure, there may be perfectly valid constraints on these imposed by the FTC. But the FTC's apparent effort to escape *any* constraints on its own authority to dictate even the most trivial details of disclosures, privacy policies and notifications (particularly when data collection is involved) will not serve consumers well on balance.<sup>44</sup>

### The FTC Failed to Prove that *Nomi*'s (Alleged) Implied Promise of In-Store Notification Was Material

In the absence of proof of intent (and even if it *is* present, given the DPS's requirement that the FTC “always consider relevant and competent evidence offered to rebut presumptions of materiality”), the FTC must prove that an implied promise was material.<sup>45</sup> Here again the majority fails.

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<sup>42</sup> See Solove & Hartzog, *supra* note 3, at 658-61 (and enforcement actions cited therein).

<sup>43</sup> See *In the Matter of Apple, Inc., Complaint*, (Jan. 15, 2014), *available at* <https://www.ftc.gov/sites/default/files/documents/cases/140115applecmpt.pdf>; *In the Matter of Google, Inc., Complaint*, (Sept. 4, 2014), *available at* <https://www.ftc.gov/system/files/documents/cases/140904googleplaycmpt.pdf>; *FTC v. Amazon.com, Inc., Complaint*, (W.D. Wash., Jul. 10, 2014), *available at* <https://www.ftc.gov/system/files/documents/cases/140710amazoncmpt1.pdf>.

<sup>44</sup> See Geoffrey Manne & Ben Sperry, *Debunking the Myth of a Data Barrier to Entry for Online Services*, TRUTH ON THE MARKET (Mar. 26, 2015), <http://truthonthemarket.com/2015/03/26/debunking-the-myth-of-a-data-barrier-to-entry-for-online-services/>.

<sup>45</sup> See Deception Policy Statement, *supra* note 6, at 191 (“Where the Commission cannot find materiality based on the above analysis, the Commission may require evidence that the claim or omission is likely to be considered important by consumers. This evidence can be the fact the product or service with the feature represented

As the DPS notes:

Because this presumption [of materiality for express statements] is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.<sup>46</sup>

The majority showed no such caution and adduced no such evidence to support its presumption of materiality for the implied statement.<sup>47</sup> Moreover, the violation of the asserted implied promise of in-store notification is logically unlikely to be material because, whatever precisely Nomi's statement reasonably *implied*, it *expressly* required some affirmative action by the consumer to opt-out.

The DPS states:

In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.<sup>48</sup>

The majority asserts that notice of in-store tracking at each location was material because

consumers visiting stores that used Nomi's services would have reasonably concluded, in the absence of signage and the promised opt-outs, that these stores did *not* use Nomi's services. Nomi's express representations regarding how consumers may opt-out of its location tracking services go to the very heart of consumers' ability to make decisions about whether to participate in these services. Thus, we have ample reason to believe that Nomi's opt-out representations were material.<sup>49</sup>

But the relevant knowledge required for consumers to have the "ability to make decisions about whether to participate in these services" isn't whether Nomi's services were in use at any particular location; it's whether the consumer has, in fact, made an effective choice whether to participate. In other words, what matters is a consumer's knowledge of whether he or she actually opted-out. And *every consumer* who read the privacy policy had that notice.

If consumers saw Nomi's website privacy policy and *still* went shopping knowing that they hadn't ever taken the affirmative step of opting-out (whether online or in-store), they weren't "deceived" by the absence of in-store notifications.

Again, to some, this might sound harsh: "You're on notice now that the world has changed, so *caveat emptor!*" But remember that any consumer who saw the notice was empowered to opt-out

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costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony").

<sup>46</sup> *Id.* at 189 n. 48.

<sup>47</sup> See Majority Statement, *supra* note 25, at 2-3.

<sup>48</sup> See Deception Policy Statement, *supra* note 6, at 177.

<sup>49</sup> Majority Statement, *supra* note 25, at 2.

quite easily. And the record contains no evidence that, once put on notice, even a single consumer tried to opt-out in-store and was thwarted.<sup>50</sup>

Nothing Nomi did (or didn't do) with respect to notice necessarily affected consumers' failure to affirmatively opt-out if they didn't do so on the website — unless the claim is that they all *forgot* about the tracking once they left the website without opting-out, and the absence of conspicuous notices to remind them caused them to act against their intentions.

But the majority doesn't make this argument. And it would be difficult to square with the majority's assertion (which it is forced to make in order to counter Commissioner Wright's argument that the website opt-out alone was sufficient) that the harmed consumers were particularly privacy-sensitive:

Consumers who read the Nomi privacy statement would likely have been privacy-sensitive, and claims about how and when they could opt-out would likely have especially mattered to them.<sup>51</sup>

The majority goes on to hypothesize several scenarios in which these privacy-sensitive consumers might still have chosen not to opt-out on the website:

Some of those consumers could reasonably have decided not to share their MAC address with an unfamiliar company in order to opt-out of tracking, as the website-based opt-out required. Instead, those consumers may reasonably have decided to wait to see if stores they patronized actually used Nomi's services and opt-out then. Or they may have decided that they would simply not patronize stores that use Nomi's services, so that they could effectively "vote with their feet" rather than exercising the opt-out choice. Or consumers may simply have found it inconvenient to opt-out at the moment they were viewing Nomi's privacy policy, and decided to opt-out later.<sup>52</sup>

All but the first of these are indeed plausible. (The first isn't plausible because even if Nomi had offered an opt-out in-store, consumers presumably would *still* have had to provide a MAC address. At most, perhaps some consumers might have felt somewhat more comfortable providing a MAC address in-person rather than online, but this is highly speculative — the kind of evidence that perhaps the Commission might have weighed among other evidence, but hardly an argument for insisting on the presumption of materiality, which avoids *any* evidentiary inquiry.)

But while in-store notices might have made it *easier* for consumers who preferred to opt-out in-store, nothing changes the fact that, as long as they *didn't* opt-out, every consumer who read Nomi's website policy and continued to shop nonetheless was on notice that they might be tracked.

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<sup>50</sup> Cf. Nomi Complaint, *supra* note 24, at ¶13.

<sup>51</sup> Majority Statement, *supra* note 25, at 2.

<sup>52</sup> *Id.*

The closest the majority comes to making a viable argument for the materiality of the implied promise to provide in-store notices is its claim that “consumers visiting stores that used Nomi’s services would have reasonably concluded, in the absence of signage and the promised opt-outs, that these stores did *not* use Nomi’s services.”<sup>53</sup>

Unfortunately for the majority, however, in the absence of proof that Nomi intended to make such a (false) promise (presumably, it would be to induce consumers to infer that stores without notices did not use Nomi’s services), the materiality of such a promise can’t be presumed. And a mere statement by three FTC commissioners asserting that consumers “would have reasonably” interpreted the absence of notices to mean Nomi’s services weren’t present is insufficient — particularly with respect to nascent technology and the rapidly evolving world of consumer data collection and privacy.

As even Dan Solove and Woody Hartzog, defenders of the FTC’s “common law of settlements” and the Commission’s general approach to privacy and data security, point out:

Social science research is revealing that consumers do not read or understand privacy policies, are heavily influenced by the way choices are framed, and harbor many pre-existing assumptions that are incorrect. For example, according to one study, “64% [of the people surveyed] do not know [or falsely believed] that a supermarket is allowed to sell other companies information about what they buy” and that 75% falsely believe that when “a website has a privacy policy, it means the site will not share my information with other websites or companies.”<sup>54</sup>

There is much we don’t know about consumers’ assumptions (and their reasonableness) regarding privacy policies and their implications. Assuming without evidence that consumers would have reasonably interpreted the absence of notices to mean no tracking was present is an unwarranted leap.

### The FTC Failed to Adequately Consider Factors that Rebut the Presumption of Materiality

The Deception Policy Statement carefully quotes *Central Hudson*, including this critical proviso:

*[I]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.*<sup>55</sup>

In *Nomi* the majority fails to consider those factors, which increasingly distinguish the marketing claims of the 1980s from today’s privacy policies — not just in this case, but across the privacy and data security cases brought by the agency.

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<sup>53</sup> *Id.*

<sup>54</sup> Solove & Hartzog, *supra* note 3, at 667.

<sup>55</sup> See Deception Policy Statement, *supra* note 6, at 189 n.49 (quoting *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980)).

For materiality to make sense as a proxy for consumer harm, it must be reasonable to assume that an express statement in fact induced (or was likely to induce) harmful actions. That may be the case when advertising states that a product contains no nuts, say — a clear attempt to induce even those consumers who are allergic to nuts to purchase the product. It is reasonable to assume that such a statement, if false, could cause harm. Importantly, the harm would be caused by the action intended to be caused by the statement: purchase and consumption of the product, even by consumers who are allergic to nuts.

But several factors distinguish statements like the Nomi's privacy policy from traditional marketing claims. First, in this case (and others like it), refuting or confirming the alleged misrepresentation is wholly within the consumer's control. If, after viewing the privacy policy, a consumer shops anywhere without affirmatively opting-out, the consumer knows he hasn't opted-out; he hasn't been deceived and he's in full awareness of all the relevant facts. He doesn't have to *know* whether any particular store uses Nomi's services or not to know with certainty that he hasn't opted-out.

In other words, absent an affirmative opt-out by the consumer, it's impossible to assume that the implied (or express, for that matter) statement was material to the consumer's choice and thus that it caused any harm. The intervening step — opt-out by the consumer — can't just be ignored. For consumers who chose to shop without opting-out (or trying to opt-out), Nomi's inaccurate statement simply can't be presumed to have been material without proof.

Second, the choice at issue here is not the consumption of a product; it is the exercise of an opt-out. To the extent that the ability to opt-out from tracking may be an important characteristic of a product being consumed, it is either a characteristic of the product that *retailers* are purchasing from Nomi, or else it is a characteristic of the product that consumers are purchasing from *retailers*. It makes no difference that the opt-out *mechanism* may be offered to consumers directly by Nomi. The decision to consume a retailer's product and the decision to track consumers (whether or not they can opt-out of such tracking) are not part of the same "product," and they are not made by the same party. The inclusion of an opt-out gives consumers some influence over the retailer's decision (or ability) to track, but whether the efficacy of that influence comports with a retailer's expectations is a contractual matter between Nomi and the retailer. This presents a dramatically different dynamic, and different set of incentives, than the marketing statements traditionally at issue in deception cases.

Third, and related, remember that the basis for presuming that express statements are material is that, if the marketer invests in an advertisement, it expects that advertisement to sell more of its products. The presumption rests on the marketer's self-interest: in legal terms, the marketer is *estopped* from claiming, after the fact, that a statement that it made precisely because it was material to consumers was not, in fact, material after all.

But with privacy policies, any correlation between the company's self-interested calculation of relevance at the time it made the claim and the actual materiality to consumers can be, and likely is, far more attenuated. Some claims about privacy might well be equivalent to traditional marketing claims (such as an ad touting the privacy features of a product over one's competitors). But in general, it cannot be presumed that all privacy policies are intended to convince consumers to use the product — and certainly not to persuade them to opt-out from the product,

the very opposite of what the company wants! Privacy policies may sometimes, in fact, be required by law,<sup>56</sup> and their contents reflect considerable pressure from the FTC itself, among other government actors, to disclose more about a company's privacy practices. Finally, privacy policies, unlike ads, generally do not reflect the investment of money into a campaign intended to persuade consumers.

These points, combined with the FTC majority's theoretical (rather than evidence-based) rejection of the evidence adduced by Commissioner Wright that consumers used the website opt-out at a greater-than-typical rate, render the assumption of materiality for *both* the express and implied statements tenuous. These are all important issues that the FTC *should* have addressed — and likely would have *had* to address, had it taken the case to court, instead of simply settling it.

## **What Nomi Means and What to Do About It**

In effect, the *Nomi* settlement seems to stand for the disturbing proposition that the presumption that an express statement is material can *never* be rebutted — not even by evidence that it didn't change, and couldn't have changed, consumers' choices. As Commissioner Ohlhausen says, this amounts to a strict liability standard, without any need to establish either materiality or harm — precisely the unconstrained 1965 version of deception rejected by the Commission in the Deception Policy Statement.<sup>57</sup>

In summary, we believe the Commission is committing four legal errors in its application of the Deception Policy Statement:

1. Failing to adequately weigh evidence that the materiality presumption has been rebutted;
2. Treating claims in isolation, rather than in their full context;
3. Assuming, without proof, that Nomi intended to make the implied claim about in-store notices; and
4. Similarly, even when the presumption does not apply (such as for an implied claim that the FTC has not proven the defendant intended to make), failing to offer sufficient evidence to prove materiality.

Had this case gone to a court, we believe a court might well have rejected these arguments, or the FTC might not have made these arguments in the first place for fear that a court would

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<sup>56</sup> CAL. BUS. & PROF. CODE §§22575-79, *available at* <http://leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=22001-23000&file=22575-22579>. Although Nomi didn't "collect[] personally identifiable information through the Web site or online service," as the California law requires, it's not much of a stretch to assume that a young technology company like Nomi might post such a policy out of an abundance of caution. And California is in the process of amending its law to apply to all data collection. Proposed laws like the proposed White House Privacy Bill, moreover require such disclosures more broadly. *See Administration Discussion Draft: Consumer Privacy Bill of Rights Act of 2015, THE WHITE HOUSE* (Feb. 27, 2015), *available at* <https://www.whitehouse.gov/sites/default/files/omb/legislative/letters/cpbr-act-of-2015-discussion-draft.pdf>.

<sup>57</sup> Ohlhausen Dissent, *supra* note 25, at 1 ("we should not apply a de facto strict liability approach to a young company that attempted to go above and beyond its legal obligation to protect consumers but, in so doing, erred without benefiting itself").

reject them — but it is difficult to say given the lack of relevant adjudicated precedent, and the general tendency of courts to defer to administrative agencies in such contexts. Both because litigation on these issues is unlikely and because, even if litigation does occur, it may not correct these errors, we believe that Congress (or the FTC itself) must require the FTC to bring its approach in line with the DPS.

In addition, while the FTC may be accurately reading the plain text of the DPS (“the Commission presumes that express claims are material”), we question whether it makes sense to extend the presumption to express statements that differ fundamentally from the type of claims with which the Commission was primarily concerned back in 1983, such as in privacy policies like Nomi’s, for all the reasons explained above.

Of course, it is true that, even in 1983, the Commission had long applied deception not only to marketing claims in advertisements, but also to warranties and contracts — and, presumably, when the DPS “presumes that express claims are material,” it includes claims in these documents as well as in advertisements. Those documents might resemble today’s privacy policies or terms of service in some respects: many are lengthy and legalistic. But on the whole, they are significantly different from privacy policies like Nomi’s in the key respect that matters: they are, like advertisements, intended to help convince consumers to buy a product.

In 1983, the Commission did not have to grapple with this question because it could safely assume that all express statements were essentially similar: whatever their length or format, they reflected the same basic alignment of incentives. Today, the world of express statements made by companies has grown considerably. It may be time to consider clarifying whether the presumption of materiality applies to these statements at all, or only to express statements made to persuade a consumer to purchase (or consume) a product. Some privacy policies might well qualify for the presumption, like those of consumer-facing services, but Nomi’s likely would not. Of course, a privacy policy like Nomi’s could well still be material, but the FTC would bear *some* burden of proving this.

To a large degree, this concern could be addressed simply by ensuring that the FTC made good on the DPS’s promise to “always consider relevant and competent evidence offered to rebut presumptions of materiality.”<sup>58</sup> This would not entirely correct the problem, of course; the burden would remain upon the defendant to rebut the presumption. And in some of those cases, it may be the FTC that should bear the burden for all the reasons expressed above. But it would at least be a significant improvement over the status quo.

Finally, like Commission Ohlhausen, we question the FTC’s use of its prosecutorial discretion: it is difficult to see how this case will actually make consumers better off. Yet we recognize that, as a legal matter, the FTC enjoys broad deference on this point. Indeed, the FTC Act does not actually specify *any* legal standard the FTC must satisfy before settling a case (which itself suggests that the Congress that took such great pains to constrain the FTC’s rulemaking authority

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<sup>58</sup> Deception Policy Statement, *supra* note 6, at 189 n.47.

with the Magnuson-Moss Act of 1980 and to force the FTC to narrow its understanding of unfairness would be shocked to discover that the FTC today operates entirely by settlement).

By their own terms, the FTC's settlements claim only to satisfy Section 5(b), which requires only that the decision to bring an enforcement action (not a settlement) be supported by (i) "reason to believe" a violation of the Act occurred and (ii) the Commission's belief that an investigation would be in the public interest.<sup>59</sup> As Commissioner Wright argues, "that threshold should be at least as high as for bringing the initial complaint."<sup>60</sup> We agree — but so long as there is no clear standard, any three Commissioners will retain broad discretion to settle cases that may have highly questionable benefits for consumers and may, over time, skew the FTC's understanding of its guiding doctrines.

### **What to Do about These Problems: Potential Reforms**

In principle, the Commission *could* make significant improvements on each of these three problems. Yet the agency has had 32 years to clarify materiality and has failed to do so; indeed, the Commission has actually reverted to a less sensible approach. And the "common law of consent decrees" problem has greatly accelerated in the last 18 or so years as the Commission has applied both deception and unfairness in novel ways that push the boundaries of both policy statements — all without effective judicial oversight.

We believe that real, lasting reform will likely require Congressional intervention — and that Congress has essentially three options:

1. Require the FTC to issue a policy statement on materiality, within certain parameters;
2. Constrain the FTC by statute, akin to adding Section 5(n) in 1994, and
  - a. Attempt to craft limiting principles itself; or
  - b. Outsource the task of deciding on limits to a Privacy Law Modernization Commission, such as we have previously proposed, and then implement the recommendation in legislation; and/or
3. Focus on process reforms that will make the FTC more likely to have to litigate in court — so that the courts will be in a position to insist that the FTC better explain its analysis.

We believe all three may be necessary, but that the second two are especially critical in the long term: Commissioners will come and go but the FTC should remain laser-focused on consumer injury.

#### **A New Policy Statement on Materiality?**

Congress could ask or even require the FTC to issue a Policy Statement on Materiality — or, perhaps "guidelines" — making clear that these are intended to elaborate upon and clarify, not supersede, the Deception Policy Statement. This could mark a substantial improvement over the

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<sup>59</sup> 45 U.S.C. § 45(b).

<sup>60</sup> Wright Dissent, *supra* note 25, at 2.

status quo, in much the same way that, at least for a time, the UPS and DPS served to constrain the FTC's uses of unfairness and deception.

In short, a new policy statement would likely be better than nothing — if it actually happened. Given the refusal of Chairwoman Ramirez even to entertain the proposals by Commissioners Wright and Ohlhausen for a Policy Statement on Unfair Methods of Competition (the third major area of the FTC's Section 5 authority, which the FTC has never defined and which simply was not at issue in the 1970s/80s fights over consumer protection<sup>61</sup>), it seems likely that significant political pressure would have to be exerted to force the FTC to do something it does not want to do — effort that we believe would be better spent on legislative solutions.

But, in addition, we see several obvious drawbacks to this approach:

1. **The FTC can revoke a policy statement at any time** without any notice or public input.<sup>62</sup> This is precisely what the FTC did in 2012, summarily revoking a policy the Commission's 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases (better known as the "Disgorgement Policy Statement") — over the loud dissent of Commission Ohlhausen.<sup>63</sup>
2. Even while in effect, **policy statements aren't actually binding upon the FTC** — as explained below.
3. **The FTC has little incentive to constrain its discretion**, so the any policy statement it did produce would likely only formalize its current, expansive views of materiality.

### Putting the Deception and Unfairness Policy Statements in Context

Crafting effective legislation requires understanding the historical perspective of both the Deception and Unfairness Policy Statements, which the Commission offered to forestall further legislative reforms (as Congress had curtailed FTC rulemaking earlier in 1980).<sup>64</sup> It's difficult to overstate the importance of the 1980 Unfairness Policy Statement in the history of the FTC: Narrowing the scope of unfairness to focus on consumer injury was essential to ensuring the political survival of the FTC as an institution — so damaged was its credibility by its adventur-

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<sup>61</sup> See Commissioner Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act (June 19, 2013), *available at* <http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf>; Commissioner Maureen K. Ohlhausen, Section 5: Principles of Navigation (July 25, 2013), Remarks at the U.S. Chamber of Commerce, *available at* <http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf>.

<sup>62</sup> See, e.g., FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases Will Rely on Existing Law (Jul. 31, 2012), *available at* <https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies>.

<sup>63</sup> See Statement of Commissioner Maureen K. Ohlhausen, Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (Jul. 31, 2012), *available at* [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf).

<sup>64</sup> See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Lemon Law), Pub. L. No. 93-637, 88 Stat. 2183 (codified at 15 U.S.C. §§ 2301-2312 (2000)); see also Beales, *supra* note 4.

ism and boundless legal claims of authority in the 1970s.<sup>65</sup> It's not surprising, then, that Congress in 1994 (a heavily Democratic Congress, as in 1980) codified the UPS into law.<sup>66</sup> Indeed, the 1994 amendment actually narrowed the scope of unfairness even further in a way so subtle it is rarely acknowledged: by clarifying that “public policy considerations may not serve as a primary basis for [determining that a practice is unfair],”<sup>67</sup> something the UPS *had* allowed.

The 1983 Deception Policy Statement was less politically contentious, but in substantive ways no less important. Just as the UPS resolved a heated debate about the need for the FTC to establish *consumer injury*, the DPS resolved a heated debate about the need for the FTC to establish *materiality*.<sup>68</sup> In both cases, the FTC abandoned the position it had taken in the 1970s: that it had free rein to act without evidence of harm or materiality — which, it clarified in the UPS, was simply a proxy for injury.<sup>69</sup> Both Statements also reflected compromises between the FTC's earlier positions and more radical curtailing of the FTC's authority: abolishing unfairness altogether or abolishing the presumption of materiality.

Yet the two Statements differ in one crucial respect: Congress has never codified, let alone curtailed, the DPS. The 1994 codification of the UPS marks not only the last time Congress modified the FTC Act, but also the last time it reauthorized the Commission.<sup>70</sup> This means that, strictly speaking, the Deception Policy Statement isn't actually binding on the FTC the way that a statute or judicial decision is; subject to certain constraints, the FTC can always change its mind.<sup>71</sup>

Back in 1999, in the FTC's very first “information broker” case (*TouchTone*), the Commission found that the “pretexting” company had deceived not consumers but the banks that held their information when its representatives pretended to be the customer in order to gain access to information about the customer.<sup>72</sup> In addition to its unfairness claim, the Commission insisted that the DPS:

was not issued by this agency to serve as a straitjacket for Section 5's deception authority. This Commission has never so held. And, with due respect to [dissenting Commissioner Swindle's] unduly narrow interpretation, no Court of Appeals has

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<sup>65</sup> See Beales, *supra* note 4.

<sup>66</sup> Codified at 15 U.S.C. §45 (2012).

<sup>67</sup> *Id.* at §45(n).

<sup>68</sup> See Deception Policy Statement, *supra* note 6.

<sup>69</sup> *Id.* at 191 (“Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.”).

<sup>70</sup> The FTC has thus been operating for 21 years — an entire generation — on short-term appropriations, something that is highly unusual even in today's era of a dysfunctional legislative branch.

<sup>71</sup> See *supra* n.51 and accompanying text.

<sup>72</sup> See *FTC v. TouchTone, Complaint, Civil Action No. 99-WM-783 (D. Colo. 1999)*, available at <https://www.ftc.gov/sites/default/files/documents/cases/1999/04/ftc.gov-touchtonecomplaint.htm>.

found the Statement to preclude challenging as deceptive certain acts or practices that were not foreseen at the time or described within its four corners.<sup>73</sup>

In other words, the FTC refuses to be constrained by its own policy statement. It has brought at least some cases that appear to go beyond the “four corners” of the DPS. A year after *Touch-Tone*, the FTC brought another enforcement action based on business-to-business deception, this time claiming that tech giant eBay was deceived by the upstart Reverse Auction.<sup>74</sup> More recently, the Commission has wielded its deception authority in business-to-business conduct concerning standard-essential patents — over the strong dissent of Commissioner Ohlhausen.<sup>75</sup>

### FTC Process Reform Legislation

At a minimum, Congress could pass legislation that looked something roughly like Section 5(n) of the FTC Act:

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.<sup>76</sup>

Language written at this high conceptual level could help — simply by codifying what the DPS already says. But to actually address the problem illustrated by the *Nomi* settlement, the legislation would likely have to be more granular. Where Congress was able to distill the key provisions of the UPS into one sentence, and narrow it further with another, clarifying the definition of materiality would be harder. It would likely require more clearly defining the *process* by which materiality is defined, including:

Appropriately constraining the FTC’s discretion without hamstringing the agency’s legitimate consumer protection efforts — creating an administrable rule but not a blank check — would not be easy, just as it was not when the FTC wrote either Policy Statement, either. But Congress could draw on at least three sources of authority to assist it:

1. FTC Commissioners, each of which could be invited to suggest language;

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<sup>73</sup> In the Matter of Touch Tone Information, Inc., File No. 982-3619, Statement of Chairman Pitofsky & Commissioners Anthony & Thompson, *available at* <https://www.ftc.gov/sites/default/files/documents/cases/1999/04/ftc.gov-majoritystatement.htm>.

<sup>74</sup> FTC v. ReverseAuction.com, Inc., Complaint. *available at* <http://www.ftc.gov/sites/default/files/documents/cases/2000/01/www.ftc.gov-reversecmp.htm>.

<sup>75</sup> See *In re Robert Bosch GmbH*, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen, at 3- 4 (Nov. 26, 2012), *available at* <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf>.

<sup>76</sup> 15 U.S.C. § 45(n) (2012).

2. Congress's usual legislative process, including both hearings and a GAO study; and
3. A Privacy Law Modernization Commission, such as we have proposed.<sup>77</sup>

But if the FTC's experience in recent decades has taught us anything, it is that articulating better substantive standards is only half the problem — whether in policy statements (*e.g.*, UPS, DPS) or in binding, statutory form (*e.g.*, Section 5(n)). These constraints will mean little if the FTC is not subject to some external constraint. Clearer standards might spur more statements by Commissioners and thus more analysis of each case, but they will never supplement for the key missing ingredient: litigated decisions by which Article III courts enforce these limiting principles.<sup>78</sup>

Possible specific reforms Congress should consider include:

1. Creating a standard for settling cases that:
  - a. Is higher than the very low bar set by Section 5(b) for *bringing* the investigation;
  - b. Requires the FTC to clearly tie the consent decree to the conduct at issue (something that, in theory, is required by the Supreme Court's 1968 *Colgate-Palmolive* decision,<sup>79</sup> but which the Commission has consistently failed to do);
2. Requiring that the FTC say more in each settlement about its legal claims;
3. Making settlements subject to judicial review;
4. Vesting one Commissioner with veto power over a settlement: the right to insist that the matter be referred to a federal court, which would decide whether the FTC had satisfied its burden. In the absence of a defendant willing to litigate the matter, that Commissioner could even be given statutory standing to argue the case in court.
5. Re-examining the Commission's Compulsory Investigative Demand (CID) process to ensure that it does not, through its cost and lack of due process, facilitate the FTC coercing settlements based on questionable legal claims;
6. Requiring the FTC to issue retrospective guidelines summarizing the doctrinal trends in its enforcement actions, akin to the FTC and DOJ's various merger guidelines; and
7. Requiring the FTC to publish more guidance on cases it did *not* bring, either in the form of
  - a. Closing letters;
  - b. Analysis in guidelines; or

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<sup>77</sup> Comments of TechFreedom & International Center for Law and Economics, In the Matter of Big Data and Consumer Privacy in the Internet Economy, Docket No. 140514424-4424-01, at 4 (Aug. 5, 2014), *available at* [http://www.laweconcenter.org/images/articles/tf-icle\\_ntia\\_big\\_data\\_comments.pdf](http://www.laweconcenter.org/images/articles/tf-icle_ntia_big_data_comments.pdf) (“A Privacy Law Modernization Commission could do what Commerce on its own cannot, and what the FTC could probably do but has refused to do: carefully study where new legislation is needed and how best to write it. It can also do what no Executive or independent agency can: establish a consensus among a diverse array of experts that can be presented to Congress as, not merely yet another in a series of failed proposals, but one that has a unique degree of analytical rigor behind it and bipartisan endorsement. If any significant reform is ever going to be enacted by Congress, it is most likely to come as the result of such a commission's recommendations.”).

<sup>78</sup> See Szoka, *supra* note 23.

<sup>79</sup> *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1968) (an order's prohibitions “should be clear and precise in order that they may be understood by those against whom they are directed,” and that “[t]he severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.”) (internal citations omitted).

- c. Annual reports that summarize such cases without identifying the parties;

This is merely an illustrative list of more obvious examples. Since the FTC's processes have not been substantially modified (or probably even re-examined) by Congress since 1980, and even the 1980 assessment focused on rulemaking, not enforcement, any proper reauthorization of the agency will likely involve many more, smaller changes, including reassessment of processes and organizational structure. FTC Commissioners and staff will play one of three roles in such a process, and in helping bring it about:

1. Ideally, they will be an active, constructive participant, helping Congress understand both sides of each issue, the tradeoffs between administrability and rigor of legal standards, and the error costs of both making the FTC's job too easy and making it too hard — just as in 1982-3, Chairman Miller and other Commissioners presented very different visions of deception (require not just materiality but proof of harm vs. allow the Commission to generally presume materiality), and the Commission reached the middle ground of the DPS whose precise application is at issue in *Nomi*.
2. Conversely, the Commission could simply drag its heels, stonewalling any efforts to constrain the FTC's discretion or provide guidance to those regulated by it — as the current FTC leadership has stonewalled proposals by Commissioners Wright and Ohlhausen for a Policy Statement on Unfair Methods of Competition<sup>80</sup> — and these issues will simply fester indefinitely.
3. Congress may simply have to compel the agency to cooperate against its will, just as Congressional leaders of both parties forced the FTC in 1980 to issue the Unfairness Policy Statement.

## Conclusion

*Nomi* will undoubtedly be remembered as the first in what is sure to be a series of cases dealing with collection of data “offline” — a distinction that will likely increasingly seem quaint as the “Internet” permeates our everyday lives. Its true importance, however, has little to do with the specifics of the case (*e.g.*, in-store signage, creative systems for pushing notification to users about tracking) and everything to do with doctrine and process.

The majority's logic reveals its true conception of deception, one in which the materiality requirement so essential to the Deception Policy Statement is reduced to a mere formality. By refusing to adequately weigh competing evidence, the Commission has claimed maximum discretion — the very opposite of “doctrine,” which is best understood as a conceptual framework or procedural steps that the agency is supposed to use to decide particular cases.

What the case says about the FTC's processes may be even more disturbing: yet again, completely outside the legal system, the FTC has made a significant leap in doctrine, nullifying *the* core element of what is supposed to be one of its two foundational Policy Statements. *Nomi* was not willing to litigate the case, and so the matter stands at its unsatisfying end: In a few sentences, the complaint lays out a theory of deception that is difficult to reconcile with the DPS and is

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<sup>80</sup> See *supra* note 61.

supported by less than two pages of legal analysis by the majority. Even that much analysis was provided only because of the dissent of Commissioner Wright, who objected to the majority's legal analysis (not merely its exercise of prosecutorial discretion, as did Commissioner Ohlhhausen). If anything, the *Nomi* case is remarkable not for how little legal analysis it contains, but for how *much* it contains relative to the many other cases where the FTC made small leaps without objection. This may resemble the "common law" in that it is case-by-case and that it changes over time, but it lacks the essential feature of the common law: rigorous analysis of fine points of doctrine, to ensure that each leap, however small, is actually justified by the overarching doctrines that the FTC is supposed to be applying, understood in their full context.<sup>81</sup>

If "discretion" is the FTC's goal, "attenuation" is the process by which it has achieved that: without judicial review, each case becomes more attenuated from the starting point. Thus the concept of deception has become more attenuated from consumer injury. Materiality was supposed to marry the two, while giving the FTC a more easily administrable rule, yet the FTC has replaced the easier exercise of establishing materiality with a general presumption of materiality, thus attenuating the result even further from the overall purpose of the agency (preventing consumer injury). The same is true for the various factors that are supposed to justify the presumption, like establishing intent (to justify presuming that an omission is material).

At every level of analysis, the pattern is the same: maximize the FTC's discretion and attenuate the analysis as much as possible from an analysis of consumer welfare. Doing so moves the FTC ever further from the compromise enshrined in the DPS, rooted in the uncontroversial recognition that the FTC may sometimes be mistaken in its assessments, and that its interventions may do consumers more harm than good.

That pattern is unlikely to change unless Congress intervenes to return the FTC to the Deception Policy Statement *and* also to ensure that the courts play a greater role in scrutinizing the agency's leaps in the future. Otherwise, the pattern of maximizing discretion through attenuation will simply play out again and again.

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<sup>81</sup> See Manne & Sperry, *FTC Process and the Misguided Notion of an FTC "Common Law,"* *supra* note 22 at 8 ("The common law thus emerges through the accretion of marginal glosses on general rules, dictated by new circumstances.").



# Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission

December 2013 '

Report 1.0 of the  
FTC: Technology & Reform Project '



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This document represents the combined input of several authors and commentators, and has been compiled to ask questions and prompt discussion about the Federal Trade Commission. It is, by design, over-inclusive, so that it may foster broad discussion. At the same time, it is also certainly not complete. This document does not necessarily represent the views of its principal authors or other contributors to the drafting process, nor the members of the FTC: Technology & Reform Project. The FTC: Technology & Reform Project was convened by the International Center for Law & Economics and TechFreedom. It is not affiliated in any way with the FTC.

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## I. Introduction

In 1914, Congress gave the FTC sweeping jurisdiction and broad powers to enforce flexible rules, to ensure that it would have the ability to serve as the regulator of trade and business that Congress intended it be. Much, perhaps even the great majority, of what the FTC does is uncontroversial and is widely supported, even by critics of the regulatory state. However, both Congress and the courts have expressed concern about how the FTC has used its considerable discretion in some areas, particularly in its evolving interpretation of “unfairness.” Now, as the FTC approaches its 100<sup>th</sup> anniversary, the FTC, courts and Congress face a series of decisions about how to apply or constrain that discretion. These questions will become especially pressing as the FTC uses its authority in new ways, expands its authority into new areas, or gains new authority from Congress.

The purpose of this report is not to lambaste the agency, but rather to ask whether more should be done to improve how the agency exercises its discretion, and, if so, how to do so without hamstringing the agency. Indeed, improving the well-considered constraints on the FTC’s use of its discretion may make the Commission more, not less, effective by bringing about clearer, more consistent guidance, in turn increasing the FTC’s credibility and achieving greater compliance. Ultimately, the measure of the FTC’s success should not be how “active” it is, how far it extends its jurisdiction or how far it pushes the boundaries of its discretion, but rather how well it achieves its overarching purpose of maximizing consumer welfare.

Specific recommendations for reform will be evaluated in future reports, but this report is an essential predicate to the reform process, framing the questions, both about institutional processes and dynamics and about discrete areas, including privacy, advertising, patents, and merger enforcement. In particular, the report highlights two specific areas in which the FTC’s exercise of its discretion has become increasingly controversial: the FTC’s data security and privacy cases, and its Unfair Methods of Competition (UMC) cases. Both of these sets of cases involve the core question of how to define unfairness under Section 5 of the FTC Act (Section 5), a question that the FTC itself grappled with in writing its Unfairness Policy Statement of 1980:

The present understanding of the unfairness standard is the result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time. As the Supreme Court observed as early as 1931, the ban on unfairness “belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called ‘the gradual process of judicial inclusion and exclusion.’”<sup>1</sup>

This report focuses not so much on what such underlying criteria ought to be or on the right outcome in any particular area of law. Instead, it focuses on the fundamental need for such limiting “criteria” under

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<sup>1</sup> Letter from the FTC to the House Consumer Subcommittee, *appended to* In re International Harvester Co., 104 F.T.C. 949, 1073 (1984), *available at* <http://www.ftc.gov/ftc-policy-statement-on-unfairness> [hereinafter, “Unfairness Statement”].

Section 5 and the difficult question of why they have not “develop[ed] over time” in the analytically rigorous way that the courts, informed by economics, have developed the principles of antitrust law. Ultimately, the “evolutionary process” by which the laws enforced by the FTC “evolve” may be more important than what the law happens to be in a particular area at a particular point in time.

Nowhere is this form of flexibility more needed than to keep pace with the evolution of technology and changing business models and practices. Inherent limitations on anyone’s knowledge about the future nature of technology, business and social norms caution skepticism as regulators attempt to predict whether any given business conduct will, on net, improve or harm consumer welfare. In fact, a host of factors suggests that even the best-intentioned regulators may tend toward overconfidence and the erroneous condemnation of novel conduct.<sup>2</sup> At the same time, business generally succeeds by trial-and-error more than theoretical insights or predictive power,<sup>3</sup> and over-regulation thus risks impairing experimentation, an essential driver of economic progress. As a consequence, doing nothing may sometimes be the best policy, and limits on regulatory discretion to act can be of enormous importance.<sup>4</sup>

The FTC must always weigh the costs of intervention against the costs of doing nothing. But what, and who, will limit the FTC’s discretion in assessing these trade-offs? It is the same age-old question: Who will watch the watchers?

This report explores these concerns largely through the lens of technology-related issues for two reasons. First, it is in this context that the FTC has, in recent years, most assertively pushed the boundaries of its discretion. Second, even if technology issues remain a small portion of what the agency does, by slow accretion the FTC is nevertheless gradually becoming the Federal *Technology* Commission – the *de facto* regulator of a wide range of what are commonly viewed as “technology” issues that permeate the American economy. Further, Congress may give the agency additional authority over tech-related issues, such as privacy, data security, and telecommunications matters traditionally regulated by the Federal Communications Commission.

The FTC may well be the most appropriate regulator of these issues; indeed, it operates under what is almost certainly a better regulatory model than that of the FCC, for example.<sup>5</sup> But as the economic importance of advanced technology increases, and as the FTC’s focus on technology issues grows, so too

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<sup>2</sup> See, e.g., Ronald H. Coase, *Industrial Organization: A Proposal for Research*, in ECONOMIC RESEARCH: RETROSPECT AND PROSPECT VOL. 3: POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION (Victor R. Fuchs, ed. 1972), available at <http://www.nber.org/chapters/c7618.pdf>; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010).

<sup>3</sup> See Armen Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950).

<sup>4</sup> As Nobel Laureate economist Ronald Coase put it, “direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm. But equally there is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency.... There is, of course, a further alternative which is to do nothing about the problem at all.” Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 18 (1960).

<sup>5</sup> See, e.g., Berin Szoka & Geoffrey A. Manne, *The Second Century Of The Federal Trade Commission*, TECHDIRT (Sept. 26, 2013), <http://www.techdirt.com/blog/innovation/articles/20130926/16542624670/second-century-federal-trade-commission.shtml>.

does the importance of understanding the scope of the FTC's discretion, and the appropriate mechanisms for limiting it where needed.

## A. What this Report is About

The issues discussed here, therefore, apply broadly and suggest general areas for investigating the FTC's approach and avenues for contemplating reforms of how it operates. The FTC has in the past recognized the need to adjust both the process and the substance of traditional antitrust law to meet changing times. The same need now also confronts the Commission in a number of areas: defining unfair methods of competition beyond the traditional antitrust laws; key aspects of consumer protection law, as well as applying existing definitions with renewed vigor; and the enforcement of codes of conduct and other non-governmental sources of law as an especially crucial mechanism for flexibly governing new technologies.

This report introduces the FTC and provides a conceptual organization for major questions about how the FTC works. Our goal at this stage is to not to *answer* these questions, but to prompt discussion within a useful framework. For those steeped in the work of agencies like the FTC, this report is more analogous to a Notice of Inquiry than to a Notice of Proposed Rulemaking or Final Rule.

The report is intended to guide anyone who cares about the future of the FTC and of competition and consumer protection law more generally, regardless of her opinion on any particular controversy. The members of the FTC: Technology & Reform Project intend to offer recommendations for possible reforms to the Commission's substantive, procedural, and institutional design elsewhere during the course of this 100<sup>th</sup> year of the FTC's existence.

Organizationally, the remainder of this introduction provides some historical background and context for the FTC and the questions asked in the rest of this report. Part II considers what has emerged as a general theme as this project has developed: the nature and extent of FTC discretion. Parts III and IV develop and present questions about the Commission's work and power, with Part III focusing on general institutional and process issues and Part IV looking at specific subject matter issues.

## B. The (Not-So-Unique) Role of Technology

In this report we pay particular attention to issues raised by new technology. The effect of FTC action on technology issues, companies or industries is not a fundamentally different or unique kind of problem. FTC regulation of any industry with dynamic competition and pervasive innovation increases the probability of regulatory error and the magnitude of the resulting error costs. (Indeed, because technology has transformed nearly every industry, technology regulation does affect every industry.) As such, the technology-driven issues this report focuses on are simply one manifestation of the more general issues regarding how the FTC operates and that should, potentially, be reformed.

But technology does present unique – or perhaps just especially exigent – challenges for regulators precisely because it tends to create new consumer protection and competition issues, or upset previously settled issues, and because such change tends to occur more rapidly than in some other settings. Regulation abhors a vacuum; technology tends to render existing regulation obsolete, creating such a vacuum. Moreover, technology can give rise to *new* issues, or at least *new-seeming* issues, which can leave regulators looking for novel regulatory tools and justifications for regulation. That is, regulators often feel the need to do *something*, even where it is unclear whether or what regulation is needed.

It is on the cutting edge, new issues that the stress-points in the FTC’s general approach become most clearly visible, but these stress-points are by no means unique to the technological setting. Moreover, of particular importance, welfare-enhancing innovation is not just about technological advance, but also organizational, business model and contractual developments, and these important advances can also be threatened by the excessive use of discretion.<sup>6</sup>

Many of the FTC’s most significant recent cases exemplify these concerns. Facing novel data security questions, the agency has pushed the bounds of its UDAP authority to constrain firms trying to experiment and adapt in the face of developing technology. Similarly, by expressing myriad concerns about business methods and practices in high-tech firms – among them Intel, N-Data, Rambus, Twitter, Google and Facebook – and investigating issues ranging from privacy to search engine design to patent enforcement to integrated circuit fabrication, the Commission has pushed the bounds of its Section 5 authority, and has indicated its desire to continue expanding the power afforded by that authority. In short, any large (that is, successful and innovative) firm operating in the technology sector, would be prudent to expect that today the FTC is investigating its business practices.

### **C. Some Historical Context: Constraining & Reasserting FTC Power**

Unease about the scope of the Commission’s authority is not new. The FTC was created in response to concerns that the courts were taking a too-narrow view of the antitrust laws and that Congress moved too slowly to keep up with evolving business practices. Whether that concern was warranted at the time is beyond the scope of this report, but it is clear that Congress expressly gave the Commission extremely broad and flexible powers. Over time, these powers have waxed and waned as the agency has asserted them more or less broadly and the courts and Congress have occasionally constrained them.

Since 1914, the FTC has been responsible for protecting consumers against “unfair methods of competition” (UMC). This has generally meant enforcing the same antitrust laws enforced by the Department of Justice, state attorneys general and private plaintiffs. In 1938, Congress gave the FTC additional authority to protect consumers from unfair or deceptive acts or practices (UAP or DAP or, together, UDAP). Some select history of both UDAP and UMC authority is important for informed consideration of the Commission’s authority, especially regarding the concept of unfairness common to UMC and UAP.

#### **1. UAP Authority, and How the FTC Lost Its Groove (and Its Funding)**

The most important era of the FTC’s UAP authority was 1972 through 1980, during which the FTC is generally recognized as having run amok with its unfairness authority. In 1964 the FTC defined unfair acts or practices by a three-part test, under which it would proscribe conduct that 1) “offends public policy,” as divined from “statutes, the common law, or otherwise”; 2) “is immoral, unethical, oppressive, or unscrupulous;” or 3) “causes substantial injury to consumers (or competitors or other businessmen).”<sup>7</sup> The last time the Supreme Court opined on unfairness – and even then, only in dicta – was its 1972 *Sperry v. Hutchinson* decision. There the Court seemed to endorse the FTC’s broad

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<sup>6</sup> See, e.g., Manne & Wright, *Innovation*, *supra* note 2; Ernest Gellhorn, & William E. Kovacic, *Analytical Approaches and Institutional Processes for Implementing Competition Policy Reforms by the Federal Trade Commission*.

<sup>7</sup> J. Howard Beales, III, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, §II.A, available at <http://www.ftc.gov/speeches/beales/unfair0603.shtm>.

understanding of unfairness, ruling that the FTC may, “like a court of equity, consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”<sup>8</sup>

The FTC subsequently tested the limits of the unfairness doctrine through a rash of expansive actions. As Howard Beales, then Bureau of Consumer Protection (BCP) director, explained in a landmark 2003 historical survey, “[e]mboldened by the Supreme Court’s dicta, the Commission set forth to test the limits of the unfairness doctrine. Unfortunately, the Court gave no guidance to the Commission on how to weigh the three prongs – even suggesting that the test could properly be read disjunctively.”<sup>9</sup> In response to the FTC’s rulemaking spree – and to address questions about the FTC’s rulemaking authority – Congress imposed various procedural requirements on UAP-related rulemaking, beyond those of ordinary APA requirements, with the Magnuson-Moss Act of 1975.<sup>10</sup> But these did little to stem the FTC’s efforts. “The result was a series of rulemakings relying upon broad, newly found theories of unfairness that often had no empirical basis, could be based entirely upon the individual Commissioner’s personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace.”<sup>11</sup> Things came to a head when, Beales explains, the FTC

[T]ried to use unfairness to ban all advertising directed to children on the grounds that it was “immoral, unscrupulous, and unethical” and based on generalized public policies to protect children. [The FTC Chairman] opined that the Commission could use unfairness, *inter alia*, to regulate the employment of illegal aliens and to punish tax cheats and polluters.

The breadth, overreaching, and lack of focus in the FTC’s ambitious rulemaking agenda outraged many in business, Congress, and the media. Even the Washington Post editorialized that the FTC had become the “National Nanny....”<sup>12</sup>

Early in 1980, Congress passed the FTC Improvements Act, imposing further procedural safeguards on Magnuson-Moss rulemakings. President Carter declared, “This bill contains some valuable features patterned after my program to eliminate excessive regulation. It requires that FTC rules be based on sound economic analysis. Another provision directs the agency to find the least burdensome way of achieving its goals.”<sup>13</sup> Leaders of a heavily Democratic Congress continued pressuring the FTC to limit its unfairness discretion. When, later in 1980, the FTC’s funding ran out during the first modern government shutdown, Congress simply let the agency close. The FTC got the message, and in December it published the Unfairness Policy Statement in a letter to Congressional leaders, defining unfair acts or practices as those that (1) cause, or are likely to cause, substantial injury to consumers (2) that are not outweighed by countervailing benefit and (3) that consumers themselves cannot reasonably avoid.<sup>14</sup> Consistent with its new spirit of restraint, the FTC issued an analogous Deception Policy Statement in

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<sup>8</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). "

<sup>9</sup> Beales, *supra* note 7, at §II.A. "

<sup>10</sup> 15 U.S.C.A. §§ 2301-2312 (2012). "

<sup>11</sup> Beales, *supra* note 7, at §II.A. "

<sup>12</sup> *Id.* at §II.B. "

<sup>13</sup> Jimmy Carter, *Federal Trade Commission Improvements Act of 1980 Statement on Signing H.R. 2313 Into Law & (May 28, 1980)*, available at <http://www.presidency.ucsb.edu/ws/?pid=44790>.

<sup>14</sup> Unfairness Statement, *supra* note 1.

1983, defining deception as (1) misleading statements or omissions (2) that are material to consumer choice.<sup>15</sup>

The FTC had finally – under duress – agreed to limit its discretion. The Commission continued to bring enforcement actions predicated on unfairness, but further narrowed its understanding of unfairness to focus on the three-part test codified by Congress in 1994<sup>16</sup> (abandoning “public policy” as an independent basis) and ceased conducting new rulemakings based on unfairness. Meanwhile, unfairness slumbered as an independent basis for policing competition.

## 2. UMC, and How the FTC Lost That Groove, Too

The FTC’s UMC authority has long been understood to give it authority to enforce the antitrust laws (*e.g.*, the Sherman and Clayton Acts). The history of this power, therefore, is largely coextensive with that of the antitrust laws. For most of the 20<sup>th</sup> century, antitrust law was very favorable to plaintiffs, with the Supreme Court recognizing a wide range of business practices as *per se* illegal, unfettered by requirements that a given practice, or practitioner of that practice, actually (or even be likely to) harm competition.<sup>17</sup> As a result, the FTC had little reason to push the envelope of its Section 5 UMC authority beyond the courts’ interpretation of the Sherman and Clayton Acts.

This approach to antitrust law began to change in the 1970s. The generally accepted watershed moment was the publication of Robert Bork’s book, *THE ANTITRUST PARADOX*, in 1978. *THE ANTITRUST PARADOX* made the case that antitrust law should be based on rigorous economic analysis – and that the subject of that analysis should be protecting consumer welfare. While the Chicago School had long criticized the course of antitrust law for its lack of economic rigor, Bork’s book largely marked the beginning of the modern era of antitrust, which has seen a sweeping transition in Supreme Court precedent under which most cases are now decided under a *rule of reason* standard – a standard under which plaintiffs generally face the burden of demonstrating that conduct harms consumers and courts weigh its likely costs against its benefits.

One of the central themes of the modern era of antitrust can be characterized as “regulatory humility”: Regulators should intervene in markets only with great caution. Several reasons urge such caution. First, the regulator’s natural inclination – in fact, his very job – is to *regulate*. This inclination on the regulator’s part is compounded by the fact that, as Ronald Coase explained,

If an economist finds something – a business practice of one sort or another – that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.<sup>18</sup>

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<sup>15</sup> See Letter from the FTC to the Committee on Energy and Commerce, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) <http://www.ftc.gov/ftc-policy-statement-on-deception> [hereinafter, “Deception Statement”].

<sup>16</sup> In 1994, Congress enshrined this statement in Section 5(n) of the FTC Act. 15 U.S.C.A. § 45(n) (2012).

<sup>17</sup> See Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 715 (1982).

<sup>18</sup> Coase, *Industrial Organization*, *supra* note 2, at 59.

Second, the greatest pressure for regulatory intervention against a firm often comes from that firm's competitors, which seek to use regulation to benefit themselves (not consumers). Many antitrust practitioners refer to this as "the first rule of antitrust": competitor complaints indicate a *competitive* market. Third, even where regulatory intervention may be justified, it is often not clear what intervention is appropriate to the harms, especially in markets characterized by rapid change or innovation. Much of the history of antitrust regulation is a catalog of failure – efforts that too often harmed the very consumers they were meant to protect.

Last, and perhaps most important, market forces often constrain harmful conduct more effectively than regulation. In competitive markets, a firm's competitors will respond to its conduct. In uncompetitive markets, the monopoly profits extracted by the malfeasant firm will attract entry by competitors eager to share in the surplus. Such market responses may not offer a perfect response to harmful conduct. But they need not be perfect to be preferable to regulation – only better than the also imperfect regulatory alternative.<sup>19</sup> Given the possibility that seemingly harmful conduct may, in fact, not be harmful, the difficulty of remedying harmful conduct, and the possibility that the remedy could actually harm competition and consumers, it is frequently the case that regulatory inaction is preferable to ill-conceived regulation.

Generally, this approach to analyzing competition concerns is called the "error cost" framework. Such a framework seeks to balance the potential harms of false positives (erroneous intervention) and negatives (erroneous restraint) – so-called Type 1 and Type 2 errors – against the potential benefits of correct judgments.<sup>20</sup> The error cost approach has come to dominate antitrust over the past 35 years. There is, however, constant pressure for antitrust law to take a more aggressive stance towards potentially harmful conduct. Yet the Supreme Court has consistently held antitrust to the more circumspect approach advocated in THE ANTITRUST PARADOX.

Because the courts for many years employed an expansive view of antitrust liability, the FTC had little reason to apply its UMC authority more expansively for much of its history. As antitrust law began to shift toward the "rule of reason," the FTC began, in the 1980s, to push the boundaries of its UMC authority beyond the traditional antitrust laws in a trio of cases.<sup>21</sup> However, the FTC's position was roundly rejected by the courts. Advocates for a more expansive approach to antitrust law generally have continued to advocate the view that Section 5 incorporates, but expands beyond, the "antitrust laws," however.<sup>22</sup>

### **3. Re-asserting Unfairness Authorities, or, How the FTC Is Getting Its Groove Back**

Over the past decade, the FTC has begun to reassert its twin unfairness authorities. In 2000, the FTC declared that Section 5 was inadequate to address the challenges raised by digital privacy issues and

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<sup>19</sup> See Coase, *Problems of Social Cost*, *supra* note 4. "

<sup>20</sup> See, e.g., Manne & Wright, *Innovation*, *supra* note 2. "

<sup>21</sup> See *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980).

<sup>22</sup> For an informative discussion on the FTC's UMC authority and Commissioner Wright's call for more guidance from a variety of perspectives, see Truth on the Market Blog Symposium on UMC (Aug. 1-2, 2013), <http://truthonthemarket.com/category/umc-symposium/>.

asked Congress to pass new legislation.<sup>23</sup> Congress has considered a series of privacy and data security bills, but passed none. So the FTC began bringing enforcement actions against companies for failing to have “reasonable data security,” initially premised on the theory that this was deceptive (given their data security promises)<sup>24</sup> and, by 2005, that this was unfair.<sup>25</sup> Unfairness had risen again, if timidly.

With the rise of a new guard of Commissioners, the FTC began to use its unfairness authorities more aggressively. In 2008, the FTC brought UMC and UAP claims against N-Data’s alleged breach of pricing commitments for certain standard essential patents.<sup>26</sup> In 2009, new leadership at the FTC began pursuing unfairness cases more vigorously. The FTC brought a stand-alone Section 5 claim against Intel, which was settled early in 2010.<sup>27</sup> In July 2011, the FTC opened an investigation into Google’s business practices that dragged into early 2013, with then FTC Chairman Jon Leibowitz publicly declaring his intention to use the Google case to revive Section 5 as an independent basis for UMC actions that the antitrust laws would not reach (because of substantive and procedural limitations imposed by the courts).<sup>28</sup> At the same time, the FTC used its UMC authority to secure consent decrees against Bosch and Motorola for their actions concerning standard essential patents.<sup>29</sup> Meanwhile, BCP began using unfairness to prosecute data security cases more aggressively,<sup>30</sup> as well as a number of other technology-related cases, including the design of software and hardware.<sup>31</sup> BCP has also used the bully

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<sup>23</sup> Federal Trade Commission, *Privacy Online: Fair Information Practices In The Electronic Marketplace: A Report To Congress* (May 2000), available at <http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf>.

<sup>24</sup> Federal Trade Commission, *Eli Lilly Settles FTC Charges Concerning Security Breach*, Press Release (Jan. 18, 2002), <http://www.ftc.gov/news-events/press-releases/2002/01/eli-lilly-settles-ftc-charges-concerning-security-breach>.

<sup>25</sup> Federal Trade Commission, *BJ’s Wholesale Club Settles FTC Charges*, Press Release (Jun. 16, 2005), <http://www.ftc.gov/news-events/press-releases/2005/06/bjs-wholesale-club-settles-ftc-charges>.

<sup>26</sup> Federal Trade Commission, *In the Matter of Negotiated Data Solutions LLC*, Press Release (Sept. 22, 2008), <http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2008/09/negotiated-data-solutions-llc-matter>.

<sup>27</sup> Federal Trade Commission, *FTC Settles Charges of Anticompetitive Conduct Against Intel*, Press Release (Aug. 4, 2010), <http://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel>.

<sup>28</sup> See Jon Leibowitz, “*Tales from the Crypt*” Episodes ‘08 and ‘09: *The Return of Section 5 (“Unfair Methods of Competition in Commerce are Hereby Declared Unlawful”)*, Section 5 Workshop (Oct. 17, 2008), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/tales-crypt.episodes-08-and-09-return-section-5-unfair-methods-competition-commerce-are-hereby-declared-unlawful/081017section5.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/tales-crypt.episodes-08-and-09-return-section-5-unfair-methods-competition-commerce-are-hereby-declared-unlawful/081017section5.pdf) (“all of us agree that there are circumstances in which the Commission ought to bring “pure” Section 5 cases.”).

<sup>29</sup> See Federal Trade Commission, *FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems*, Press Release (Nov. 26, 2012), <http://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge>; Federal Trade Commission, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns*, Press Release (

<sup>30</sup> See, e.g., Federal Trade Commission, *FTC Files Complaint Against Wyndham Hotels For Failure to Protect Consumers’ Personal Information*, Press Release (Jun. 26, 2012), <http://www.ftc.gov/news-events/press-releases/2012/06/ftc-files-complaint-against-wyndham-hotels-failure-protect>; Federal Trade Commission, *FTC Filed Complaint Against LabMD for Failing to Protect Consumers’ Privacy*, Press Release (Aug. 29, 2013), <http://www.ftc.gov/news-events/press-releases/2013/08/ftc-files-complaint-against-labmd-failing-protect-consumers>.

<sup>31</sup> See, e.g., Federal Trade Commission, *HTC America Settles FTC Charges It Failed to Secure Millions of Mobile Devices Shipped to Consumers*, Press Release (Feb. 22, 2013), <http://www.ftc.gov/news-events/press-releases/2013/02/htc-america-settles-ftc-charges-it-failed-secure-millions-mobile>; Federal Trade Commission,

pulpit aggressively to call on companies to adopt best practices, such as privacy and security “by design.”

## II. The Causes & Consequences of Excessive Discretion

Perhaps the central problem of today’s FTC is the extent to which it takes advantage of its wide discretion to act, flowing from its broad statutory mandate and its institutional design. Among other things:

- The antitrust laws and Section 5 are (intentionally) vague, terse and amorphous.
- Even where the FTC itself has imposed limitations (through guidelines, rulemakings, and the like), its administrative enforcement process demands little specificity or consistency in its interpretation of these limits.
- In practice, the FTC often simply includes a perfunctory reference to limiting language in its administrative complaints, offering little content to flesh out its meaning or constrain the agency’s discretion.
- Parties have little incentive to litigate in court to add definition to these terms, which leaves the Commission with considerable regulatory slack within which it can advance novel interpretations of Section 5 through consent decrees that go unchallenged.
- Other businesses (not parties to a consent agreement) lack any firm basis for understanding an agreement’s terms and their significance, which magnifies the FTC’s discretion to assert the boundaries of its own authority in future cases.

### A. The FTC as an Institution

When we say that the FTC “has discretion” we really mean that the human decisionmakers at the Commission have discretion, as guided by their own judgment and that of those whom they may consult, and as constrained by any limitations imposed upon their decisions internally or externally.

#### 1. , *Discretion of Individual Decisionmakers*

One traditional approach to addressing concerns about an agency’s discretion has been to commit that discretion to wiser decisionmakers. Indeed, this was the progressive-era genesis of the Commission: Congress, recognizing its own inability to put in place effective commercial regulation, created the FTC to exercise the expertise and flexibility to create the rules that it could not.

This approach, however, has serious drawbacks. Most important, it is limited by the ability to find irreproachable decisionmakers to helm the Commission – to steer unfailingly between Type 1 and Type 2 errors. For much of the Commission’s recent history – since the difficulties of discretion the Commission faced in the 1970s into the 1980s – the Commission has been frequently lauded for its work.<sup>32</sup> Importantly, during this era the Commission’s exercise of its power was implicitly constrained.

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*Peer-to-Peer File-Sharing Software Developer Settles FTC Charges*, Press Release (Oct. 11, 2011), <http://www.ftc.gov/news-events/press-releases/2011/10/peer-peer-file-sharing-software-developer-settles-ftc-charges>.

<sup>32</sup> See *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers: Before the Senate Subcommittee on Consumer Protection, Product Safety, and Insurance*, 111th Cong. 10 (Mar. 17, 2010)

On the consumer protection side, it was constrained by the fresh institutional memory of the Congressional response to its excesses of the earlier era. And on the competition side, it was constrained by the still evolving economic antitrust consensus that had begun forming with Bork's THE ANTITRUST PARADOX.

More recently, the Commission has increasingly – and at times deliberately – shed these constraints. As documented elsewhere in this report, its work on the Consumer Protection side has taken an increasingly interventionist role, for instance in its data security and advertising cases. On the competition side, there is developing feeling that antitrust is too “pro-business,” and the Commission unable to restrain perceived anticompetitive conduct relying on established antitrust principles. In response, commentators (including several Commissioners) have begun urging the FTC to make more aggressive use of its amorphous UMC authority instead of relying on that authority merely as a basis to enforce existing antitrust norms.

An important aspect of the Commission's recent efforts is that it has benefitted from the reputation it established over the prior 10-15 years. Having established itself as an extremely competent competition and consumer protection authority, it has commanded more respect (and discretion) as it has sought to expand its authority, even where its approach has changed significantly, such as in the area of standard essential patents.

## **2. Structural Discretion**

The alternative to relying on decisionmakers to exercise constrained discretion is to rely instead on institutional design. This has the downside of imposing administrative costs: reducing agency flexibility and increasing the time required to make decisions. But it has the advantage of reducing the “human element” – and, in particular, reducing reliance on future, unknown, decisionmakers of uncertain discretion.

Structural restraints may be either internal (*e.g.*, internal agency procedures) or external (*e.g.*, judicial review of agency action). Perhaps the most important example of these constraints for the FTC are the rulemaking requirements imposed by Magnuson-Moss, which requires the FTC to engage in additional procedures beyond those traditionally required by the APA when engaging in rulemaking. These procedures are generally internal constraints, imposing additional requirements on the Commission's own decisionmaking process. But Magnuson-Moss also imposes external restraints, for instance by providing that rules must be provided to Congress for review before being enacted.

The basic premise of structural constraints on discretion is to open an agency's exercise of its authority to review by a larger number of decisionmakers. A basic example is the requirement that the FTC be helmed by a 5-member commission, of which a majority must approve any action. Fundamentally, this is not about constraining the power of the Commission – it's about constraining the discretion of

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(statement of Timothy J. Muris, Foundation Professor, George Mason University School of Law), *available at* [http://www.commerce.senate.gov/public/?a=Files.Serve&File\\_id=283c285e-53c8-4bf2-ad48-ee772b93d8c4](http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=283c285e-53c8-4bf2-ad48-ee772b93d8c4) (“Given this impressive agenda and workload, in 2009 the Global Competition Review gave the FTC its highest rating out of 5 stars. The GCR stated that “[f]ew agencies in the world balance their antitrust and consumer protection duties as well as the U.S. Federal Trade Commission. While many agencies struggle to be good at one or the other, the FTC has mastered both.”) [hereinafter, “Muris Testimony”].

individual actors within the commission, to ensure that institutional decisions reflect a more learned, careful, and deliberative exercise of the Commission's discretion.

### **3. \* Sources of Restraint on Discretion**

In principle, discretion at the FTC can be restrained, and guided, in a number of ways:

- Internal constraints & guidance
  - The very mentality that guides the agency may be the single greatest factor in understanding how it exercises its discretion, and depends largely on the identity and background of the Commissioners and, especially, of the Chairman.
  - Analytical rigor, such as in economics or technology, both disciplines which may help to predict unintended consequences and weigh costs.
  - Public statements of guidance or policy, which, at minimum, give rise to reputational constraints if such pronouncements are later ignored, and may provide basis for subsequent external constraints by the courts and Congress.
  - Checks and balances within the agency, such as from the Bureau of Economics ("BE"), a potential future Bureau or Office of Technology, and, vitally, Commissioners themselves.
- External constraints & guidance
  - The Courts, which may review agency decisionmaking for substantive and procedural compliance with the law.
  - Congress, which may exercise an enormous check on an agency through oversight and appropriations, even without substantively changing the limits of the agency's power or the legal standards or processes by which it operates.
  - The legal community, from much of which the agency's staff and commissioners are drawn and to which they will return.

## **B. The FTC as Administrative vs. Law Enforcement Agency**

Assessing the appropriate balance between the FTC's distinct roles as an administrative and a law enforcement agency is fundamental to effective reform. Recent experience indicates that the FTC is operating more as an administrative agency exercising largely unfettered discretion than a law enforcement agency bound by the courts.

As an administrative agency, the FTC's primary form of regulation involves administrative application of a set of general principles – a "law enforcement" style function that, practically speaking, operates as administrative regulation for reasons described below. Although less frequent, the FTC also regulates through formal rulemaking. At the same time, the agency also engages as a law enforcement agency in litigation, invoking the processes and substantive rules of the courts to enforce and further interpret its regulations and the statutes it is charged with enforcing. Law shaped primarily, or at least ultimately, by the courts, is quite a different matter from regulation, in which the courts' involvement is episodic at best, especially regarding the law's substantive contours. Indeed, the more formal the regulation, the greater may be the courts' involvement. In some cases, such as mergers, the parties can often appease the regulators while achieving their business purposes without litigation. In other cases, a party must appear frequently before the same regulator and therefore has incentives to maintain good relationships. Meanwhile, in many cases, the agency seeks to retain its largely unfettered discretion and prefers to avoid judicially imposed limitations.

Despite the disadvantages of administrative regulation, in some areas it is the preferable process for addressing regulatory issues. All three processes – judicial, rulemaking, and administrative – are common throughout the administrative state, and at the FTC. The use of administrative processes rather than either rulemaking or judge made law is common elsewhere. The drug approval process is a prominent example of a hybrid process: Rules spell out an elaborate process, but the key substantive issues involve evaluation of the methods and results of clinical trials, in which the agency has enormous discretion with little judicial oversight.

The problem with administrative regulation is, as noted at the outset, the risk and cost of the excessive exercise of discretion by an agency unchecked by regular, if any, judicial oversight.

As an administrative agency, the Commission is delegated broad power. Consistent with its statute, it may make rules and regulations, conduct investigations, and adjudicate violations of its rules and regulations. This is all done under its own authority. There is some judicial (as well as Congressional) oversight of the agency's conduct – but what oversight there is occurs almost exclusively after the conclusion of the Commission's own process. And given the extent of the Commission's discretion, this infrequent oversight typically does not impose substantial limits on the agency.

Law enforcement agencies play a more limited – but no less important – role in the legal system. Like administrative agencies, they have substantial discretion over which investigations to conduct and which cases to bring. But the process of those investigations is more often (though not always) subject to judicial oversight. More importantly, law enforcement agencies bring enforcement actions in court, subject to the oversight of and adjudicated by actors that are independent of the agency (*i.e.*, Article III judges). A final, extremely important, difference is that law enforcement agencies do not have authority to make rules or regulations – that is, to say what the laws they enforce mean. Rather, the task of saying what the law means – and adhering to jurisprudential concepts such as *stare decisis* – falls to the courts.

While the FTC is known as a “law enforcement agency,” in reality the FTC was deliberately structured to operate as an administrative agency and given the broad powers and discretion entailed. Indeed, this was done primarily so that the agency would have the flexibility to investigate and develop rules applicable to changing social and business norms. In 1914, there was concern that the Department of Justice and the courts, enforcing the antitrust laws, were unable (or unwilling) to keep pace of growing firms.

As one of the key legislative accomplishments of the progressive era, the discretion given to the FTC reflects the confidence of that time that sufficiently independent, accomplished and capable regulators could be trusted to use their discretion wisely to serve the public interest. The FTC was expected to apply that discretion in promulgating static rules that would bar conduct that harmed consumers and guide businesses on how to comply. It was expected, in other words, that the FTC would create (or help Congress to create) rules that would then be enforced in a law enforcement setting.

The modern administrative state as it has evolved over roughly the past 30 years (*e.g.*, since around the time of the Supreme Court's opinion in *Chevron*) recognizes agencies as operating more in the realm of policy than of law. Congress specifies the outer boundaries of an agency's “policy space,” and the agency is free to specify – and to change – rules *within that space*. The latter part of that is important: agencies are generally free to change their established rules, so long as the new rules remain permissible under the agency's statute. In other words, *stare decisis* applies to court decisions but not to those of administrative agencies. Thus, while the Congress of 1914 intended to create an agency better suited than itself to establish a flexible but predictable and consistent body of law governing commercial

conduct, the modern trend of administrative law has relaxed the requirement that an agency's output be predictable or consistent.

The FTC has embraced this flexibility as few other agencies have. Particularly in its efforts to keep pace with changing technology, the FTC has embraced its role as an administrative agency, and frequently sought to untether itself from ordinary principles of jurisprudence (let alone judicial review). In its privacy and data security cases, for example, the Commission has used its administrative process to extract an expansive, and increasingly ad-hoc, series of consent decrees from firms. These consent decrees are reached using a one-sided investigation process, backed by the threat of potentially embarrassing and expensive administrative adjudication. None of this is reviewed by the courts. As a result, these consent decrees contribute little to the development of a stable or predictable body of law. Similarly, in its UMC enforcement, the Commission has sought to untether aspects of its competition authority from the constraints of traditional antitrust law; rather, it would prefer to operate under a discretionary standard, where it – not the courts – both decides what the law means and adjudicates violations of it. Given that the courts rejected the FTC's most recent litigations on UMC and have yet to test the FTC's approach to privacy and data security cases, the FTC's actions have been unmoored from judicial oversight.

The predicates for this power and approach are not unreasonable. There is legitimate need for an expert agency with the flexibility necessary to develop efficient and predictable rules in a changing environment. But the FTC has occasionally gone quite far to the administrative extreme, and greater judicial oversight may be needed to ensure that the agency's work actually benefits the consumers it is meant to protect. Even within the realm of enforcement, some have adduced evidence to suggest that the FTC's subject-matter expertise improves little upon generalist courts.<sup>33</sup> So is it time for a rebalancing of the Commission's roles as an administrative versus law enforcement agency? If so, how?

### C. The Challenges Created by Technology

Technological change presents regulatory challenges precisely because it is disruptive (or, perhaps, it is disruptive technology that presents regulatory challenges). The term "disruptive" is a term of art, albeit one that acquired mythological or religious quality. But from a legal perspective, "disruptive" means that a new technology alters (or appears to alter) the antecedents upon which current legal rules are based – *that*, rather than existing business models or market shares, is the key thing which such technology disrupts.

These changes in the underlying assumptions of a legal regime are problematic for several reasons. First, they create an exigent demand for new rules as both those who benefited under the prior rules and those disadvantaged by the technology will seek regulatory restrictions upon new technology. Second, by its very nature (*i.e.*, the circumstances of the prior legal rules having changed), would-be regulators operate in an uncertain legal environment. Third, and especially in the modern setting, the pace of change can be very rapid. Fourth, because the sources of these changes are hard to predict, regulators seek (and are often given) broad, flexible powers and substantial discretion to address them. And fifth, but far from least important, such regulation is often a reflexive response, one that preserves the prior regulatory regime (and benefits its entrenched interests) without weighing the consumer benefits of the

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<sup>33</sup> See Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence From The Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2013).

new and old regimes. The current ongoing battle between taxi regulators and services like Uber exemplify these trends, as regulators (spurred on by incumbents) rush in to regulate these services without an understanding of their benefits.

These concerns can be summarized succinctly: there is great pressure for regulators to “do something” in response to new technology, but it is usually unclear what that “something” is or whether it will benefit consumers. Importantly, the concept of “new technology” isn’t restricted to technology-related businesses. These same concerns arise as firms in any industry incorporate new technology into existing businesses, or as new business techniques give rise to new business models. A firm need not be doing technology-related work for innovation to disrupt some aspects of its business.

Unfortunately, in the rush to do something, the fact that doing the wrong thing can be harmful is often lost. The history of regulation is replete with examples of failed regulation – the most egregious of which are cases where regulatory efforts have in fact created anticompetitive conduct or otherwise *caused* substantial harm. The best-case scenario for regulation is often where the regulatory regime proves to be irrelevant.

There is a strong practical argument against the notion that the FTC, or any government agency, should attempt to develop explicit technology based standards: Such standards would quickly become obsolete, given the constantly shifting nature of technology. Clearly, no regulatory agency can adapt quickly enough to keep such rules current. As the Unfairness Policy Statement put it: “[Section 5] was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion.”<sup>34</sup> On the other hand, delineating general rules for specific technologies risks deterring technological experimentation and innovation and slowing technological advance.

These issues – the pressure to do something, the uncertainty as to what that something is, and the potential for that something to in fact be harmful – give rise to a set of competing concerns for how agencies such as the FTC operate. On the one hand, regulators need the ability to act flexibly and quickly if they are to have relevance in rapidly changing settings, and Congress may need to delegate broad power and substantial discretion to them (because Congress cannot know, *ex ante*, what challenges new technologies may bring). There is even an argument for intervening *earlier* in high-tech markets, rooted in the error cost framework but built on the assumption that the costs of *not* intervening, even in the face of uncertainty, are higher than the costs of erroneous intervention.<sup>35</sup>

On the other hand, the risk that unwise regulation can wreak havoc upon regulated industries cautions restraint and humility, and a reluctance to use any broad powers or discretion (because, like Congress, even the FTC cannot know, *ex ante*, how technology will continue to evolve).

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<sup>34</sup> Unfairness Statement, *supra* note 1. #

<sup>35</sup> See, e.g., TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2010). #

## III. Institutional & Process Issues

### A. Discretion Generally

Efforts to address the extent of the Commission's discretion must assess the trade-off between too much and too little flexibility. The central questions relating to discretion concern how much the FTC needs in order to carry out its mission, how much it actually has today (in the exercise of each of its various authorities), and how specifically to constrain the Commission's use of its discretion where it is nevertheless needed. This last consideration is paramount, because it is not possible to perfectly fit the extent of the agency's discretion to its mission – invariably it must have more power than is minimally necessary in order to carry out its mission.

With this in mind, the following questions are important to any discussion of FTC discretion:

- How much discretion does the Commission have in different areas (*e.g.*, UDAP vs. UMC)? How does it vary based upon how the Commission acts (*e.g.*, if it proceeds first through an ALJ in its enforcement actions)?
- In what way may the Commission's exercise of its discretion be constrained?
  - Should Congress narrow the agency's substantive authority or jurisdiction, either in general or in specific areas?
  - Should Congress constrain the agency's investigative powers (*e.g.*, its ability to issue CIDs)? If so, how to do this without limiting the Commission's ability to conduct investigations (*e.g.*, *ex ante* vs. *ex post* review of CIDs)?
  - Should procedural safeguards on the agency's use of its power be implemented, either as a matter of agency practice or through legislation (*e.g.*, should a Competitive Impact Statement be required to accompany any administrative adjudication or rulemaking)?
- Can the FTC increase internal institutional safeguards (*e.g.*, by requiring separate approval of the Bureau of Economics, and/or the office of the Chief Technology Officer, prior to undertaking any administrative or investigative action)?
- How might Congress increase external institutional safeguards, particularly from the courts?
  - Currently judicial approval is required for merger injunctions and other equitable relief such as disgorgement. Should other substantive agency decisions require similar judicial review?
  - How much deference (*e.g.*, *Chevron* deference) does the Commission receive when exercising its various authorities?
- How do we respond where the Commission seeks to increase its authority beyond historically recognized norms, for example:
  - The Commission's desire to untether UMC from the traditional antitrust laws?
  - The Commission's use of a "common-law-of-settlements" in developing data privacy law?
  - The Commission's application of all existing requirements to bring an action under Section 5 and/or its policy statements (or lack thereof)?
  - The Commission's desire for increased powers in fraud cases (especially in seeking damages and for third-part liability)?
  - The Commission's increased activity, under broader standards, for advertising claims?

- With the Commission’s increased activity against companies that allegedly “assist” fraudsters,<sup>36</sup> is the agency trying to claim powers Congress declined to give it in 2010?
- What are the agency's enforcement powers, generally and vis-a-vis DOJ, CFPB, etc.?

## B. -Rulemaking & Guidance

### 1. - Rulemaking

Again, after the FTC began its rulemaking spree, Congress created a formal rulemaking process for the agency under Section 5 in the 1975 Magnuson-Moss Act and imposed additional procedural safeguards in its 1980 amendments to Magnuson-Moss. That formal rulemaking process has since gone unused (for new rulemakings). Instead, Congress has passed specific pieces of legislation requiring the FTC to undertake a rulemaking regarding issues that could, at least arguably, have been addressed through a Magnuson-Moss rulemaking, like the Do-Not Call registry.<sup>37</sup> Moreover, the Commission has succeeded in crafting informal rules through its adjudicatory process. Where that litigation has evolved entirely or largely by settlement the FTC has been able to shape law without the discipline required either by Magnuson-Moss or by normal judicial scrutiny.

In general, the FTC has essentially refused to use the Magnuson-Moss process. The Commission’s most recent former Chairman, Jon Leibowitz, routinely insisted that Magnuson-Moss was “medieval,” and he lobbied aggressively to abolish the Act and to give the FTC the ability to make formal regulations through the Administrative Procedures Act typically used by regulatory agencies (and which the FTC itself uses in certain areas where Congress has given it specific statutory authority).

- Do the concerns that animated Congress’ decision to enact Magnuson-Moss still pertain today? In other words, are consumer interests better served by the FTC enacting rules under broader (APA) or narrower (Magnuson-Moss) constraints? Or would the problems with the FTC’s use of its discretion simply be compounded?
- Whether a result of the perceived need to sidestep Magnuson-Moss or not, is there nevertheless value in incentivizing Congress to influence the agency’s rulemaking agenda by passing legislation in specific areas (*e.g.*, Do Not Call)?
- What is the scope of the FTC’s UMC rulemaking authority under Section 6(g)?<sup>38</sup> What procedures are required for it to use this authority? When has it used this authority in the past?
- Why hasn’t the FTC used its Magnuson-Moss rulemaking power? Is it really as burdensome or difficult as some FTC Commissioners have insisted? Or is it simply unnecessary given the FTC’s ability to make rules through adjudications without effective restraint?

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<sup>36</sup> See, *e.g.*, Federal Trade Commission, *FTC Sues Payment Processor for Assisting Credit Card Debt Relief Program*, Press Release (Jun. 5, 2013), <http://www.ftc.gov/news-events/press-releases/2013/06/ftc-sues-payment-processor-assisting-credit-card-debt-relief-scam>. #

<sup>37</sup> See Muris Testimony, *supra* note 32, at 22-29. #

<sup>38</sup> See Federal Trade Commission, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, § II.B.1.b, <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last revised July 2008). #

- Are there areas where Magnuson-Moss could be used effectively today, and might provide clearer guidance to industry? For example, could the FTC use this rulemaking authority to achieve a national data breach notification standard?
- Could Magnuson-Moss be made easier or faster to use without changing the substantive standards for rulemaking or removing key procedural safeguards?

## 2. Guidelines & Policy Statements

Among the agency's activities, the issuing of guidelines, policy statements, advisory letters and the like regarding its own authority are unique in that they tend to *restrain* the scope of the agency's discretion rather than expand it. Other than increased judicial oversight (or legislated jurisdictional limitations), self-imposed guidance may be the most effective procedural tool for cabining agency discretion.

Ideally, the agency's guidelines and policy statements are constituted to accurately reflect agency practice and legal interpretations, offering insight into the agency's decision-making process, the benefits of its expertise and a clear signal of its likely future actions. Because guidelines are not binding, actual enforcement (and regulatory) actions may deviate from their prescriptions. However, guidelines and other policy statements may have important effect on subsequent agency actions. For instance, they may affect a court's subsequent evaluation of an agency action, or provide potential litigants with insights needed to mount an effective judicial challenge. Should the agency act contrary to its published position, this may provide impetus for Congressional scrutiny of the agency. And, at minimum, deviation from its prior published statements may incur reputational harms of concern to the Commission.

Despite (or because of) their imposition of constraints on discretion, some of the FTC's guidelines have been enormously successful. The Horizontal Merger Guidelines (HMGs) have historically "provide[d] a flexible, comprehensive, and administrable approach," while still remaining both "broadly applicable and providing certainty to businesses and practitioners."<sup>39</sup> Moreover, they seem, generally, to reflect actual agency practice. That said, it is telling to note that the FTC and DOJ's decision to revise these guidelines in 2010 has been met with criticism – it remains to be seen how they will be embraced by the courts and what lasting effects they will have on merger review.

- What is the legal impact of different statements of guidelines and policy? In what ways are they formally binding upon the agency? What level, if any, of deference do they receive from the courts?
- Under what circumstances is it appropriate for the Commission either to, or not to, issue such guidance? Should the Commission provide guidance?
- What informal constraints do guidelines, policy statements, and the like place upon the agency? What are the mechanisms of these constraints?
- To what extent has the FTC been bound by such documents in the past? To what extent has the commission altered, or otherwise declined to follow, such guidance in the past?
- To what extent are those subject to such guidelines influenced by, or do they otherwise rely upon, them?

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<sup>39</sup> Timothy J. Muris and Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, ANTITRUST SOURCE 3-4 (April 2010), available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/1256ThreeKeyPrinciples.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/1256ThreeKeyPrinciples.pdf).

- To what extent do those with authority over the agency rely upon such guidelines and policy statements in evaluating the performance or decisions of the agency?
- To what extent does the ease with which the Commission can revoke guidance (*e.g.*, the revocation of the Disgorgement Policy Statement without any public comment or other process beyond a vote of the Commissioner diminish the value of whatever guidance the Commission does provide? Can the FTC actually become more effective in steering industry if it binds its future discretion by making it more difficult to revoke guidance once given?
- What is the proper role of highly informal guidance like Frequently Asked Questions? For example, was it appropriate for the FTC to conclude its revision to the Children’s Online Privacy Protection Act (“COPPA”) rule while assuring industry that some of their concerns would be addressed in FAQs? Are these FAQs really new regulations and should the FTC, in such situations, issue further Notices of Proposed Rulemaking?

## C. Information Gathering

### 1. \* Section 6(b) Investigations

Section 6(b) of the FTC Act gives the Commission the authority “to conduct wide-ranging economic studies that do not have a specific law enforcement purpose” and to require the filing of “annual or special ... reports or answers in writing to specific questions” for the purpose of obtaining information about “the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals” of any company over which the FTC has jurisdiction, except insurance companies. This section is a useful tool for better understanding business practices, particularly those undergoing rapid technological change.

- But the costs of these investigations can be significant, both to the FTC and to companies. How should the FTC weigh these costs? Should the Paperwork Reduction Act be amended?
- Is the FTC making full use of the information it already has? It is adequately equipped to do so?
- What principles, if any, should limit the FTC’s discretion in conducting 6(b) inquiries?
- Has the FTC attempted to use 6(b) orders to shape business practices, by focusing attention on certain practices and using the Commission’s bully pulpit to call for change? For instance, the Commission’s ongoing inquiry into “data brokers”<sup>40</sup> has been targeted so broadly as to redefine that term to include many companies that never considered themselves “data brokers” (a term with increasingly negative connotations), while one Commissioner has pressed industry hard for greater transparency around the uses of consumer data through the appealing brand of “Reclaim Your Name.” Is this an appropriate use of Section 6(b) – or the FTC’s bully pulpit?
- Conversely, should Section 6(b) continue to bar the Commission from gathering information about insurance companies without specific Congressional authorization to do so?

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<sup>40</sup> Federal Trade Commission, *FTC to Study Data Broker Industry’s Collection and Use of Consumer Data*, Press Release (Dec. 18, 2012), <http://www.ftc.gov/news-events/press-releases/2012/12/ftc-study-data-broker-industrys-collection-use-consumer-data>.

## 2. Omnibus Resolutions

In competition cases, the entire Commission must vote to authorize CIDs in each matter and also vote to close investigations once compulsory process is issued. But in consumer protection investigations, there are standing Commission orders authorizing compulsory process for certain types of investigations. For instance, there is a standing Commission order authorizing staff to investigate telemarketing fraud cases. Thus, if staff wants to issue a CID to investigate a certain telemarketer, it need only seek approval of the CID from the Commissioner assigned that matter (much like a judge assigned to “sit circuit”). In such cases, the other Commissioners do not have an opportunity to vote on the issuance of the CID and would not know about the investigation. The Chairwoman effectively controls the staff, by virtue of appointing the senior staff, and thus can control setting the agenda of agency staff. Thus, because of omnibus resolutions, some cases not presented to the other Commissioners to determine whether the investigation is an appropriate use of the agency’s resources or whether the legal basis for the case is sound, and in some cases, the other Commissioners may not even see the case until a settlement has been negotiated as a *fait accompli*. Since the Chairman’s office can always assign a matter to itself, the most important and sensitive matters may be handled by the entirely by the Chairman.

- Are omnibus resolutions legal under the FTC Act?
- How large a problem is this? To what extent has the omnibus resolution process diminished the ability of Commissioners to oversee the work of agency staff, to check the discretion of the Chairman, and, in particular, of minority Commissioners to provide an effective alternative to the approach of the majority?
- Which, if any, omnibus resolutions should be retained? Why? How valuable are they as an administrative convenience in expediting run-of-the-mill UDAP investigations? How should the Commission decide when those benefits outweigh the costs to transparency within the agency?
- If omnibus resolutions are retained, can the process be modified to ensure that they are not abused?

## 3. HSR Premerger Notification Disclosures

The Hart-Scott-Rodino (HSR) Antitrust Improvements Act requires firms engaging in mergers or acquisitions above certain size thresholds to report these transactions to the FTC (and DOJ; one of the agencies will be assigned to review each transaction) at least 30 days prior to the transaction’s closing. The purpose of this is to allow the agencies to challenge potentially anticompetitive transactions prior to closing, on the grounds that after a transaction closes it may become very difficult to “unscramble the eggs” should the transaction prove to have anticompetitive consequences.

Should the reviewing agency determine that a transaction may be problematic, it can submit a “Second Request” for information from the parties to the transaction. This is effectively a subpoena for information. The transaction then cannot proceed until the parties have complied with the Second Request and the reviewing agency has had at least an additional 30 days to review the transaction. The information requested in a Second Request is often voluminous, can impose substantial costs (both in terms of time, money, and resources) to collect, and can take many months for the parties to provide, further delaying a transaction.

In addition, the basis of the HSR process is to allow the reviewing agency to make informed predictions about the likely outcomes of a given transaction. That is: to determine whether the transaction is likely to substantially lessen competition. This can be a difficult, if not impossible task – and it is one that often

leads to particularly burdensome Second Requests, as the agency attempts to make judgments about myriad dynamic, and often nascent, industries.

- How much information should the FTC be able to demand as part of the Second Request process? Historically, it has agreed to self-imposed restraints, such as the number of custodians parties must provide documents from, or search terms parties must use. Are these sufficient? What is the legal basis for such restraints?
- An important metric for the agency is its “win rate” – that is, the number of cases that it wins versus the number of cases that it brings. How does this affect its review of mergers, where the “win” for consumers is often to allow a transaction to proceed?
- How long should this process take? What are the costs that this process imposes upon firms?
- How should merger review proceed in dynamic industries? What is the role of nascent or developing markets in merger evaluation?
- What forms of evidence are appropriate to consider in blocking a transaction, and what weight should they have? For instance, how should economic data and models that do not support challenging a transaction be weighed against business documents (so-called “hot docs”) containing statements that indicate anticompetitive hopes for the transaction (e.g., “This transaction will allow us to corner the market on widgets and raise prices 80%!?”)
- What protections do, or should, exist for third parties subject to CIDs for information relevant to a merger?

#### ***4. Civil Investigative Demands (CIDs)***

To the extent that the tendency of companies to settle FTC enforcement actions out of court explains why the courts have been involved so little in the development of Section 5, much of the reason for that tendency may lie in the application of Section 20, which allows the FTC to issue Civil Investigative Demand (CID) orders instead of having to get a federal court to issue subpoenas, as normal plaintiffs must do.

- Are the FTC’s CIDs too broad? Is BE adequately assessing CIDs before issuance?
- How costly are CIDs? Could BE perform a study on these costs, and how they affect settlement negotiations?
- Has the FTC used overly broad and duplicative CIDs to raise the costs to companies of not settling?

## **D. Enforcement**

### ***1. Case Selection***

Given the FTC’s nature as a law enforcement agency, and its success in settling cases in a manner that approaches regulation as described above, how it selects the cases it brings may be the most important aspect of its discretion.

- In deciding whether to open an investigation or bring an enforcement action, how does the FTC apply its “Reason to Believe” standard, assess whether the case is worth the agency’s resources, and whether it is in the public interests?
- What consideration does the agency give to likely remedies, potential unintended consequences, and error costs?

- How well, and how, does the FTC guard itself against being used as merely a tool in battles among competitors, especially by those who are seeking to stop innovative disruptive technologies, to the detriment of consumer welfare?

## 2. *Part III vs. Article III Adjudication*

There are important differences between adjudications that proceed initially in administrative (e.g., Part III) vs. judicial (e.g., Article III) venues. In some cases, the FTC is required to proceed initially in one venue or the other; on other cases, it may have a choice in which venue to initially proceed (which it may use to its strategic advantage). The selection of venue can affect the FTC's likelihood of success, the deference it will receive from courts, the costs imposed upon litigants (and therefore their willingness to settle), the range of discovery options available, the range and sort of materials considered by the tribunal (e.g., through amicus briefs), the extent to which the tribunal's decision creates norms or rules binding upon other parties, and the extent to which those parties receive notice about or have opportunity to challenge those rules.

These concerns give rise to myriad questions about the availability of administrative vs. judicial adjudication to the FTC, which is the proper venue for the Commission's various enforcement actions and the power of the Commission in some cases to select its initial forum.

- What is the current scope of the FTC's authority to litigate in federal courts independent of the Department of Justice? Should that authority be expanded?
- Should the FTC retain the ability to bring all enforcement actions through its Part III administrative process? Should the FTC instead always have to litigate in federal court? If administrative costs are the main reason for retaining Part III, could Part III become essentially a small claims court to allow the FTC to prosecute certain cases without the expense of Article III litigation?
- What kind of deference might the FTC receive in interpretations of Section 5, depending on what kind of action it takes (e.g., *Chevron*)? Should that deference be altered by Congress?
- How does the Commission's decision of how to proceed affect its ability to "win" cases? How does it affect the availability of discovery to the Commission – and the costs of discovery upon litigants and third parties? How does the requirement that litigants appeal through the Commission to final agency action before being heard in an Article III court affect outcomes?
- How do outcomes of Part III vs. Article III adjudication differ in terms of how they establish rule-like legal norms (e.g., in terms of the correctness of these rules, the range of factors they consider (from other industry actors, affected parties and other sources), and the information and notice they provide to other parties about the future applicability of these rules?

## 3. *' Negotiation of Consent Decrees*

Central to understanding the FTC's current discretion, especially in unfairness cases, is the question: Why do companies so often settle FTC enforcement actions? Understanding this question requires answering a host of more complicated questions:

- What drives the overwhelming tendency to settle enforcement actions? Is that tendency actually significantly greater with respect to the FTC than with respect to other agencies?
- Why does the tendency to settle vary, if it does, between DAP, UAP, UMC and antitrust actions? Do these differences reflect differences in the degree of doctrinal development or varying substantive standards, or something else?

- To what extent does the expense and nature of the FTC’s CID process drive companies to settle cases they might otherwise litigate? Could targeted reforms to that process encourage sufficient litigation to sufficiently constrain the FTC’s discretion in bringing future enforcement actions?
- How large a causal factor is the FTC’s ability to force a defendant unwilling to settle to go through the Part III administrative adjudication process before getting to an Article III court? Would reforming, or partially eliminating, Part III litigation help?
- Or does the tendency towards settlement stem more from the public relations consequences of challenging the FTC, particularly on issues like data security and privacy? If so, is the FTC’s use of its bully pulpit appropriate?
- Is there anything improper or harmful about the practice of FTC staff conducting investigation with a standardized “pocket settlement” in hand? Does this create improper coercion or inadequate tailoring of remedies to the facts of each case?
- Do Commissioners have adequate opportunity to oversee the process by which consent decrees are negotiated?
- How does the Commission weigh error costs as it charts the direction of the law through negotiating consent decrees?
- In which forum should the agency proceed when seeking preliminary injunctions, especially of mergers (*e.g.*, where it enforces the same laws as the DOJ, but has available the option of administrative adjudication that the DOJ does not)?
- Should litigants be able to appeal directly to an Article III court without waiting for final agency action, or otherwise influence the initial choice of venue?

#### 4. *Enforcement of Consent Decrees*

In some areas of law, the FTC operates entirely by settling enforcement actions in consent decrees, most notably data security. Consent decrees, generally with 20-year terms, are also increasingly becoming a tool for informal policymaking, allowing the Commission to require individual companies to require things that are not required by law and thus might more appropriately be addressed on a general basis through the rulemaking process. This is particularly true in the high-tech sector and on issues such as privacy. With nearly every major large technology company operating under a consent decree, many have asked whether the FTC is moving towards a form of regulation in which its discretion will be even more unconstrained, as companies face additional pressure to settle alleged violations of consent decrees because they face monetary penalties (unavailable in Section 5 cases) and even worse public relations fall-out than for violations of Section 5.

- What limits should there be on the FTC’s discretion in setting the terms of consent decrees? How far may the Commission use consent decrees to make policy, such as by requiring “privacy by design” or “security by design?” Is the FTC improperly using consent decrees to effectively regulate particular companies, or entirely industry sectors?
- Is the FTC rigorously fulfilling all requirements for UDAP under Section 5 and/or its policy statements in bringing consent decrees (*e.g.*, properly finding materiality when claiming that privacy policies are deceptive)? If not, what type of internal or external oversight would be needed to ensure that it does so?
- How should the FTC distinguish between violations of a consent decree and independent violations of Section 5? In other words, how closely related must new conduct be to be considered a direct violation of the consent decree?

- Are the standards for determining whether a company has violated a consent decree different from those of establishing a Section 5 violation? Should the FTC be allowed to create consent decree requirements that are unmoored from the requirements of Section 5 or the Unfairness and Deception policy statements?
- Are 20-year consent decrees too long? Is the FTC enforcing consent decrees consistently, or are different officials interpreting these decrees in inconsistent ways?
- How should monetary penalties for consent decree violations be calculated?
- If a company has agreed to a consent decree based on legal theories that are invalidated by a future court decision, legislation, or other FTC action, or if a provision in a consent decree is later similarly invalidated or called into question, what process is there for having that provision nullified? If there is not one, should there be?

### **5. Consent Decrees as Guidance**

In cases where the agency does act, complaints describe numerous potential problems but few insights into which ones were particularly important to the decision to proceed. For example, the desire to avoid suggesting that any one step is the key to information security has trumped the need for guidance to the regulated community about what is important and what is not. Such lack of guidance could well violate judicial requirements that agencies must, to satisfy constitutional standards of due process, provide “fair notice” of their policies, although that judicial doctrine may be underdeveloped. What particularly merits investigation, however, is whether a different standard should apply in the case of data security and merger guidance, and what the consumer welfare consequences of this divergence are.

In many instances consent agreements are efficient and effective. However, such agreements have a number of problems that certain reforms could mitigate. For example, the FTC could issue competitive impact statements with each settlement, including a fuller discussion of the agency’s reasoning, the importance of particular facts and legal arguments, and clarification of general principles

### **6. Due Process & Fair Notice concerns**

Three key questions are currently pending in litigation:

- Has the FTC’s approach to data security provided adequate guidance to ensure fair notice?
- At what stage of litigation should due process concerns be raised?
- What should be the FTC’s pleading burden in UDAP cases?

#### **a) Fair Notice**

Wyndham has asked the federal district court to dismiss the FTC’s claim that the company’s failure to provide “reasonable” data security constitutes an unfair trade practice because the FTC has failed to provide “fair notice” as to what would constitute reasonable data security. Wyndham relies on the Supreme Court’s decision in *FCC v. Fox* (2012).<sup>41</sup>

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<sup>41</sup> After the FCC changed policy regarding the utterance of expletives and glimpses of nudity during daytime TV, the Court held that broadcasters had a constitutional right to be warned in advance of what the FCC’s new policy against indecency prohibited.

- To the extent that the FTC has prosecuted companies for having unreasonable data security for failing to follow data security practices recommended by the Safeguards Rule or that are actually industry best practices, has the FTC really failed to provide fair notice?
- More generally, what would constitute “fair notice” as to what Section 5 requires? Is the point of the doctrine requiring notice as to the right “standards” in a particular area or rather how the core elements of unfairness – substantial injury, countervailing benefit and reasonable avoidability by consumers – are weighed against each other?

#### **b) When Must Fair Notice Questions Be Resolved?**

The Wyndham litigation currently hinges on the question of how early in the litigation process questions of fair notice may be addressed. At a procedural level, the question has important implications for the *Wyndham* case, insofar as it may control whether fair notice claims can be heard at the Motion to Dismiss phase or, instead, must be heard following discovery at the summary judgment or trial stage. Perhaps more important, the question affects whether fair notice, especially as a Constitutional Due Process issue, places a burden upon the FTC to ensure that those subject to its regulations are reasonably apprised of them, or whether the burden is instead upon regulated parties either to be aware of the Commission’s rules or to prove the negative facts that they were both reasonably informed but nonetheless unaware for the Commission’s intended legal standard.

- If fair notice claims cannot be resolved until a motion for summary judgment, what effect will this have on defendants’ willingness to litigate? Conversely, will such a rule further increase the tendency of companies to settle enforcement actions with the FTC and thus reduce the likelihood that courts will play a role in limiting the FTC’s discretion in interpreting the boundaries of Section 5?
- Absent a clear judicial ruling that fair notice claims must be resolved at the MTD stage, could the FTC commit to resolving such questions at the MTD in, for example, an Enforcement Policy Statement? What are the practical arguments for and against such a policy? Should Congress legislate such a requirement?
- How should fair notice (and other Constitutional) claims be handled in Part III administrative litigation? Should the same arguments for resolving fair notice claims at the MTD stage should not apply equally, or even more strongly, in Part III matters? Have the Commission and its ALJ given appropriate consideration to Constitutional concerns raised by defendants?

#### **c) What Should Be the FTC’s Pleading Burden in UDAP Cases?**

More generally, how much factual support and legal analysis must the FTC offer in its complaints to explain what constitutes alleged deception or unfair practice? *Wyndham* – supported by an amicus brief signed by several members of this Project<sup>42</sup> – has asked the district court to dismiss the FTC’s complaint for failing to plead enough facts to make the FTC’s claims more than “threadbare conclusions of law.”<sup>43</sup>

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<sup>42</sup> See Brief of Amici Curiae TechFreedom, International Center for Law & Economics, & Consumer Protection Scholars, *FTC v. Wyndham Worldwide Corp.*, 2:13-cv-01887-ES-SCM (2012), available at <http://bit.ly/1j9IKEo>.

<sup>43</sup> Under the Supreme Court’s decisions in *Twombly* and *Iqbal*, plaintiffs, including the government, must plead enough factual material to make out a plausible basis for relief. Further, Federal Rule of Civil Procedure 9(b)

At most, the FTC may need to amend or re-file its complaint against Wyndham, yet the question could fundamentally change how the FTC builds law under Section 5 in two respects: making companies more likely to litigate (thus producing fewer settlements and more judicial decisions), and making settled cases more useful as guidance. The questions raised here parallel those above regarding fair notice:

- As a legal matter, what pleading requirements is the FTC subject to? How long might it take to get a clear court decision?
- As a policy matter, should the FTC voluntarily commit to heightened pleading requirements, such as in an Enforcement Policy Statement? Specifically, Should the FTC more fully plead certain allegations, such as UAP's requirement of substantial injury and DAP's requirement of materiality? Or should Congress legislate such pleading requirements, as it has done for other "Special Pleading Matters" under FCRP Rule 9?
- Is there any reason why the same requirements should not apply equally in Article III litigation and Part III administrative litigation?
- What are the arguments for and against such requirements? Would they hamper the FTC's enforcement actions? Or is the FTC in a unique situation because, unlike normal plaintiffs, it can conduct generally significant discovery through its CID process, and thus should be able to draft complaints with greater particularity before proceeding in normal litigation? Conversely, what about fraud cases, where the agency's first direct contact with the defendant is its attempt to seek a temporary restraining order to block immediate further consumer injury?

## E. !Competition Advocacy

Antitrust law coexists with countless regulatory programs at the federal, state, and local levels that, intentionally or not, often restrict entry and limit output. Regulatory schemes often straitjacket competitive forces that, if unleashed, would improve economic performance and consumer welfare.

The FTC occupies a unique position in its role as the *government's* competition scold. Despite the absence of direct legal authority over government actors (which limits the efficacy of competition advocacy efforts), some have argued that "the commitment of significant Commission resources to advocacy is nonetheless warranted by the past contributions of competition authorities to the reevaluation of regulatory barriers to rivalry, and by the magnitude and durability of anticompetitive effects caused by public restraints on competition."<sup>44</sup> Most recently, the FTC has recently received broad acclaim for comments it has filed opposing efforts by taxicab commissions to block entry by Internet-based alternatives to traditional cab services, like Uber and Lyft.

There is generally broad support (at least outside of government) for the FTC's competition advocacy role. Indeed, if there is a consensus, even among those critical of other aspects of the FTC's approach, it is for the FTC to do *more* competition advocacy.

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requires heightened pleading when a plaintiff alleges "fraud," which, Wyndham argues, includes Section 5 deception claims. In such cases, a plaintiff must allege the factual basis of the cause of action with particularity. The FTC insists 9(b) does not apply but argues, nonetheless, that it has satisfied the requirement if it does apply.

<sup>44</sup> Gellhorn, & Kovacic, *supra* note 6.

- How can the Commission bolster its competition advocacy efforts? Should competition advocacy take greater priority in the agency's budget requests relative to enforcement and other functions?
- How should the FTC prioritize its competition advocacy efforts?
- Do barriers to technologically disruptive companies like Uber deserve greater emphasis?
- How should competition advocacy relate to, and support, broader policy objectives? For example, given the emphasis placed in the FCC's National Broadband Plan (a report commissioned by Congress on promoting broadband investment, deployment and competition), should the FTC use its competition advocacy tools to attempt to reduce regulatory barriers to the deployment of broadband infrastructure?
- Should Congress get involved? Can Congressional hearings and letters help to amplify the FTC's competition advocacy efforts by calling attention to anti-competitive barriers to entry, especially regarding new technologies?

## F. Institutional Structure

### 1. *The Role of the Bureau of Economics*

Implementing more and better economic analysis at the FTC should begin with a consideration of how the agency can make better use of the considerable economic expertise in its Bureau of Economics. The FTC is an unusual agency in that it has a large staff of economists; it should leverage that capacity. In particular this expertise must be applied in a meaningful way in consumer protection issues.

Relatedly, benefit-cost analysis should be more widely used by the agency. For example, ongoing privacy discussions have been largely devoid of any rigorous benefit-cost analysis. This should be rectified, and institutional reforms put in place to ensure that benefit-cost analysis is both rigorous and a meaningful check on agency discretion.

The Bureau of Economics has long shaped the Bureau of Competition's implementation of the antitrust laws, both by having a formal role in competition enforcement and by having a leading role in writing the antitrust guidelines co-authored by the FTC and Department of Justice. But what is BE's role in consumer protection matters, and what *should* it be? Indeed, what is the role of economics as a discipline in limiting the FTC's broad discretion to define UDAP, and in ensuring that the FTC's UDAP efforts do not inadvertently harm competition? Specifically:

- As discussed below, the FTC increasingly uses its deception authority beyond enforcement of traditional marketing claims to enforce codes of conduct, FAQs, help files and other informal statements, it is testing the presumption of materiality that once made sense to ensuring that consumers got the benefit of the bargain promised then. What is the role of economics, and the BE, in shaping the emerging, expanded doctrine of materiality? Would there be any basis for no longer using materiality to determine whether consumers have been harmed by the targeted conduct?
- The Unfairness Policy Statement clearly defines consumer injury as the lodestar of Section 5 and demands cost-benefit analysis by requiring that the FTC weigh injury against countervailing benefits to consumers or to competition. Yet, with scant litigation of unfairness cases, both UAP and UMC, how much cost-benefit analysis has the FTC really engaged in in practice? What has been the BE's role in this process? What should it be?

- Indeed, why should the BE's role in selecting cases for enforcement and defining the appropriate legal arguments differ between competition and consumer protection cases? Is it simply a question of volume and scale?
- What role has economics played in informing the FTC's policymaking function? In particular, the FTC has produced a series of reports and conducted a number of workshops regarding consumer privacy. Have these been appropriately informed by economics?
- Where the FTC has engaged in rulemakings, *e.g.*, in revising the COPPA Rule, has the FTC given adequate consideration to the economic consequences and trade-offs of its proposed revisions?
- Does the current regulatory impact process effectively assess the impact of regulation on innovation? Are compliance costs really what matters in sectors driven by small businesses, especially startups, or can even relatively small compliance costs discourage investment from certain areas (*e.g.*, children's media)?

## 2. *Institutional Competence: Office of Technology?*

Since creation of the FTC, the Bureau of Economics has guided the agency's understanding of economics. With technology issues increasingly dominating the FTC's agenda (measured in terms of priorities and impact, if not caseload), is it time for the FTC to institutionalize technological expertise in the same way it has institutionalized economic expertise – by creating a standing Office of Technology? It was not until late 2010 that the FTC appointed its first Chief Technologist, and the FTC remains without a full-fledged Office of Technology staffed with technologists, especially those from the business community who understand innovation tradeoffs. Indeed, its CTOs and senior advisors on technology have all been from academia, and the FTC might well benefit from an infusion of insight from those who have shaped technology in industry. It appears that the FTC draws on limited technical expertise scattered across multiple existing offices and bureaus, and on assistance from special contractors.

- What has been the track record of the FTC's first three Chief Technologists over the last three years?
- What does the institutional history of the Bureau of Economics suggest for how the FTC should approach building in-house technological expertise and using that expertise effectively in the various aspects of the FTC's enforcement, investigation and policymaking functions?
- What are the pitfalls of creating a larger permanent in-house technological capability? Might it cause the FTC to engage in more enforcement or use of the bully pulpit than is appropriate? How can such an office be integrated into all aspects of the FTC's work holistically as a resource to better weigh error costs? How can its expertise be married with an appropriate degree of humility about the ability of technical experts to predict an uncertain future?
- What kind of technical expertise would the FTC need to properly exercise the jurisdiction it has already asserted over broadband issues, such as Net Neutrality, speed claims and billing; over telecom services on all-IP networks; over privacy issues on telecom networks, if Congress transfers jurisdiction from the FCC; and over other telecom services?
- FTC computers do not have access to many new technologies, and some online services are actively blocked. Could such an office be used to better reform internal technology use at the FTC by, for example, improving its integration and use of new technologies?
- Could this office improve open data standards at the agency to allow researchers to engage in important consumer-welfare enhancing research (*e.g.*, non-sensitive Consumer Sentinel data)?

## G. Codes of Conduct, Multistakeholder Processes & Advice Letters

Internet governance has, for decades, relied on multistakeholder processes, from ICANN’s administration of the domain name system to the various standards-settings bodies that have shaped the technical framework that allows computers to connect over the Internet. Increasingly, policymakers have realized that such private, often highly informal bodies may be better source of law than traditional regulatory agencies when it comes to complex and fast-changing issues at the intersection of law and technology. Most notably, the White House’s “Consumer Privacy Bill of Rights” declared that, “when appropriately structured ... multistakeholder processes ... can provide the flexibility, speed, and decentralization necessary to address Internet policy challenges.”<sup>45</sup> The Commerce Department has undertaken a series of government-sponsored processes, starting with mobile app transparency and continuing with facial recognition. But the private sector has increasingly been using such processes to generate codes of conduct, from the Digital Advertising Alliance’s successful (if criticized) principles on behavioral advertising and multisite data to the W3C’s still-unresolved Do Not Track Process. The FTC can enforce any promise to abide by such a code of conduct under its deception authority. Yet on many issues, it is widely presumed that substantive rules must come from the FTC, rather than being generated by such bodies and merely enforced by the FTC.

- What kinds of policy issues are better suited to resolution by multistakeholder bodies than by the FTC under unfairness or formal rulemaking, and under what circumstances?
- Why has no such code of conduct emerged regarding data security? Could the FTC’s enforcement actions have displaced such bottom-up emergence of enforceable legal norms? Or are the data security requirements imposed by credit card networks upon vendors essentially the same thing?
- What systemic changes could the FTC make to encourage the emergence of codes of conduct from non-governmental sources? Has the agency’s increasingly expansive conception of materiality in enforcing commitments to codes of conduct inadvertently discouraged the creation of such codes in the first place?
- Would the FTC need new statutory authority to recognize such codes of conduct (as proposed by the White House in draft privacy legislation) or could it recognize such codes informally by issuing advice letters, much as the Securities and Exchange Commission does?

## IV. Substantive Issues (

### A. Competition

#### 1. Antitrust law

At least since the Chicago revolution in antitrust, it has been generally acknowledged that antitrust is a blunt, powerful and thus potentially harmful instrument that requires significant analytical rigor to ensure it serves rather than undermines its consumer welfare objectives. In significant part because the antitrust laws are broad and vague they are easily misconstrued and misused. The Supreme Court’s

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<sup>45</sup> *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* (February 2012), <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

recent antitrust jurisprudence has consistently recognized this and, almost without exception, operated to limit the scope of antitrust law and the discretion afforded to its enforcers.

In one sense antitrust is, in Herb Hovenkamp's description, a "residual" regulator, "promot[ing] competition to the extent that market choices have not been preempted by some alternative regulatory enterprise."<sup>46</sup> Implicit in this view of antitrust is a singular focus on private, as opposed to government, market restraints. Thus, unlike many other countries' competition laws and practices, U.S. antitrust law does not address public restraints as a matter of law enforcement, only as a matter of agency advocacy.

The FTC's enforcement of the antitrust laws has had mixed success, as is inevitable. Its existence is a function of early 20<sup>th</sup> Century Congressional expectations regarding the importance of specialized expertise in antitrust, but it isn't clear that the FTC has achieved particularly better results than, say, the Antitrust Division of the Department of Justice. Regardless, some have raised the question of the justification for the agency's existence (at least as an antitrust enforcer), particularly as its standards of enforcement (under the FTC Act) diverge from those of the DOJ (which does not enforce the FTC Act).

- There may be general agreement that antitrust merits some constraints, but the specific contours of those constraints are the subject of vigorous disagreement. With respect to the issues addressed in this report, are there particular judicial or legislative decisions that would optimize the constraints placed on the FTC's role in the antitrust enterprise?
- Former Chairman Leibowitz has argued (in advocating for expanded use of the FTC's UMC authority) that the limits imposed on antitrust by the Supreme Court are and should be aimed at private plaintiffs exclusively.<sup>47</sup> To the extent they constrain public enforcement these constraints are harmful and, thus, the appeal to Section 5 to sidestep the Court's jurisprudence is appropriate. Is this assessment appropriate? To what extent should government enforcers be subject to different judicial standards than private plaintiffs?
  - In this regard, the FTC does enjoy a deferential standard of review for judicial review of the Commission's decisions on administrative adjudications. Is this deference appropriate? Does it help to ameliorate (or exacerbate) in any significant way the public/private enforcement question?
- Is the FTC's continued role in antitrust enforcement (alongside the DOJ) justified?
- Do the FTC's enforcement decisions reflect an appropriate role for economic analysis? Is the economics practiced at the FTC and embodied in its enforcement decisions and arguments the "right" economics?

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<sup>46</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* (2005).

<sup>47</sup> *Interview: Federal Trade Commission's Jon Leibowitz*, Wall St. J. (Jan. 31, 2010) available at <http://online.wsj.com/article/SB10001424052748704722304575037572444983454.html> ("The courts have pared back plaintiffs' rights in antitrust cases. They're concerned about what they believe to be the toxic combination of class actions, treble damages and a very aggressive plaintiffs' bar. The problem for us as an agency is we come under those restrictions, [too]. So how do we do what we're supposed to do, which is stopping anticompetitive behavior? One tool in our arsenal is using what's known as our Section 5 authority to stop unfair methods of competition. When Congress created this agency, it wanted to give us broader jurisdiction to stop behavior that harms consumers than the antitrust laws. We haven't used it often recently but I think we're committed -- not necessarily often, but in appropriate circumstances -- to using this authority.").

- Of particular importance to antitrust’s relationship with technology, do the FTC’s enforcement decisions reflect an appropriate role for dynamic competition analysis, reflecting and rigorously applying an appreciation for difficult-to-observe and difficult-to-measure attenuated effects?
- Does the FTC make appropriate use of its administrative process in antitrust cases?

## 2. ) *Unfair Methods of Competition*

The FTC enforces the antitrust laws, the Sherman and Clayton Acts, only indirectly, by punishing violations of these acts – or more precisely, the complex web of judge-and-agency-made doctrines built upon these terse acts – as an “unfair method of competition.” But what conduct, if any, does the FTC’s UMC authority cover that the antitrust laws do not? Neither the courts nor Congress have ever resolved the question.

Increasingly the Commission has interpreted its UMC authority to extend the reach of the antitrust laws in novel fashion. These efforts have been met with considerable resistance. When, for instance, the majority in the Google SEP settlement asserted that conduct was unfair, but offered almost no explanation for why the conduct was unfair, it occasioned heated statements from Commissioners Ohlhausen and Rosch.<sup>48</sup> Two current Commissioners have proposed a Policy Statement on UMC analogous to those on DAP and UAP, and a third Commissioner has agreed, in principle, on the usefulness of such a statement. But the claimed need for UMC guidance is not without controversy.

It is an open question whether a UMC Policy Statement would, on net, reduce or increase the agency’s competition enforcement power. While a Policy Statement would, as we have discussed generally, act as a constraint, Commissioner Wright and others have noted that self-restraint can actually *increase* the FTC’s influence, even if it loses some degree of freedom.

- What should be the limiting principles of UMC? Should the same substantial injury requirement apply as in UAP cases?
- If Section 5 is in fact to prohibit conduct beyond the reach of the other antitrust laws, are guidelines necessary or advisable to delineate the scope of its jurisdiction as well as its economic basis?
- What kind of economic findings should be required to justify such guidelines? Specifically, what kind of empirical analysis would support finding that extending UMC beyond the antitrust laws would actually benefit consumers?
- If the FTC does not issue clear limiting UMC principles justified by adequate evidence, should Congress statutorily limit UMC to the Sherman Act?
- How should the Commission’s definition of UMC inform its definition of UAP, and vice versa?
  - What are the conceptual parallels between UMC issues and, say, data security?
  - What role should economics, especially cost-benefit analysis have in both areas?

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<sup>48</sup> In the Matter of Motorola Mobility LLC and Google Inc., FTC File No. 121-0120 (Ohlhausen, dissenting), *available at* <http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf> (noting that “the majority says little about what ‘appropriate circumstances’ may trigger an FTC lawsuit); *id.* (Rosch, concurring), *available at* <http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaroschstmt.pdf> (“[I]t is not clear what the ‘limiting principles’ of such a claim would be.”).

### 3. ( Mergers

The FTC undertakes its merger enforcement activities largely in accordance with the familiar Horizontal Merger Guidelines. By almost all accounts, at least until the most recent, 2010 revisions, the Merger Guidelines have been successful. Since then-Assistant Attorney General Bill Baxter's 1982 Merger Guidelines,<sup>49</sup> the Merger Guidelines have largely embodied rigorous economic logic and operated to impose a degree of economic rigor on both the agencies and the courts. In fact, courts have looked to the Merger Guidelines in recent years as a source of law, thus reinforcing their internal constraining effect with a further external constraint. While the latest revisions to the HMGs are more controversial, there is little disagreement that the HMGs' influence on the FTC's merger enforcement practice (to say nothing of their usefulness for practitioners and the companies they advised) from 1984 until 2010 was salutary.

As noted, the 2010 revision to the Merger Guidelines introduced controversy in part – and in keeping with the theme of this report – because they also introduced more discretionary scope for the agency. Most notably, the new Guidelines contemplate an expanded scope for agency discretion in defining relevant markets and market power. Because courts have historically imbued the market definition/market power stage of merger analysis with near-dispositive significance, the new Guidelines' transformation of the traditional market definition analysis may, if broadly implemented by courts, undermine this constraint on agency merger enforcement discretion.

- To a significant extent, the 2010 Merger Guidelines do reflect recent agency practice, and in this sense fulfill an important function of guidelines. At the same time, by “codifying” the agency's more discretionary analytical framework they also have the potential to dramatically weaken the extent of the judicial constraint on agency discretion. Which of these two competing effects is more important to ensuring optimal merger outcomes? Are there specific changes to the 2010 Merger Guidelines that would rebalance that trade-off without undermining the Guidelines' descriptive accuracy?
- In terms of substance, do the Guidelines embody the appropriate economic framework for assessing the competitive effects of mergers? Could or should they do a better job continuing the legal retreat from the structure-conduct-performance model whose repudiation began with the 1982 Guidelines?
- The DOJ and FTC share authority for reviewing proposed mergers. Although there have been attempts to formalize the merger clearance process, none have had any staying power. Arguably, however, the informal process works. Should merger clearance be formalized to clarify for prospective merging parties which agency will review its merger?
- To some extent there are differences between the two agencies' merger processes and the process requirements imposed on the agencies in federal court. Do these different processes have significant practical effect on outcomes? Would harmonization be desirable – or possible?
- Merging parties bear monetary and disclosure obligations under the HSR Act, and merger reviews can be time intensive – creating substantial costs also borne by the parties. Are

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<sup>49</sup> The 1982 Merger Guidelines were issued by the DOJ alone, but the *Statement of the Federal Trade Commission Concerning Horizontal Mergers* of the same year noted that “the DOJ 1982 revision to the 1968 Guidelines will be given considerable weight by the Commission and its staff.” The FTC has joined the DOJ in issuing the HMGs since 1992.

premerger notification requirements appropriately calibrated to facilitate consummation of welfare-enhancing mergers while still enabling enforcement against anticompetitive mergers?

- How do we know? Does the FTC appropriately review and evaluate its merger practices?

## B. Data Security

The FTC comes closest to being a “technology regulator” in data security cases. Through a string of four dozen UDAP enforcement actions over the last decade, the FTC has policed how American companies protect user data. Initially, the Commission used this standard only in deception cases, reading in an implied promise of reasonableness into data security promises and holding companies responsible if actual practice was found to be unreasonable. Since 2005, however, the FTC has expanded the reasonableness approach to cases in which the company made no security promise, essentially collapsing UAP’s substantial injury/countervailing benefit/reasonably avoidable elements into “reasonableness,” which in turn has largely, if not explicitly, been defined by the data security standards (the “Safeguards Rule”) promulgated through APA rulemaking for financial institutions under Gramm-Leach-Bliley.

In principle, it makes sense treat some forms of inadequate data security as an unfair trade practice, regardless of whether the company made any promise about security. But recent experience suggests the FTC is moving toward *ex post* strict liability and away from judging the reasonableness of security precautions *ex ante*, and making that assessment without first developing or explaining the elements of unfairness in a rigorous way. While companies, such as Wyndham, and many commentators have argued for the need for greater guidance, it is not clear what shape that guidance should take.

Although some have argued that the agency’s data security complaints, consent orders, speeches and Congressional testimony collectively provide sufficient guidance, the lack of more formal guidelines is notable.<sup>50</sup> Moreover, this set of guiding materials is notably lacking any direct discussion of the reasons data security investigations are *closed* (and none are likely to appear in the near future given a relatively new informal policy strongly disfavoring such explanations).

- Is the FTC’s approach becoming a strict liability rule, presuming that any loss of data is *per se* proof that a company’s data security practices were unreasonable? If so, on what legal basis?
- In practice, the FTC brings data security cases (under both Deception and Unfairness) based on the alleged unreasonableness of a respondent’s security practices without addressing the actual Section 5 elements (materiality, substantial injury, *etc.*) and without connecting them to reasonableness. Would making such connections explicit satisfy the need for flexibility as well as certainty? Put differently, is the need for “standards” more a need for doctrinal guidance (about how the FTC measures reasonableness) than for specific technical measures or requirements?
  - Would a policy statement or other doctrinal guidelines on data security help to provide clearer notice about what constitutes reasonable data security, taking account of the need for experimentation, self-correction, consumer self-help and the costs and

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<sup>50</sup> Some have further argued, in fact, that that the threat of action through speeches, reports and the like is preferable to more concrete statements or guidelines because they are even more flexible. *See, e.g.,* Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841 (2011), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1506&context=dlj>.

benefits of data security practices with reference to other characteristics (like company size, industry, threat, *etc.*)?

- Or does the Commission need to provide greater guidance on UAP more beyond just data security cases, to further explain how the Commission will implement the principles of the Unfairness Policy Statement? How would such guidelines compare with antitrust guidelines?
- If consent decrees are to be the primary form of guidance the FTC offers to companies, can the FTC better explain how it weighs the required elements of unfairness in each complaint or other materials explaining the settlement?
- Would greater *ex ante* certainty (in whatever form) sacrifice too much flexibility, perhaps imposing far greater costs on businesses and consumers than the current regime? How should the Commission evaluate the trade-off between certainty and flexibility?
- What are the appropriate boundaries of substantial injury? If the FTC's cases rely on losses borne by companies (fraudulent charges reimbursed to consumers), is the FTC really protecting consumers or large businesses? Consumers can, and do, suffer out of pocket losses, particularly with new account fraud. How great must they be to constitute substantial injury?
- What about the time and effort required to mitigate harm, such as monitoring account charges or replacing credit cards? How should this be measured as a form of injury or as part of the inquiry into whether consumers can "reasonably avoid" injury?
- Is the guidance provided in the Safeguards Rule – which, while offering some details, nonetheless ultimately rests on operative rules like "Reasonable" and "effective" – the appropriate amount of specificity and guidance necessary in data security and other fast-paced issues?
- Regardless, is it appropriate for the FTC to boot-strap a rule enacted under one statute to direct FTC enforcement action under Section 5?
- In particular, if reasonableness depends, under the Safeguards rule, on the specific characteristics of the company, has the FTC provided enough guidance as to those characteristics?
- How should the Commission apply its standards to ensure that the duty of care imposed on businesses is appropriate to their size and degree of sophistication, as well as to the security threats at issue?

### C. Patents

Perhaps nothing the FTC does more directly implicates technology and innovation than its treatment of intellectual property. Writing about "Antitrust in the New Economy," Judge Posner noted that the "principal output of these industries... is intellectual property."<sup>51</sup> But as far as antitrust economics has progressed generally, it still lacks a solid understanding of the relationship among investment in R&D, market structure, price, quality, speed of innovation and welfare effects. The risk of Type 1 error thus is particularly high, and its potential cost higher still.<sup>52</sup> Nonetheless, basic economics suggests that, in unknown degrees, the production, distribution and enforcement of intellectual property will lead to

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<sup>51</sup> Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 927 (2001).

<sup>52</sup> Manne & Wright, *Innovation*, *supra* note 2, at 170.

standardization (coordination among competitors), the need for interoperability (and thus a greater opportunity for anticompetitive foreclosure), economies of scale (high levels of concentration), and the presence of network effects, all of which may contribute to an increased likelihood of monopolization.<sup>53</sup> On the other hand, many question the validity of many patents and the reliability of the patent approval process, and note the potential for “greenmail.” These critics have encouraged the FTC to use its UMC authority against companies asserting legally questionable or standard-essential patents (SEPs) in certain contexts.

Against this backdrop, the FTC has in recent years stepped up its enforcement around patents. Recent (and controversial) Section 5 cases against Intel, Rambus, Google and Bosch, for example, have turned on issues surrounding those firms’ enforcement of SEPs. The Commission is currently conducting a 6(b) investigation into patent assertion entities, and the FTC has pursued a vigorous and lengthy war on pharmaceutical industry reverse payment settlements.

The question of the appropriate application of UMC to patent issues, particularly to police the enforcement of SEPs through the threat of injunctions and the breach of FRAND requirements by certain patent holders, is a controversial one. But here as elsewhere the core of the controversy may rest in the appropriate exercise of discretion generally rather than as applied to patents in particular. As Commissioner Ohlhausen wrote in dissenting from the Commission’s action in *Bosch*:

I simply do not see any meaningful limiting principles in the enforcement policy laid out in these cases. The Commission statement emphasizes the context here (*i.e.* standard setting); however, it is not clear why the type of conduct that is targeted here (*i.e.* a breach of an allegedly implied contract term with no allegation of deception) would not be targeted by the Commission in any other context where the Commission believes consumer harm may result.<sup>54</sup>

Whatever the propriety of the application of Section 5 to these issues, there remains important questions regarding the appropriate *scope* of that authority.

- The upshot of the FTC’s range of actions against patents is, in varying degrees, to move the property rule of patents (enforceable by injunction) more towards a liability rule (enforceable by royalty payments). Is such a shift justified? Is it beneficial or harmful?
- To the extent that the FTC’s SEP actions are motivated by concerns about “hold-up” problems arising from refusals to license essential IP, is the FTC sufficiently sensitive to the analogous “hold-out” problem of potential licensees taking advantage of lax enforcement in order to infringe?
- Is the FTC applying its approach to patents consistently? Or has it unfairly singled out a class of patents or patent-holders?
- Is the FTC’s overall patent-related activity essentially a form of competition advocacy directed at the USPTO, Congress and the courts? What would more direct competition advocacy in this area look like and would it be preferable?

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<sup>53</sup> *Id.*

<sup>54</sup> In the Matter of Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012) (Maureen Ohlhausen, dissenting), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commissioner-maureen-ohlhausen/121126boschohlhausenstatement.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/121126boschohlhausenstatement.pdf).

- Related, many (including many in Congress) see significant problems in the patent system. To the extent that patent system problems rather than competition problems underlie the FTC's patent-related actions, does this represent an appropriate exercise of the agency's power? Is the agency sufficiently sensitive to the scope of its authority vis-à-vis other agencies and branches of government?
- Should the FTC be responsible for regulating the demand letter process under its UMC authority, as some have proposed? What are the advantages and pitfalls of such an approach?

## D. Advertising & Pure Deception

The core of the FTC's consumer protection work lies in policing deception in marketing and advertising claims, where it enjoys broad support as ensuring that consumers get the benefit of the deal they were promised. The Commission thus protects consumers from a clear injury, yet it need not prove any actual or even likely injury in any enforcement action because, so long as a statement to the consumer was material to their decision, the Commission may validly presume that *not* getting what the statement promised constitutes harm.<sup>55</sup> Yet the FTC's recent enforcement actions have raised two concerns regarding its application of deception: (1) the degree of substantiation required, particularly for health claims, and (2) the FTC is pushing the boundaries of its deception authority by attempting to enforce statements that are not clearly material to consumers, and thus where harm cannot be presumed.

### 1. - Advertising Labeling

The FTC has a long history of both advocacy about and enforcement against what it has deemed insufficient labeling of messages as advertising. This effort has intensified as technology has disrupted traditional means of communicating to consumers: from its Endorsement Guidelines to its Search Labeling Letters to its recent Native Advertising Workshop. Some failures to label a message as an advertisement are clearly misleading to consumers. However, many have criticized some of the Commission's recent guidelines as stifling free speech, failing to adequately assess whether consumers are injured, and advocating conduct that is not clearly required by the law.

- Is the FTC seeking disclaimers about speech that are moored in journalistic ethics rather than in Section 5?
- Is the FTC guidance here appropriately allowing for innovative labeling techniques? Or is the FTC creating inflexible guidelines that push for certain formats and unneeded consistency?
- Is the FTC properly assessing costs to free speech, innovation, and burden on content providers in its advocacy? Again, what has BE's role been in assessing the FTC's approach in this area?
- Is the FTC properly considering the context of the speech when determining what constitutes proper labeling?

Is the FTC focusing its resources on activity and actors that are most clearly deceptive and likely to cause consumer harm?

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<sup>55</sup> Deception Statement, *supra* note 15.

## 2. Claim Substantiation Standards

The FTC recently reversed a decision of its Administrative Law Judge holding that POM Wonderful had adequately substantiated the health claims it made in marketing its signature pomegranate juice by spending more than \$30 million on scientific research. Instead, the FTC held, for the first time in the agency's history, that such claims must be backed by randomized clinical trials of the sort required of drug makers, who spend an average of \$600 million on RCTs. There is little chance such massive costs could be recouped in a competitive market, especially because companies like POM cannot patent their food products the way drug makers can. So the FTC's RCT requirement amounts to a ban on an entire category of speech.<sup>56</sup> The FTC decision also seems to contravene the D.C. Circuit's 1999 decision in *Pearson v. Shalala*, where the court struck down a similar FDA requirement and required the FDA to allow health benefit claims if made with appropriate qualifications alerting the public to the lack of conclusiveness in the science.<sup>57</sup>

- In reaching this decision, how did the FTC weigh the costs and benefits of effectively banning health claims like those made by POM Wonderful?
- In general, how well substantiated must a claim be to avoid being subject to a deception action? What burden does the FTC bear in substantiating its own deception claims with economic evidence?
- Does an adjudicatory process allow for proper weighing of such evidence, or should the Commission use its rulemaking process to ensure a proper weighing of the record?

## 3. The Presumption of Materiality

In traditional advertising, the FTC applies a second presumption: that all advertising claims were material. But increasingly, the Commission is extending that presumption of materiality to claims made outside advertising, in forms ranging from privacy policies to online help file to FAQs. For example, FTC alleges that the "unreasonable" data security of Wyndham's hotels was both itself an unfair trade practice and also deceptive, insofar as it violated the company's promise to "safeguard [its] Customers' personally identifiable information by using industry standard practices." The FTC is thus trying to hold Wyndham responsible for deception despite an explicit disclaimer in the same privacy policy that the parent company was not responsible for the data security practices of its franchisees. At oral argument, FTC Counsel asserted, flatly, that "expressed statements are presumed material under FTC law."<sup>58</sup> In another case, the FTC charged Google with having violated a consent decree by deceiving customers

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<sup>56</sup> Members of the Working Group filed two amicus briefs in this matter. See Brief of Amici Curiae Consumer Healthcare Products Association & Council for Responsible Nutrition in Support of Petitioners' Request for Reversal, No. 13-1060 (Aug. 21, 2013), available at [http://www.crnusa.org/pdfs/r\\_8475.pdf](http://www.crnusa.org/pdfs/r_8475.pdf); Brief of Amici Curiae Alliance for Natural Health-USA & TechFreedom Supporting Petitioners' Opening Brief, no. 13-1060 (Aug. 20, 2012), available at <http://techfreedom.org/post/58924602984/pom-wonderful-ftc-ban-on-food-health-claims-violates.#>

<sup>57</sup> *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999). #

<sup>58</sup> Oral argument transcript in *FTC v. Wyndham*, at 132, available at [http://www.pogowasright.org/wp-content/uploads/FTC\\_V.\\_WYNDHAM\\_OralArgument-.pdf](http://www.pogowasright.org/wp-content/uploads/FTC_V._WYNDHAM_OralArgument-.pdf). #

after an online help page explaining how Apple users could configure their browser to block Google cookies became inaccurate due to technical changes made by Apple.<sup>59</sup>

- The 1983 Deception Policy Statement says that “In many instances, materiality, and hence injury, can be presumed from the nature of the practice” but adds that, “In other instances, evidence of materiality may be necessary.”<sup>60</sup> When does it make sense for the FTC to presume all express statements are material? If it cannot make such a presumption, how should it determine whether a statement is actually material? What role should economics play in such determinations?
- How does the FTC weigh the potential for over-enforcement of deception to discourage companies from making statements in the first place?

## E. \*Privacy

The Commission’s approach to privacy issues beyond data security has been more amorphous. While the Commission has brought a number of privacy-related enforcement actions, they are not as uniform in their concerns, approach or remedies as the Commission’s data security cases. The Commission’s approach to privacy has been dominated by its 2010 Privacy Report,<sup>61</sup> as well as the various workshops that led to that report and that have followed, building on the report in other areas, such as the Internet of Things. Certain Commissioners have continued to call for “baseline comprehensive privacy legislation,” and the Obama Administration appears ready to introduce their own draft legislation imminently. Meanwhile, a bipartisan House task force is examining the question of privacy.

The FTC has also played a significant role in ongoing private sector efforts to produce privacy codes of conduct. Most notably, the World Wide Web Consortium’s Tracking Protection (Do Not Track) Working Group was driven to a large degree by pressure from the FTC and some participants have suggested that FTC pressure for the chairs to produce particular outcomes may have made a negotiated outcome with industry impossible.

- What economic analysis of trade-offs, and what legal analysis of underlying doctrines, did the FTC engage in its 2012 Privacy Report?
- Do such reports help guide industry in complying with their legal obligations under Section 5? Or, given their lack of discussion of legal basis, are they primarily hortatory, recommending best practices that the FTC cannot actually require? Is the FTC sufficiently clear when its guidelines are merely “best practices” rather than required by law?
- When holding workshops and creating guidelines, is the FTC openly assessing all views? Or is it steering the record toward a pre-determined result?

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<sup>59</sup> Federal Trade Commission, *Google Will Pay \$22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Apple’s Safari Internet Browser*, Press Release (Aug. 9, 2012), <http://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented>.

<sup>60</sup> Deception Statement, *supra* note 15.

<sup>61</sup> Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (Dec. 2010), available at <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201privacyreport.pdf>.

- Is it, in fact, necessary for the FTC to steer clear of any consideration of how access by law enforcement or national security affect privacy, as it has routinely insisted it must? Or, since the FTC has general authority to collect information and advocate for policies that remove barriers to competition and enhance consumer welfare, should the FTC take a more holistic view of privacy in its reporting, analysis and recommendation functions?
- What does the FTC’s experience with privacy regulation thus far and with other grants of statutory authority, especially COPPA, tell us about the advantages and disadvantages of “comprehensive” privacy legislation? How should economic analysis and an understanding of error costs guide the FTC’s discretion in fleshing out a statutory framework through regulation and enforcement?
  - How well did the FTC justify its expansion of the COPPA rule? What role did economics, and the Bureau of Economics, play in this process?
- What does the history tell us about the advantages and pitfalls of giving the FTC statutory authority to certify safe harbors from enforcement of comprehensive baseline privacy legislation, as apparently proposed by the White House bill? In particular, given that merger reviews at the FCC and, increasingly, antitrust reviews generally at the FTC and DOJ, frequently result in companies “voluntarily” agreeing to settlements that involve major concessions that the agencies could not legally (or in some cases, even constitutionally) have required, might such a process give the FTC too much discretion in defining the terms of codes of conduct? Where is the line between “self-regulation” or truly bottom-up multistakeholder processes and “co-regulation?”
- Is the FTC focusing its resources on consumer protection issues that result in concrete consumer harm, or engaging more broadly in privacy policy development that is not based on whether the practices in question create specific harms to consumers?

## V. Conclusion

The FTC enjoys uniquely broad support across political and ideological lines for its mission: maximizing consumer welfare through its consumer protection and competition powers. The issues presented in this report are just some of the many questions that must be considered by the FTC and Congress as the Commission approaches its 100<sup>th</sup> anniversary in September 2014. Without serious consideration of these questions, and without whatever reforms are implied by their answers, the agency risks failing to reach its otherwise positive potential.

Above all, achieving that potential depends on understanding that too much discretion can actually weaken the agency’s ability to execute its mission – and that limits, imposed internally or externally, can significantly strengthen the agency’s ability to succeed. Greater analytical discipline and legal rigor will help the agency provide clearer guidance, thus promoting compliance while minimizing the burden of regulation; it will also help the agency prioritize its limited resources and ensure that it can enforce the law vigorously within the scope of its legal authority and general principles of the rule of law.



The **FTC: Technology & Reform Project** brings together a unique collection of experts on the law, economics, and technology of competition and consumer protection to consider challenges facing the FTC in general, and especially regarding its regulation of technology.

This document represents the combined input of several authors and commentators, and has been compiled to ask questions and prompt discussion about the Federal Trade Commission. It is, by design, over-inclusive, so that it may foster broad discussion. At the same time, it is also certainly not complete. This document does not necessarily represent the views of its principal authors or other contributors to the drafting process, nor the members of the FTC: Technology & Reform Project.

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