**Cornell Law Review**

Volume 63
Issue 5 *June 1978*

Article 3

# Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers

Peter C. Carstensen

Nina H. Questal



## Recommended Citation

Peter C. Carstensen and Nina H. Questal, *Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers*, 63 Cornell L. Rev. 841 (1978)
Available at: http://scholarship.law.cornell.edu/clr/vol63/iss5/3

# THE USE OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT TO ATTACK LARGE CONGLOMERATE MERGERS

*Peter C. Carstensen*† *and Nina H. Questal*††

The unprecedented wave of merger activity in the 1960's and 1970's spawned a new antitrust problem: what to do about the many large firms seeking to acquire other large companies engaged in businesses unrelated to their own. These so-called "conglomerate mergers"—lacking the horizontal or vertical characteristics of most traditional mergers—raised substantial questions as to the applicability of section 7 of the Clayton Act,[1] the basic antitrust law regulating corporate combinations. To date, legal discussion of conglomerate mergers has centered on whether and when such combinations are sufficiently anticompetitive to trigger the application of section 7. This approach is unsatisfactory. Massive mergers may be undesirable even if they are not anticompetitive. We suggest, therefore, that attention should focus on section 5 of the Federal Trade Commission Act[2] as a potentially useful weapon for combatting conglomerate mergers. Evaluating these mergers as possible "unfair acts" under section 5 would obviate the need for a showing of probable anticompetitiveness in traditional economic terms, and would therefore provide antitrust enforcers with greater flexibility and effectiveness in challenging undesirable conglomerate combinations.

This Article will demonstrate that section 5 of the Federal Trade Commission Act, in light of its legislative history and evolving Supreme Court interpretation, is an appropriate mechanism

---

† Associate Professor of Law, University of Wisconsin Law School. B.A. 1964, University of Wisconsin; LL.B., M.A. 1968, Yale University.

†† Member, Wisconsin Bar; attorney, Federal Trade Commission. B.A. 1973, J.D. 1976, University of Wisconsin. The views expressed herein are strictly those of the authors and do not in any way represent the positions of any agency or institution with which they are or have been associated.

[1] 15 U.S.C. § 18 (1976).

[2] *Id.* § 45. The section provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 45(a)(1).

for dealing with conglomerate mergers. In advocating the use of section 5, we will first identify the inadequacies of the Clayton Act as a vehicle for controlling this problem. We then will trace the development of section 5; describe how it has been used in the context of antitrust-related activity in the past; show that both antitrust policy and more general social concerns provide bases for challenging conglomerate combinations as "unfair acts"; propose a rule for implementing a section 5 prohibition; and finally, evaluate the merits of such an approach for dealing with the conglomerate merger problem.

We emphasize at the outset that we are concerned with only those conglomerate mergers involving firms that are large in absolute terms.[3] We limit our discussion to large conglomerate mergers for three reasons. First, although we are not willing to accept the proposition that bigness is intrinsically bad, we do fear the transformation of many large firms into fewer, larger firms. To the extent that large firms have advantages over small ones in terms of survival, growth, or efficiency, we think it important that the number of large firms not be decreased. Second, although we recognize the dangers present when large firms acquire small firms, we feel that conglomerate mergers between large firms involve a quantum leap in terms of corporate growth, and that such instantaneous augmentation of size and power is particularly undesirable. Finally, we are pragmatists. Perhaps the law should bar most, or even all, acquisitions by major firms. We sense, however, that social mistrust of large conglomerate mergers is particularly acute. Regulation of these combinations thus provides a proper point of departure in the development of a doctrine of unfair mergers.

## I

## Conglomerate Mergers and the Clayton Act

In December 1975, the directors of General Electric Company (GE) and Utah International (UI) announced the proposed merger of the two companies.[4] The merger, one of the largest in United

---

[3] We focus in this Article on mergers that may lack significant anticompetitive effect. We do not mean to imply, however, that mergers with more direct anticompetitive implications fall outside the analysis set forth in this Article. In such cases, the FTC should have the option of invoking either traditional antitrust theory or the unfairness analysis we propose.

[4] *See Boards of GE, Utah International Clear Talks for $1.9 Billion Merger*, Wall St. J., Dec. 16, 1975, at 2, col. 2.

States history, was consummated about a year later.[5] GE's 1975 sales of $13.4 billion ranked it ninth on *Fortune*'s list of the largest industrial corporations; UI, with $686 million in sales, ranked 273rd.[6] GE's profits in 1975 totaled $580.8 million and UI's $111.6 million.[7] In terms of assets, GE and UI ranked 11th and 159th, respectively, on the 1975 *Fortune* list.[8]

UI's principal business was mining coal, iron ore, uranium, and copper. Overseas mineral properties generated ninety percent of its earnings.[9] The company also had interests in land development, ocean shipping, and oil and gas properties. GE's primary business was in manufacturing electrical equipment, appliances, and various capital goods. Except for the possibility of some interaction between GE's activities in building atomic reactors and UI's interests in uranium mining, a small element of UI's business, the two firms' operations did not overlap. The deal represented a nearly pure conglomerate merger.[10] Moreover, the facts revealed no apparent efficiency justifications.[11]

After a lengthy investigation, the Department of Justice granted the merger a clearance.[12] The Antitrust Division con-

---

[5] *See* Kraar, *General Electric's Very Personal Merger*, FORTUNE, Aug. 1977, at 194.

[6] *See The Fortune Directory of the 500 Largest U.S. Corporations*, FORTUNE, May 1976, at 316, 318, 328.

[7] *Id.*

[8] *See id.*

[9] Kraar, *supra* note 5, at 187.

[10] A pure conglomerate merger is one in which the merging parties have neither a horizontal nor a vertical relationship; *i.e.*, they are neither competitors, nor supplier and customer. *See* E. ROCKEFELLER, ANTITRUST QUESTIONS AND ANSWERS 205 (1974).

[11] UI's chairman asserted that the merger would give his company access to GE's sophisticated research and development capabilities and other resources, thus enabling UI "to take advantage of more and greater opportunities in the mining field." *Boards of GE, Utah International Clear Talks for $1.9 Billion Merger*, Wall St. J., Dec. 16, 1975, at 2, col. 2. The chairman of GE explained his company's motivations in terms of enhancing international business and providing "a probable hedge" against inflation. *GE Sees Proposed Merger as Providing Inflation Hedge, Aid to Business Abroad*, Wall St. J., Dec. 18, 1975, at 18, col. 1. One observer concluded, however, that "[m]ore than anything else, this merger has in fact served to fulfill the needs and ambitions of the two men who conceived it." Kraar, *supra* note 5, at 187. UI's chairman, according to Kraar, sought a lessening of certain risks to UI shareholders—of which he was among the largest—and, rather than diversifying UI, "was willing to trade off some of his company's fantastic growth to get it." *Id.* GE's chairman "wanted to make a lasting imprint on his corporation." *Id.* GE, contrary to its general practice, is operating UI as a separate and independent subsidiary having little or no relation to the rest of the company. *Id.* at 194.

[12] *See Justice Dep't Gives Green Light to Revised GE-Utah International Merger*, [1976] ANTITRUST & TRADE REG. REP. (BNA) No. 783, at A-19. *See also Merger of GE, Utah International Fails to Gain Business Review Clearance*, [1976] ANTITRUST & TRADE REG. REP. (BNA) No. 774, at A-9.

fronted an obvious problem: the lack of an adequate legal-economic theory under section 7 of the Clayton Act to justify a challenge to the merger. Central to the application of section 7 in this context is the requisite finding that the merger "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly."[13] By focusing the key inquiry on possible anticompetitive effects, this requirement severely limits attacks upon conglomerate mergers.

Since the 1950's, when the trend in corporate mergers shifted from strictly horizontal or vertical combinations toward acquisitions aimed at diversifications,[14] the problem of controlling conglomerate mergers has intensified. In the wake of this trend, both the FTC and the Antitrust Division have attempted to use section 7 to block conglomerate mergers.[15] The Supreme Court's interpretation of the 1950 Celler-Kefauver amendment in *Brown Shoe Co. v. United States*[16] invited these efforts: "[B]y the deletion of the 'acquiring-acquired' language . . . [Congress] hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."[17] Other post-amendment decisions lent support to a liberal reading of the "substantially lessen competition" standard of section 7.[18]

---

[13] 15 U.S.C. § 18 (1976).

[14] *See* P. STEINER, MERGERS: MOTIVES, EFFECTS, POLICIES 154-57 (1975). Recent data suggest that the trend toward large conglomerate mergers still continues. *See* FTC BUREAU OF ECONOMICS, STATISTICAL REPORT ON MERGERS AND ACQUISITIONS 3, 105-06 (1977).

[15] *See, e.g.*, General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); United States v. White Consol. Indus., Inc., 323 F. Supp. 1397 (N.D. Ohio 1971).

[16] 370 U.S. 294 (1962).

[17] *Id.* at 317 (footnotes omitted).

[18] Although not a pure conglomerate merger, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), involved an expanded use of § 7. Consolidated, a food processor, wholesaler, and retailer, acquired Gentry, a producer of dehydrated onions and garlic. The Court found a § 7 violation based on the theory of reciprocity. Consolidated had informed its suppliers that, in return for Consolidated's business, they would be expected to buy from Gentry. This would foreclose other onion and garlic manufacturers from competing for the business of Consolidated's suppliers. *Id.* at 593-95, 600. *See also* United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966).

FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967), involved a product extension merger between the leading detergent producer and Clorox Chemical Co., manufacturer of the leading household liquid bleach. The Court found two bases for a § 7 violation: first, the merger would probably increase Clorox's advantage in the liquid bleach market by raising barriers to entry; and second, the merger resulted in the loss of potential compe-

As the combinations under review took on a purely conglomerate quality, however, courts began to reject section 7 attacks. In *United States v. Northwest Industries, Inc.*,[19] the Government sought a preliminary injunction to prevent the consolidation of Northwest Industries and B.F. Goodrich, two of the country's 100 largest corporations. Rejecting the Government's economic concentration argument, the court denied injunctive relief:

> While it is certainly more probable that the consolidation of two of the country's corporate giants may have anti-competitive results in one or more lines of commerce, the Government contends that they are inherent in such mergers because of the great economic power resulting therefrom even though there is no competitive relationship between them. . . .
>
> There may be very good reasons indeed to limit the growth of this country's largest corporations, particularly through mergers and acquisitions. . . . The law as it now stands, however, makes the adverse effect on competition the test of validity and until Congress broadens the criteria, the Court must judge proposed transactions on that standard.[20]

In *United States v. International Telephone and Telegraph Corp. (ITT)*,[21] section 7 litigation involving ITT's acquisition of Grinnell Corporation, the court found that the Government had failed to demonstrate a substantial lessening of competition:

> The Court declines the government's invitation to indulge in an expanded reading of the statutory language and holds that the statute means just what it says. It proscribes only those mergers the effect of which "may be substantially to lessen competition"; it commands that the alleged anticompetitive effects be

---

tition, since it eliminated Procter & Gamble as the most likely potential entrant into the bleach market. *Id.* at 578-79.

General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968), also rested on a liberal interpretation of § 7. The court upheld an FTC order that General Foods, a producer and distributor of packaged foods, divest itself of SOS, a leading soap pad producer. The Commission had found that General Foods' acquisition of SOS would substantially increase barriers to entry for potential entrants. 386 F.2d at 946-47. *Cf.* United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) (unsuccessful competing bidders held competitors under § 7); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (joint ventures within purview of § 7).

[19] 301 F. Supp. 1066 (N.D. Ill. 1969).

[20] *Id.* at 1096.

[21] 324 F. Supp. 19 (D. Conn. 1970). *See* 306 F. Supp. 766 (D. Conn. 1969) (denial of Government's motion for preliminary injunction), *appeal dismissed*, 404 U.S. 801 (1971).

examined in the context of specific product and geographic markets; and it does not proscribe those mergers the effect of which may be substantially to increase economic concentration.[22]

Even in the few cases holding that conglomerate mergers may violate the antitrust laws, the courts have focused on specific problems raised by the particular combination in issue, rather than on broader social and economic effects. For example, in *United States v. White Consolidated Industries, Inc.*,[23] the court enjoined a proposed conglomerate merger where the Government demonstrated that the resulting entity could possess inter-market leverage or "reciprocal" power.[24] Although noting the "new problems" associated with conglomerate mergers—such as increased economic concentration—the court confined its focus to traditional antitrust standards, declining to consider the Government's contention that the "size and structure of [the two merging firms] may have anti-competitive effects transcending any single product market."[25]

Neither *Northwest Industries,*[26] *ITT*,[27] nor the few cases finding Clayton Act violations[28] received Supreme Court review. As a result, the judicial posture regarding conglomerate mergers remains uncertain. Meanwhile, the scholarly debate has continued in full force.[29] Some advocate the complete legality of conglomerate mergers.[30] These observers believe not only that the mergers lack anti-

[22] 324 F. Supp. at 54. *See* United States v. International Tel. & Tel. Corp., [1971] TRADE CAS. (CCH) ¶ 73,619 (N.D. Ill.) (complaint challenging ITT's acquisition of Canteen Corp. dismissed on merits).

[23] 323 F. Supp. 1397 (N.D. Ohio 1971).

[24] *Id.* at 1398. The Third Circuit has also recognized the concept of reciprocity as a basis for disallowing conglomerate mergers. *See* Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc., 414 F.2d 506, 518-19 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); United States v. Ingersoll-Rand Co., 320 F.2d 509, 524-25 (3d Cir. 1963).

[25] 323 F. Supp. at 1400.

[26] *See* notes 19-20 and accompanying text *supra*.

[27] *See* United States v. International Tel. & Tel. Corp., [1971] TRADE CAS. (CCH) ¶ 73,665 (D. Conn.) (consent decree in litigation over ITT's acquisition of Grinnell Corp.). *See also* United States v. International Tel. & Tel. Corp., [1971] TRADE CAS. (CCH) ¶ 73,666 (D. Conn.) (consent decree in litigation over ITT's acquisition of Hartford Fire Insurance Co.); United States v. International Tel. & Tel. Corp., [1971] TRADE CAS. (CCH) ¶ 73,667 (N.D. Ill.) (consent decree in litigation over ITT's acquisition of Canteen Corp.).

[28] *See* notes 23-25 and accompanying text *supra*.

[29] *See, e.g.*, P. STEINER, *supra* note 14; Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555 (1973); Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231 (1968); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965).

[30] *See* Coase, Working Paper for the Task Force on Productivity and Competition: The Conglomerate Merger, 115 CONG. REC. 15,938 (1969); Bicks, Comegys, Jr. & Lewis, *Con-*

competitive effect, but also that they occur solely because of economic efficiencies. Donald Turner, prior to taking charge of the Justice Department's Antitrust Division, took a less extreme position, and argued that weak quantitative information on the effects of large corporate acquisitions required antitrust prosecutors to proceed with caution against conglomerate mergers. "[O]ne cannot support an attack of much greater breadth on conglomerates," Turner stated, "without trenching on significant economic and other values, and therefore without an unprecedented reliance on judgments of an essentially political nature."[31] Furthermore, according to Turner, Congress properly minimized the courts' burden of balancing social and economic interests by focusing attention on anticompetitive effect:

> I do not believe Congress has given the courts and the FTC a mandate to campaign against "superconcentration" in the absence of any evidence of harm to competition. In light of the bitterly disputed issues involved, I believe that the courts should demand of Congress that it translate any further directive into something more formidable than sonorous phrases in the pages of the Congressional Record.[32]

Professor Blake, on the other hand, contends that any substantial acquisition by a large firm injures competition.[33] He argues that section 7 is therefore applicable to large conglomerate mergers regardless of the extent to which the businesses of the merging

---

*glomerate Mergers Under Section 7 of the Clayton Act*, 28 Bus. Law. 83, 99 (1973). *But see* Federal Trade Commission, Economic Report on Conglomerate Mergers 69-119 (1969) (app. to pt. 8 of *Hearings Pursuant to S. Res. 40 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969)) (empirical evidence suggests that 1960's merger movement not explainable in terms of performance criteria); Blair, *The Conglomerate Merger in Economics and Law*, 46 Geo. L.J. 672, 679-83 (1958) (conglomerate acquisitions have little claim to promoting economic efficiency).

[31] Turner, *supra* note 29, at 1394.

[32] *Id.* at 1395. Turner's argument that courts cannot repudiate the Clayton Act's competition-based standard is valid. It does not follow, however, that the FTC may not invoke the Federal Trade Commission Act to challenge conglomerate mergers on grounds other than anticompetitive effect. It is important to remember that Turner was examining conglomerate mergers within a traditional antitrust framework, focusing on the prohibition of substautial anticompetitive effects. It was not until National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), that a court held that the FTC had the power to promulgate rules having the effect of substantive law—*i.e.*, "rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent." *Id.* at 698. Congress has since confirmed the FTC's power to engage in substantive rulemaking under the "unfair or deceptive acts or practices" clause of § 5 of the Federal Trade Commission Act. *See* notes 98 & 136 *infra*.

[33] *See* Blake, *supra* note 29.

firms overlap.[34] Blake states that one of the primary purposes of the 1950 Celler-Kefauver amendment was "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisition."[35] Furthermore, "from the economic data discussed in the hearings, it is clear that 'economic concentration' referred to more than concentration in particular markets."[36] Blake therefore advocates a strong presumption of illegality where both merging parties are large.[37]

In sum, there is a broad spectrum of opinion on the possible adverse consequences of large conglomerate mergers.[38] From our own standpoint, we do not regard it as proven that large conglomerate mergers lack the requisite anticompetitive potential for the purposes of section 7 of the Clayton Act; indeed, strong arguments exist to the contrary.[39] However, to quickly bring conglomerate mergers under effective legal control, we urge bypassing the anticompetitiveness question and formulating a fresh approach.

As a first step, regulators and commentators should shift attention away from the restrictive analytical model of section 7 with its focus on potential anticompetitive effects, and ask instead whether massive corporate consolidations produce any demonstrable economic benefits. It is true that such mergers may occur because they produce real economies or efficiencies for the parties. However, mergers may also occur because—without producing serious *inefficiencies*—they add to the prestige or wealth of those who control a corporation,[40] or because they are advantageous for tax, accounting, or securities reasons.[41] Indeed, many commentators

---

[34] *See id.* at 566-67.

[35] *Id.* at 585 (quoting S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950)).

[36] Blake, *supra* note 29, at 585 (footnote omitted).

[37] *See id.* at 560; Mueller, *Conglomerates: A "Nonindustry"*, in THE STRUCTURE OF AMERICAN INDUSTRY 442, 477 (5th ed. W. Adams 1976).

[38] It is worth noting that opponents of conglomerate mergers tend to approach the subject from a social policy standpoint. In contrast, those advocating the legality of such mergers usually take a more economic approach, with the apparent view that a combination having no significant, discernible anticompetitive potential must, *ipso facto*, be desirable. *Compare* Blake, *supra* note 29, *with* Coase, *supra* note 30. Although the logic of this latter position derives from § 7 of the Clayton Act, it is not necessarily convincing when the conglomerate merger problem is viewed as a matter of social—as well as economic—concern.

[39] *See* Blake, *supra* note 29, at 564-70; Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331 (Nat'l Bureau Econ. Research ed. 1955); Mueller, *supra* note 37.

[40] *See* P. STEINER, *supra* note 14, at 75-127.

[41] *See id. See also* Winter, *Conservative Firms Bent on Profit Growth Join the Merger Chase*, Wall St. J., April 11, 1978, at 1, col. 6.

have suggested that although inefficiency is a constraint on corporate conduct, corporate decisions frequently rest on considerations other than efficiency.[42] In large conglomerate mergers, such as the General Electric-Utah International combination,[43] each party is often already a leader in its market and of sufficient magnitude to enjoy all economies of scale. It is our belief—and that of many economists—that most conglomerate mergers are based on such non-efficiency grounds and produce no significant or lasting economic advantages.[44] The only efficiency argument in favor of conglomerate mergers that we have seen is that the threat of acquisition may produce more efficient conduct on the part of target firms, and that the introduction of new management may result in more efficient use of acquired firms' resources.[45] Even if this were true, however—and we are by no means sure that it is—it does not follow that the acquiring firms should be permitted to keep all of their existing assets in addition to the newly acquired ones. In our view, conglomerate mergers generally produce adverse social and political consequences by augmenting the vast political power already possessed by large economic entities, by further centralizing control over business assets, and by placing control over business operations in the hands of even more distant managers.[46] Despite these justifications for regulation, to the best of our knowledge, no one has yet undertaken a careful examination of whether any statute, aside from the Clayton Act, reaches these socially counterproductive combinations.[47]

---

[42] *See* W. BAUMOL, BUSINESS BEHAVIOR, VALUE AND GROWTH (rev. ed. 1967); E. PENROSE, THE THEORY OF THE GROWTH OF THE FIRM 158-61 (1959); Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253, 262-65 (1959).

[43] *See* notes 4-11 and accompanying text *supra*.

[44] *See* Blair, *supra* note 30; Mueller, *supra* note 37; Scherer, Book Review, 86 YALE L.J. 974, 987-88 (1977) (large mergers contribute little to productive efficiency). *But cf.* Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1197 (1977) (conglomerate form of business encourages takeover threats, thus promoting managerial efficiency). Moreover, even where a merger does produce efficiencies, this does not establish that those efficiencies could not have been achieved by other means. *See* United States v. Third Nat'l Bank, 390 U.S. 171, 189-92 (1971).

[45] *See* P. STEINER, *supra* note 14, at 68-69; Elzinga, *supra* note 44, at 1197.

Although we do not pause to consider at length the possibility of other intrinsic benefits resulting from large conglomerate mergers (*see* note 134 *infra*), none immediately occur to us. In any case, we believe that in light of the visible negative effects of large conglomerate mergers, proponents should bear the burden of demonstrating that positive benefits will generally result.

[46] *See* notes 120-34 and accompanying text *infra*.

[47] Subsequent to the preparation of this Article, but prior to its publication, the FTC began to consider the possibility of using § 5 of the Federal Trade Commission Act to

## II

## The Meaning of the "Unfair" Standard in the Federal Trade Commission Act

In 1915, Congress adopted the Federal Trade Commission Act[48] and the Clayton Act[49] in a double-barrelled effort to supplement the Sherman Act.[50] Although the Clayton Act was second in order of final adoption, both houses considered the two Acts together as part of a single legislative program of strengthening the antitrust laws.[51] Thus, passage of the Clayton Act following enactment of the FTC Act did not indicate that Congress considered the FTC Act inapplicable to mergers.

The Clayton Act set forth a series of prohibitions aimed at specific forms of objectionable conduct, such as price discrimination,[52] tying,[53] anticompetitive mergers and acquisitions,[54] and interlocking directorates.[55] The Act also provided for a broad array of enforcement mechanisms: criminal penalties,[56] actions by the Justice Department to enjoin violations,[57] cease and desist orders to be issued by the FTC and certain other agencies,[58] and private actions for treble damages and equitable relief.[59]

In providing a general standard to be implemented exclusively by agency action,[60] section 5 of the Federal Trade Commission Act embodied an entirely different approach. As originally enacted the statute provided: "[U]nfair methods of competition in commerce

---

challenge conglomerate mergers. *See FTC's Dougherty Envisions Challenges to Conglomerate Mergers by Leading Firms*, [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 848, at AA-1.

[48] Ch. 311, §§ 1-7, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58 (1976)).

[49] Ch. 323, §§ 1-26, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1976)).

[50] Ch. 647, §§ 1-8, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

[51] "[B]oth [§ 7 of the Clayton Act and § 5 of the Federal Trade Commission Act] were enacted by the 63d Congress, and both were designed to deal with closely related aspects of the same problem—the protection of free and fair competition in the Nation's marketplaces." United States v. American Bldg. Maintenance Indus., 422 U.S. 271, 277 (1975).

[52] 15 U.S.C. § 13 (1976).

[53] *Id.* § 14.

[54] *Id.* § 18.

[55] *Id.* § 19.

[56] *Id.* § 24.

[57] *Id.* § 25.

[58] *Id.* § 21.

[59] *Id.* §§ 15, 26.

[60] Courts have held with near uniformity that private plaintiffs do not have a right of action under § 5. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973). *But see* Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Ind. 1976), *noted in* 29 VAND. L. REV. 1077 (1976).

are hereby declared unlawful."[61] On its face this language evinces an attempt to authorize the FTC to attack a wide variety of undesirable business conduct. Moreover, the Act's legislative history confirms the conclusion that Congress used sweeping language to avoid limiting the applicability of the Act to a particular practice or category of practices.[62] The Senate Report stated:

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define . . . .[63]

Despite this legislative history, courts at first hesitated to broadly define FTC power under section 5. In *FTC v. Gratz*,[64] for example, the Supreme Court refused to uphold a charge of unfairness in connection with a tying arrangement because the Commission had failed to demonstrate that the arrangement tended toward monopoly or substantially lessened competition. The Court stated that the epithet "unfair" was "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as

---

[61] Ch. 311, § 5, 38 Stat. 719 (1914) (current version at 15 U.S.C. § 45(a)(1) (1976)).

[62] *See* S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. 18-19 (1914). The House Report found it "impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field . . . . If Congress were to adopt the method of definition, it would undertake an endless task." *Id.* at 19. *See* FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 394-95 (1953) (dicta); Fashion Originators' Guild v. FTC, 312 U.S. 457, 463, 466 (1941) (dicta); Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 Vill. L. Rev. 517, 527-42 (1962); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 680-81 (1977); Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Proc. Acad. Pol. Sci. 666, 667-70 (1926); Thain, *Suffer the Hucksters to Come unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the Federal Trade Commission Act*, 56 B.U. L. Rev. 651, 656 (1976).

[63] S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914). There is, however, some evidence that Congress viewed § 5 primarily as a mechanism for combatting anticompetitive and monopolistic practices. *See* G. Henderson, The Federal Trade Commission 33-38 (1924). *But cf.* Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919) (§ 5 prohibits practices that "have . . . a tendency to injure competitors directly or through deception of purchasers").

[64] 253 U.S. 421 (1920).

against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[65]

*FTC v. Raladam Co.*[66] represented an even more restrictive reading of the unfairness standard. The case involved a corporate defendant who had advertised as "safe" a potentially lethal medicinal product. The Supreme Court rejected the FTC's unfairness attack, holding that because "[t]he paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree,"[67] the challenged conduct fell outside the ambit of section 5. "Unfair trade methods," said the Court, "are not *per se* unfair methods of *competition*."[68]

Just three years after *Raladam*, however, the Supreme Court reversed its field. In *FTC v. R.F. Keppel & Bro., Inc.*,[69] the Court reasoned that the practice of selling penny candy in "break and take"[70] packages was unfair within the meaning of section 5:

> [H]ere the competitive method is shown to exploit consumers, children, who are unable to protect themselves. . . . Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice . . . it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. . . . It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not "unfair."[71]

In shifting the focus of the unfairness concept to protection of the public, and away from protection of the wrongdoer's competitors, *Keppel* largely undermined *Raladam*. Yet even in *Keppel* the Court construed section 5 quite narrowly, requiring a reasonably strong showing that the conduct in issue contravened some explicit public policy.[72]

---

[65] *Id.* at 427.

[66] 283 U.S. 643 (1931).

[67] *Id.* at 647-48.

[68] *Id.* at 649 (emphasis in original).

[69] 291 U.S. 304 (1934).

[70] "Break and take" merchandising induced children to buy inferior candy in the hope of obtaining, by chance, bonus packs containing extra candy and prizes. *See id.* at 307.

[71] *Id.* at 313.

[72] The Court noted, for example, that the FTC found the challenged practice involved an element of gambling which diverted young children from other manufacturers' goods. *See id.* at 307-08.

The Wheeler-Lea amendment[73] of 1938 finally settled the question of whether section 5 proscribed only anticompetitive conduct. The amendment broadened the section's original prohibition against "unfair methods of competition" to include "unfair or deceptive acts or practices."[74] The House Report stated: "[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor."[75] After passage of the amendment, "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws . . . ."[76]

*FTC v. Sperry & Hutchinson Co. (S & H)*[77] demonstrates the current scope of the section 5 unfairness standard. In *S & H*, the Supreme Court held that the FTC could condemn under section 5 Sperry & Hutchinson's practice of seeking injunctions against business establishments which, without authorization, redeemed or exchanged S & H Green Stamps. The case explicitly established FTC authority to prosecute cases under section 5 even in the absence of consumer deception or acts contravening the letter or spirit of the antitrust laws.[78]

---

[73] Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (amending Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719) (codified at 15 U.S.C. § 45(a)(1) (1976)).

[74] The current text of the statute is set out in note 2 *supra*.

In assessing conglomerate mergers, one need not apply separately the two prongs of § 5's unfairness standard. Conglomerate mergers may be deemed both "unfair methods of competition" (insofar as they contradict the spirit, if not the letter, of the antitrust laws) and "unfair acts" (insofar as they produce consequences adverse to society in general). We would argue that in tandem these prohibitions bring large conglomerate mergers within the purview of § 5. Such a "joint application" of the two clauses finds some support in FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972) (Court seems to mix two clauses in developing liberal test) (*see* text following note 89 *infra*), and best comports with the Commission's characterization of § 5 as a "dynamic analytical tool." *See* text accompanying note 79 *infra*. But even if such an approach is rejected, we believe that § 5's prohibition of "unfair or deceptive acts or practices" independently covers large conglomerate mergers.

[75] H.R. REP. No. 1613, 75th Cong., 1st Sess. 3 (1937). *See* S. REP. No. 1705, 74th Cong., 2d Sess. 2-3 (1936).

[76] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972). *See* Pitofsky, *supra* note 62, at 680-81; Thain, *supra* note 62, at 658-60; Comment, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 WIS. L. REV. 1071, 1078. *See also* Scientific Mfg. Co. v. FTC, 124 F.2d 640, 643-44 (3d Cir. 1941).

[77] 405 U.S. 233 (1972).

[78] In *S & H* the Court cited with approval three factors that the FTC considered useful in determining whether a practice that neither violates the antitrust laws nor deceives consumers may nonetheless be deemed unfair:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of

In sum, the last half-century has witnessed a dramatic growth in the reach of section 5. As the FTC has stated, the unfairness concept "is potentially a dynamic analytical tool capable of a progressive, evolving application which can keep pace with a rapidly changing economy."[79] Of course, the FTC is not free to roam the economic landscape, condemning whatever it dislikes.[80] The Commission must relate its action to the policies underlying regulation of commerce. This burden can be discharged, however, by a coherent statement of reasons showing the incompatibility of the al-

---

> some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

*Id.* at 244 n.5 (quoting 29 Fed. Reg. 8355 (1964)). Apparently, not all three factors need be present to support an unfairness charge, nor are the three factors exclusive. *See* Thain, *supra* note 62, at 659. *But see* Comment, *Psychological Advertising: A New Era of FTC Regulation*, 1972 WIS. L. REV. 1097, 1107-08.

[79] Pfizer, Inc., 81 F.T.C. 23, 61 (1972). However, the Commission has refused to uphold unfairness charges not supported by "substantial, reliable and probative evidence." *See, e.g.*, ITT Continental Baking Co., 83 F.T.C. 865, 939 (1973).

[80] In attempting to define its approach to the unfairness standard, the FTC staff, in two recent rulemaking reports, has propounded a two-step analysis. First, "[i]t must be determined that prohibiting the practice provides greater social or economic benefit than permitting the practice to continue"; and second, "[i]t must be determined that the prohibition of a practice . . . is warranted as a legal constraint. This involves the discovery and definition . . . of the 'public values beyond . . . the antitrust laws.'" FTC BUREAU OF CONSUMER PROTECTION, STAFF REPORT ON ADVERTISING OF OPHTHALMIC GOODS AND SERVICES 216, 217 (1977) [hereinafter cited as OPHTHALMIC GOODS REPORT] (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. at 244). *Accord*, FTC BUREAU OF CONSUMER PROTECTION, PRESCRIPTION DRUG PRICE DISCLOSURES, Ch. V. A., at 7-8 (1974). The 1977 Report is even more explicit in recognizing that consideration of social benefits and costs—as well as purely economic ones—should figure into the Commission's decisions. This presumably reflects the evolution of staff thinking toward a more broadly defined concept of unfairness.

Nevertheless, both staff reports indicate that the FTC can apply its unfairness test to only a fairly narrow range of traditional "consumer" interests. *See id.* at 7; OPHTHALMIC GOODS REPORT, *supra*, at 214-15. Arguably, our concern with conglomerate mergers that lack discernible "anticompetitive" effects goes beyond the purely economic interests of consumers. It may, therefore, be important to our analysis that the relevant interests of consumers be broadly enough defined to include an interest in averting socially undesirable corporate combinations. We believe that such a broad delineation of consumer interests best complements the Commission's view of § 5 as a "dynamic analytical tool" designed to deal with social, as well as economic, evils. *See* text accompanying note 79 *supra*. Moreover, the value of the staff reports as an accurate indicator of FTC sentiment is questionable on two grounds. First, the substantive issues addressed in the reports were ones of traditional consumer concern; in this setting, there was no reason for the Commission staff to broaden its definition of consumer interests. And second, the Commission has always viewed the unfair act standard as particularly applicable to traditional consumer protection problems; thus, it may well be that the Commission has never really considered whether the scope of consumer interests might be expanded.

leged misconduct with the Commission's mandate to protect the public interest.[81]

## III

## APPLICATION OF SECTION 5 TO ANTITRUST MATTERS

The Supreme Court has long recognized that section 5 authorizes the FTC not only to enforce the specific commands of the Sherman and Clayton Acts, but also to halt "in their incipiency . . . trade restraints and practices deemed undesirable."[82] Some circuits have been reluctant to recognize the broad scope of FTC authority,[83] but numerous Supreme Court cases indicate that the Commission has broad discretion to determine whether conduct is unfair in light of the general policies of the antitrust laws.[84] Even in

---

[81] The Supreme Court has repeatedly held that "the Commission has broad powers to declare trade practices unfair." FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966). *See* Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369 (1965); FTC v. Cement Inst., 333 U.S. 683, 693 (1948). *But see* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971):

> We stand on the threshold of a new era . . . . For many years, courts have treated administrative policy decisions with great deference . . . . On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise.
>
> . . . .
>
> . . . Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions . . . .

*Id.* at 597-98 (footnote omitted).

[82] Fashion Originators' Guild v. FTC, 312 U.S. 457, 466 (1941). Thus, in FTC v. Cement Inst., 333 U.S. 683, 708-09 (1948), the Court upheld the Commission's condemnation of base-point pricing even though the Commission did not assert that the conduct violated the Sherman Act.

[83] *See, e.g.*, Texaco, Inc. v. FTC, 383 F.2d 942 (D.C. Cir. 1967), *rev'd*, 393 U.S. 223 (1968); Tag Mfrs. Inst. v. FTC, 174 F.2d 452, 465 (1st Cir. 1949).

[84] *See, e.g.*, FTC v. Brown Shoe Co., 384 U.S. 316 (1966); FTC v. Motion Picture Adv. Serv., 344 U.S. 392, 394-95 (1953). Litigation involving the major gasoline companies' practices in the sale of tires, batteries, and accessories (TBA) to their dealers is illustrative. In Texaco, Inc. v. FTC, 383 F.2d 942 (D.C. Cir. 1967), *rev'd*, 393 U.S. 223 (1968), the court of appeals held that evidence of anticompetitive effects could not be automatically inferred where Texaco, one of the nation's largest oil companies, induced its dealers—without overt coercion—to purchase TBA from a specified supplier in return for a commission paid by the supplier to Texaco. The Supreme Court reversed, holding that the arrangement was "inherently coercive" and that "the essential anticompetitive vice" was "the utilization of economic power in one market to curtail competition in another." 393 U.S. at 229-30 (1968) (quoting Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369 (1965)). The Court stated:

these cases, however, both the Commission and the Court found the disputed conduct at least potentially anticompetitive, and at least implicitly made such a finding an essential element of unfairness analysis in cases where the antitrust laws would otherwise govern.[85] Thus, despite its refusal to sanction circuit court limitations on FTC power, the Supreme Court, without apparent FTC objection, perpetuated a narrow view of the Commission's authority in the antitrust area.

In 1972, however, a crucial shift occurred. The Fifth Circuit, in *Sperry & Hutchinson Co. v. FTC*,[86] had reversed an FTC order requiring S & H to cease its attempts to block formation of exchanges where consumers could trade, buy, or sell various brands of trading stamps. In reversing the FTC's finding of unfairness, the circuit court held that the "unfair competition" standard condemned only three types of conduct: "(1) a per se violation of antitrust policy; (2) a violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts; or (3) a violation of the spirit of these Acts as recognized by the Supreme Court."[87] S & H's conduct, according to the Fifth Circuit, fell into none of these categories, and was therefore not unfair.[88]

Writing for a unanimous Supreme Court, Justice White rejected the Fifth Circuit's narrow reading of section 5:

---

> While the success of this arrangement in foreclosing competitors from the TBA market has not matched that of the direct coercion employed by Atlantic, we feel that the anticompetitive tendencies of such a system are clear, and that the Commission was properly fulfilling the task that Congress assigned it in halting this practice in its incipiency. The Commission is not required to show that a practice . . . has totally eliminated competition . . . . It is enough that the . . . practice in question unfairly burdened competition for a not insignificant volume of commerce.

393 U.S. at 230.

The Supreme Court did not view the marketing practices involved in the TBA cases as tie-in arrangements prohibited by § 3 of the Clayton Act or § 1 of the Sherman Act since the refiners did not overtly condition gasoline sales and dealership grants on dealer purchases of TBA from the designated suppliers. *See* Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369 (1965) (dictum). Attempts to seek relief on this theory were unsuccessful in the court of appeals. *See* Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964), *aff'd sub nom.* Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965). Thus, a business practice can constitute a violation of § 5 even though it does not violate the Sherman or Clayton Acts.

[85] *See* FTC v. Texaco, Inc., 393 U.S. 223, 225-31 (1968); FTC v. Brown Shoe Co., 384 U.S. 316, 320-22 (1966); Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369-71 (1965); FTC v. Motion Picture Adv. Serv., 344 U.S. 392, 394-95 (1953); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175, 181 (7th Cir. 1948), *aff'd per curiam sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

[86] 432 F.2d 146 (5th Cir. 1970), *rev'd*, 405 U.S. 233 (1972).

[87] 432 F.2d at 149-50 (footnote omitted).

[88] *Id.* at 150.

> [T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[89]

In taking this stance, the Court emphasized the section 5 prohibition of "unfair or deceptive acts or practices," although it did not fully separate that phrase from the older "unfair methods of competition" clause. In the pre-*S & H* period, the Commission had apparently taken a narrow view of unfairness, at least in matters unrelated to traditional consumer protection.[90] The *S & H* case, in a marked departure from this approach, established that a finding of unfairness—even in an antitrust-related area—does not require a demonstration of anticompetitive effect or potential; the challenged conduct need only contravene an identifiable public policy, which need not even spring from the antitrust laws.[91]

There are those who read the history of section 5 differently. A. Everette MacIntyre, while still a Federal Trade Commissioner, coauthored an article in which he argued that *S & H* merely confirmed that practices unfair to consumers need not have anticompetitive effects to constitute a violation of section 5.[92] MacIntyre thus read *S & H* narrowly, viewing the decision only in terms of consumer protection. Professor Oppenheim, writing prior to *S & H*, argued that although section 5 clearly supplements the Sherman Act, it supplements the Clayton Act only to the extent that it is used as a vehicle for applying Clayton Act standards to conduct proscribed by the Act's substantive provisions, but outside its jurisdic-

[89] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (footnote omitted). Justices Powell and Rehnquist did not participate in consideration of the case. *Id.* at 234. Even activities authorized by state law have been held subject to § 5's unfairness standard. *See, e.g.*, Spiegel, Inc. v. FTC, 540 F.2d 287, 292-93 (7th Cir. 1976) (unfair use of Illinois long-arm statute).

[90] *See* note 85 and accompanying text *supra*.

[91] *See* 405 U.S. at 243-44. Interestingly enough, although the Court did not view the S & H practice of limiting aftermarkets in its stamps as an antitrust violation, similar practices by S & H have since been found to contravene § 1 of the Sherman Act. *See* Eastex Aviation, Inc. v. Sperry & Hutchinson Co., 522 F.2d 1299 (5th Cir. 1975).

[92] *See* MacIntyre & Volhard, *The Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407, 442 (1973). This article focused on the FTC's "mandate to halt trade restraints in their incipiency" (*id.* at 409), and suggested that the Commission had broad—but not fully explored—powers in this regard. *See id.* at 443-44; Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULL. 161 (1960); Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?*, 5 ANTITRUST BULL. 533 (1960).

tional bounds.[93] Both of these interpretations, however, reflect the hesitancy of antitrust-oriented commentators to shift their focus from economic to broader social and political concerns. More important, they fail to fully take into account the sweeping language of section 5.[94]

*S & H* teaches another useful lesson. Despite its expansive reading of section 5, the Court remanded the case to the FTC for further proceedings because the FTC had failed to relate its actions to a general finding of unfairness. Rather, the Commission had attempted to force the case into the traditional antitrust mold.[95] Although the Court agreed that the record supported a finding of unfairness, it insisted that the Commission "[link] its findings and its conclusions. The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. *Nor were any standards for doing so referred to or developed.*"[96] Thus, the Commission may be obligated and certainly would be well-advised to develop standards governing agency action in applying the broad concept of unfairness.[97] Providing

---

[93] *See* Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821 (1961). "[T]he Commission has jurisdiction under section 5 to attack incipient or consummated Sherman Act offenses." *Id.* at 826. However, § 5 "supplements the Clayton Act . . . only when . . . used to reach transactions and practices *economically equivalent* to those particularized by the Clayton Act but not within its coverage because of a jurisdictional deficiency." *Id.* at 844 n.68 (emphasis in original).

[94] Although the courts have not explicitly dealt with the application of § 5 to mergers, the FTC has in the past included a § 5 charge in some complaints in addition to alleging a violation of § 7 of the Clayton Act. *See, e.g.*, FTC v. Dean Foods Co., 384 U.S. 597, 599 (1966). The purpose of the § 5 charge in these cases was to enable the Commission to challenge acquisitions of noncorporate assets. More recently, however, the FTC has appeared to include such a charge as a matter of course in merger cases. *See, e.g.*, FTC v. Food Town Stores, 539 F.2d 1339, 1341-42 (4th Cir. 1976); FTC v. British Oxygen Co., 529 F.2d 196, 197-98 (3d Cir. 1976).

In addition, there is good reason to believe that the FTC has the authority under § 5 to order divestiture. Although the only Supreme Court case holds to the contrary (*see* FTC v. Eastman Kodak Co., 274 U.S. 619 (1927)), a subsequent case involving a similar statute declared that such a power existed. *See* Pan Am. World Airways v. United States, 371 U.S. 296, 312-13 & nn.17-18 (1963). Moreover, the Court has described the *Kodak* holding as "repudiated" (FTC v. Dean Foods Co., 384 U.S. 597, 606 n.4 (1966)), and the FTC shares this view. *See In re* Golden Grain Macaroni Co., 78 F.T.C. 154 (1971), *aff'd*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

[95] 405 U.S. at 246.

[96] *Id.* at 248 (emphasis added).

[97] Rulemaking often provides a mechanism of developing and articulating legal standards that is preferable to litigation. *See* Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 390-91 (1964).

such notice to the business community will help ensure fair application of the unfairness standard. In addition, it will further enforcement goals by reducing inadvertent violations of section 5.[98]

## IV

## LARGE CONGLOMERATE MERGERS AS UNFAIR ACTS

Before the FTC condemns a practice as unfair, it must demonstrate not only that the challenged conduct serves no useful purpose, but also that it contravenes identifiable public policy. At least

---

[98] One last possible objection to a broad reading of § 5 stems from the 1975 amendments to the FTC Act. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 57a (1976)). The amendments delineate procedures that the Commission must follow in promulgating unfairness standards and rules. The Commission must follow certain procedures for the adoption of "rules which define with *specificity* acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a(a)(1)(B) (1976) (emphasis added). However, it can pronounce "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices" without observing the new procedures. *Id.* § 57a(a)(1)(A). Finally, the amendments provide that they "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition." *Id.* § 57a(a)(2). The amendments thus draw a distinction between "unfair methods of competition" and "unfair or deceptive acts or practices."

Since a purpose of the new section was to regulate rulemaking concerning sellers' activities (*see, e.g.*, H.R. REP. No. 1107, 93d Cong., 2d Sess. 32-33, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7714-15), one might conclude that "unfair or deceptive acts or practices" applies only to ongoing practices, and that structural antitrust matters, such as mergers, are exclusively covered by the phrase "unfair competition." This interpretation would resurrect the pre-*S & H* reading of § 5 by requiring some actual or potential anticompetitive effect for conduct to be deemed unfair, except in the case of sales practices.

Nothing in the legislative history, however, supports such an interpretation. *See* H.R. REP. No. 1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702. Moreover, in Illinois Brick Co. v. Illinois, 431 U.S. 720, 733-34 n.14 (1977), the Supreme Court rejected the use of legislative history of a closely related act as relevant to construction of a previously enacted provision. In the context of § 5, such "subsequent history" is, in any case, of no significance. Congress, in passing the 1975 amendments, was focusing on the problems arising from FTC efforts to promulgate certain rules of conduct, and sought to develop a rulemaking process that would serve this goal effectively. *See* H.R. REP. No. 1107, 93d Cong., 2d Sess. 32-34, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7714-16; Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 686-90 (1976). In so doing, Congress subjected a wide-ranging category of activities to special rulemaking procedures. Section 57a does not seek to confine the broad sweep of FTC authority to declare business practices unfair; it merely mandates the use of certain procedures before that authority is exercised. Thus, the 1975 amendments do not undercut our argument that § 5's prohibition of unfair acts covers conglomerate mergers. They only delineate the process of converting our proposal into practice.

four separate sources suggest the existence of a public policy against large conglomerate mergers: the Clayton Act, a pervasive skepticism running throughout the antitrust laws of excessive size and control, the concept of federalism with its emphasis on the decentralization of power, and the general social undesirability inherent in large conglomerate mergers. This Article suggests that, taken together, these sources justify treatment of large conglomerate mergers as unfair acts within the meaning of section 5 of the Federal Trade Commission Act.

### A. *The Clayton Act*

In 1950 Congress amended section 7 of the Clayton Act. Although Congress clearly intended to expand the Act's coverage,[99] it retained probable anticompetitive effect as the standard of illegality. This limitation made sense in 1950. At that time, horizontal and vertical combinations constituted the vast majority of American mergers. Conglomerate mergers were rare. It therefore is not surprising that Congress retained the statutory language requiring potential anticompetitiveness, since the combinations that then concerned Congress—horizontal or vertical mergers involving large business entities—easily satisfied this requirement.[100] In addition, the requirement gave judges applying the Clayton Act a sufficiently definite standard with which to evaluate the legality of these combinations. Underlying the standard, however, was a more general concern with the problem of economic concentration and the elimination of independent businesses.[101] The language of the Clayton Act makes it difficult to challenge conglomerate acquisitions not because Congress approved of them, but because, in revis-

---

[99] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 316-23 (1962); S. Rep. No. 1775, 81st Cong., 2d Sess. 2, *reprinted in* [1950] U.S. Code Cong. Serv. 4293, 4295; H.R. Rep. No. 1191, 81st Cong., 1st Sess. 5-6 (1949); Blake, *supra* note 29, at 584-85. For discussions of whether courts applying § 7 can develop standards by which to measure noneconomic value, compare Bork & Bowman, *The Crisis in Antitrust*, 65 Colum. L. Rev. 363 (1965), with Jones & Blake, *In Defense of Antitrust, id.* at 377, and Blake & Jones, *Toward a Three-Dimensional Antitrust Policy, id.* at 422.

[100] *See* S. Rep. No. 1775, 81st Cong., 2d Sess. 2, *reprinted in* [1950] U.S. Code Cong. Serv. 4293, 4297; H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

[101] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 316-23 (1962); S. Rep. No. 1775, 81st Cong., 2d Sess. 2-3, *reprinted in* [1950] U.S. Code Cong. Serv. 4293, 4295; H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2-5 (1949); Blake, *supra* note 29, at 570-90. *See also* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 230-33 (1960). The process of aggregate concentration has continued in the 25 years since the amendment. *See* Leonard, *Mergers, Industrial Concentration, and Antitrust Policy*, 10 J. Econ. Issues 354, 355-57 (1976).

ing the statute, Congress addressed only those types of mergers that then posed a threat to the economy.[102] Indeed, the 1950 Clayton Act amendments at least in part *caused* the shift from vertical and horizontal mergers to conglomerate combinations.[103] This unintended result illustrates precisely why Congress in 1914 used both specific statutory prohibitions and general delegations of administrative authority in attempting to eradicate undesirable business practices.[104]

### B. *General Antitrust Policy*

Discernible in the antitrust laws and their judicial interpretation is a broad policy favoring decentralization of economic power.[105] This policy underlies and at least partly explains many areas of case law. For example, even a scheme of antitrust regulation focusing only on anticompetitive effects necessarily raises questions about any merger; by destroying the existence of independent business entities, mergers threaten the multiplicity of profit-seekers upon which our competitive economy depends.[106]

The concept of the least restrictive alternative, commonly invoked in rule-of-reason inquiries, also reflects this broad concern: because society values freedom and flexibility so highly, it will pay

---

[102] Some commentators believe that Congress may have viewed all large mergers as sufficiently anticompetitive to be illegal. *See, e.g.*, Blake, *supra* note 29, at 579-85; Bok, *supra* note 101, at 230-33. Economic arguments exist to justify this view. *See* Edwards, *supra* note 39, at 331-52; Markovits, *A Response to Professor Posner*, 28 STAN. L. REV. 919, 927-28 (1976); Mueller, *supra* note 37, at 461-76.

[103] "During 1951-1958, about 75 percent (measured in assets) of all acquisitions by corporations with $1 billion in assets involved horizontal mergers. In subsequent years this percentage dwindled—to below 10 percent by the late 1960s." Mueller, *Antitrust in a Planned Economy: An Anachronism or an Essential Complement?*, 9 J. ECON. ISSUES 159, 168-69 (1975). *See also* FTC BUREAU OF ECONOMICS, *supra* note 14, at 98, 105.

[104] For a discussion of the dual framework of the Clayton Act and § 5 of the Federal Trade Commission Act, see notes 48-63 and accompanying text *supra*.

[105] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 316, 333 (1962) (Warren, C.J.); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) (Hand, J.); A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 429-31 (2d ed. 1970); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 2, at 11 (1977); Blake, *supra* note 29, at 574-79; Dewey, *The New Learning: One Man's View*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 13 (H. Goldschmid, H. Mann & J. Weston eds. 1974); Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1246-47 (1977); Elzinga, *supra* note 44, at 1196-1200; Hofstadter, *What Happened to the Antitrust Movement?*, in THE BUSINESS ESTABLISHMENT 113 (E. Cheit ed. 1969); Scherer, *supra* note 44, at 980.

[106] One commentator argues that entrepreneurial freedom is essential to the comprehensive definition of the competitive process which the antitrust laws protect. *See* Dorsey, *supra* note 105.

no more than the absolute minimum for the advantages of anticompetitive behavior. While the least restrictive alternative approach is economically justifiable,[107] it also reflects a general abhorrence of excessive control over otherwise independent entities.[108] This same policy cuts against conglomerate mergers that unnecessarily eliminate corporate independence and freedom of action.

The recurring tension in antitrust cases over the role and relevance of size also suggests the existence of a public policy against conglomerate mergers. Although the Supreme Court has accepted the proposition that size alone is not an offense,[109] it has also recognized that "size carries with it an opportunity for abuse that is not to be ignored."[110] Some businesses must be large. Courts, however, remain aware that size may create power, and that power can be misused. Moreover, while considerations of size come into play whenever a large firm expands through merger, the size factor is particularly relevant where two *large* firms seek to join forces.

Finally, an old line of cases under the Sherman Act has suggested that mergers between large firms may be unreasonable restraints of trade even though the elimination of competition is slight when measured in terms of market share.[111] For example, a district court found unreasonable a combination of two New York banks, which, although large in terms of total deposits and loans, held very small shares of the relevant national banking market.[112] The market shares were so small and the evidence of anticompetitive potential so slight that the court could not find a section 7 violation.[113] The court held, however, that because the merging banks were in competition and were large in absolute size, the

---

[107] *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1, 2), 74 YALE L.J. 775, 801-05 (1965); 75 YALE L.J. 373, 388-90 (1966).

[108] *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972); Albrecht v. Herald Co., 390 U.S. 145, 151-53 (1968); Standard Oil Co. v. United States, 337 U.S. 293, 309-14 (1949); A. NEALE, *supra* note 105, at 427-32.

[109] *See* United States v. United States Steel Corp., 251 U.S. 417, 451 (1920).

[110] United States v. Swift & Co., 286 U.S. 106, 116 (1932).

[111] *See* United States v. Southern Pac. Co., 259 U.S. 214, 229-32 (1922); United States v. Reading Co., 253 U.S. 26, 56-64 (1920); United States v. Union Pac. R.R., 226 U.S. 61, 85-98 (1912); Northern Sec. Co. v. United States, 193 U.S. 197, 231-32 (1904). *But see* United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[112] *See* United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965). The case was not appealed, but the 1966 amendments to the Bank Merger Act (12 U.S.C. § 1828(c)(7) (1976)) reversed its result by exempting bank mergers that comply with the Act from all antitrust laws except § 2 of the Sherman Act.

[113] *See* 240 F. Supp. at 952-55.

combination constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act.[114]

C. *Decentralization and the Concept of Federalism*

In identifying a public policy favoring decentralization of decisionmaking, courts need look no farther than federalism. At bottom, federalism recognizes the superior ability of local authorities to deal with local problems.[115] Although local expertise may at times be illusory, or produce undesirable results,[116] federal authorities—as a matter of political necessity and governmental efficiency—often commit difficult or detailed decisionmaking to local policymakers.[117]

As in the public sector, decentralization of private economic units facilitates sensitivity to local tastes and preferences, while centralization creates strong pressures toward uniformity. Thus, even where large conglomerates give local managers wide discretion, final authority ultimately rests in the hands of a distant, unknown few. The power to hire and fire the manager inevitably lies in centralized control; even if ostensibly given a free reign, the local manager, conscious of this sanction, will shape his behavior accordingly.

Equally undesirable is the augmentation of political power which results from centralization of business ownership.[118] Recent disclosures of unlawful corporate contributions made in an effort to mold and control the governmental process provide forceful reminders of the risks to an open political system that concentrations of economic wealth create. Even without overt corruption, large corporations have special leverage over the legislative and executive branches which provides them with protections and supports not available to smaller firms.[119]

---

[114] *See id.* at 955.

[115] "[T]be National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

[116] *See, e.g.*, Mathews v. Massell, 356 F. Supp. 291 (N.D. Ga. 1973) (enjoining misapplication of Revenue Sharing funds by city officials).

[117] *See, e.g.*, Revenue Sharing Act of 1972, 31 U.S.C. §§ 1221-1264 (1976) (as amended).

[118] "One of the most potent economies of scale of large conglomerate firms is . . . the effective presentation of their case for favorable treatment by government." Blake, *supra* note 29, at 591. Blake also points to the ability of conglomerates to "mobilize special interest support from a much wider range of sources." *Id.*

[119] The 1971 government loan guarantee to Lockheed Aircraft Corp. aptly illustrates

D. *Social Undesirability*

As the three preceding subsections suggest, unnecessary economic concentration is inconsistent with the policies underlying both antitrust law and the concept of federalism. This does not mean, however, that large corporate entities are always undesirable. Indeed, they may be essential to our economic and social wellbeing.[120] Nevertheless, we must evaluate any additional aggregation of economic power by carefully balancing the advantages and disadvantages to society.

Large institutions, especially large corporations, present substantial risks to fundamental societal values. The unchecked concentration of power in a small number of institutions threatens both individual freedom of action and majoritarian political decisionmaking. Discretionary power[121] can produce desirable results, but it also permits arbitrary decisions detrimental to the common good. Centralized decisionmakers, far removed from the areas affected by their actions, may choose a course that substantially and needlessly disrupts the lives of their employees and the stability of entire communities.[122] Centralized control also limits the discretion of local management to deploy their resources and distribute rewards,[123] thereby diminishing opportunities for individual achievement, independence, and self-expression.[124] Individual employees are forced to conform to the demands and expectations of

---

this point. *See* N.Y. Times, July 31, 1971, at 1, col. 1 (House approves loan); *id.*, Aug. 3, 1971, at 1, col. 2 (Senate approves loan); *id.*, Aug. 10, 1971, at 19, col. 1 (President signs legislation).

[120] *See* D. LILIENTHAL, BIG BUSINESS: A NEW ERA 97-130 (1953).

[121] Discretionary power is the "range of managerial choice not dictated by or fully predictable from pure profit maximizing behavior." Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1, 35 (1977). It is the power "to make decisions that affect the lives of other people." Dewey, *supra* note 105, at 11 n.18. Discretionary power is well illustrated by the problems that United Artists is currently having with its conglomerate parent. *See* Schuyton, *United Artists Script Calls for Divorce*, FORTUNE, Jan. 16, 1978, at 130. Company towns are extreme examples of private discretionary power. *See* H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS 98-137 (1963).

[122] For example, decisions to open, close, alter, or move plants affect countless persons whose welfare may not have been considered in the decisionmaking process.

[123] *See* Schuyton, *supra* note 121. A sociologist has presented the case in these terms:

> [O]rganizations are tools for shaping the world as one wishes it to be shaped. . . . The man who controls an organization has power that goes far beyond that of those that do not have any such control. The power of the rich lies not in their ability to buy goods and services, but in their capacity to control the ends toward which the vast resources of large organizations are directed.

C. PERROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY 14 (1972).

[124] *See* Dorsey, *supra* note 105, at 1264.

distant managers.[125] Although centralization of power is to some extent inevitable, a reduction in the number of independent economic institutions also reduces the number of alternatives available to the affected community or employee. The bureaucracy of large organizations "inevitably concentrates [social resources] in the hands of a few who are prone to use them for ends we do not approve of, for ends we are generally not aware of, and more frightening still, for ends we are led to accept because we are not in a position to conceive alternative ones."[126]

Centralized economic power can also damage our political processes. A sufficiently large corporation can dominate an entire community and totally subvert its democratic system.[127] If nothing else, size provides political access and an ability to press one's claims in ways unavailable to smaller entities.[128] Pushed to the extreme, large organizations can corrupt[129] and even destroy political systems.[130] A coalition of independent entities, regardless of their solidarity, can never achieve equivalent power.[131]

Reducing the number of centralized economic entities exacerbates all these problems. It broadens the scope of unbridled discretion each remaining entity enjoys. And as the number of firms decreases, so does the probability that their efforts to manipulate the social environment will be varied and, perhaps, offsetting.[132] Furthermore, the agglomeration of power entrenches control by raising economic and psychological barriers to entry into the mar-

---

[125] *See generally* W. WHYTE, THE ORGANIZATION MAN (1956).

[126] C. PERROW, *supra* note 123, at 7.

[127] *See* H. CAUDILL, *supra* note 121, at 98-137.

[128] *See* Blake, *supra* note 29, at 591; Elzinga, *supra* note 44, at 1197-98. *See also* C. PERROW, *supra* note 123, at 14; Adams, *Corporate Power and Economic Apologetics: A Public Policy Perspective*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra* note 105, at 360, 366-68.

[129] *See* A. SAMPSON, THE SOVEREIGN STATE OF ITT 181-258 (1973); Adams, *supra* note 128, at 366-68 (reviewing ITT's power and lobbying efforts).

[130] The best known recent example is the overthrow of the regime in Chile. *See Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations on the International Telephone & Telegraph Company and Chile, 1970-71*, 93d Cong., 1st Sess., pts. 1-2 (1973).

[131] *See* D. TRUMAN, THE GOVERNMENTAL PROCESS (1951). *See also* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 160 (1970) (outlining factors causing cartels to break down).

[132] This follows because power arises from limited choice and because greater numbers of organizations make common understandings among them much more difficult. *Cf.* McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 197-204 (1960) (describing conditions for cartel action, which seemingly apply to other situations involving collective conduct).

ketplace and the political arena.[133]

Relating these considerations to the evaluation of large conglomerate mergers requires a social cost-benefit analysis. We feel that these mergers are socially undesirable in this larger sense. They produce few, if any, social or economic advantages to counterbalance the harm flowing from greater concentration and fewer sources of power. This social undesirability constitutes an independent basis for opposition to large conglomerate mergers.[134]

## V

## A Proposed Section 5 Rule Covering Conglomerate Mergers

The foregoing discussion demonstrates that conglomerate mergers—even assuming that they have no anticompetitive effects—are potentially "unfair" within the meaning of the Federal Trade Commission Act. This conclusion, however, necessitates a further inquiry: How can the FTC best implement a policy against unfair mergers without prohibiting necessary or desirable conglomerate combinations? The Supreme Court's discussion in *S & H* properly suggests that principles of unfairness are usually better explained through rulemaking than through case-by-case review.[135] The FTC should therefore promulgate a rule dealing with conglomerate mergers. The rule must identify those mergers that may qualify as unfair, articulate guidelines governing application of the unfairness standard in specific cases, and provide sanctions for violation. We offer the following rule as a model for FTC action:

> The merger of two independent firms will be reviewable under this rule as an unfair act within the meaning of section 5 only if each firm has a value or annual sales of $100 million or more. The initial unfairness of reviewable combinations involving two firms, each with value or annual sales in excess of $250 million, will be conclusively presumed. The initial unfairness of review-

---

[133] *Cf.* J. Bain, Barriers to New Competition 11-41 (1956) (outlining determinants of barriers to entry in industry).

[134] We do not purport to make an exhaustive analysis here of the claim that large conglomerate mergers are socially undesirable. The purpose of this Article is to demonstrate that an alternative legal standard exists—*i.e.*, the unfairness standard—by which to evaluate these mergers. At this juncture, we think it suffices to suggest the factual bases for our views without undertaking to prove them conclusively. Should the FTC consider adopting a conglomerate merger rule akin to our suggestion (*see* notes 135-64 and accompanying text *infra*), a more searching evaluation of social costs and benefits would be required.

[135] *See* notes 96-97 and accompanying text *supra*.

able combinations in which one participant has value or annual sales of less than $250 million and the other has value or annual sales of more than $250 million will be decided on a case-by-case basis. The initial unfairness of reviewable combinations in which each participant has value or annual sales of less than $250 million will also be decided on a case-by-case basis. In all cases the merging parties shall have opportunity to overcome a finding of initial unfairness by proving that their combination involves a failing firm whose failure could not otherwise be avoided, or that it produces or is likely to produce substantial, demonstrable economies or efficiencies not otherwise achievable (*i.e.*, that could not be achieved through other means, including combinations not presumptively unfair). Proof of the existence of one or both of these defenses precludes the finding of a violation under this rule. However, where both parties to the merger have value or annual sales of less than $250 million, the Commission shall bear the burden of demonstrating the inapplicability of both defenses. The remedy for an "unfair" acquisition is divestiture of either (a) the acquired assets, or (b) other assets of the resulting corporation roughly equal in value to the assets acquired. Divestitures must result in the re-creation of a viable, independent entity of at least the same size in terms of value or sales as the acquired firm. For purposes of this rule, the term "initial unfairness" refers to the unfairness of the merger given that neither defense applies. Where the initial unfairness of the merger is not conclusively presumed, the Commission, in resolving the issue, shall consider primarily the size of the parties and the size of the resulting entity, but shall also consider the level of concentration in the industries affected by the merger, possible anticompetitive consequences of the merger, the probability of resulting economies or efficiencies not sufficient to constitute a defense under this rule, and any other factor bearing on the social or economic desirability of the merger.[136]

[136] It is not clear whether the FTC could implement our proposal by an interpretive rule and general statement of policy under 15 U.S.C. § 57a(a)(1)(A) (1976), or whether it would have to use 15 U.S.C. § 57a(a)(1)(B) (1976), which governs the adoption of rules defining unfair acts "with specificity." *See* note 98 *supra*. While the former section involves less rigorous procedures, the latter applies to rules that have greater legal force. The latter would, of course, better facilitate FTC enforcement efforts.

For the purposes of effective enforcement, we have chosen to structure our proposal as a substantive rule (*see* note 32 *supra*), and, as a consequence, the more stringent procedural requirements of 15 U.S.C. § 57a(a)(1)(B) would have to be followed. Nevertheless, the rule is also intended to serve as a guideline to firms in very much the same fashion as would a general statement of policy. For example, where the two merging parties each have over $250 million in value or sales, the FTC is very likely to challenge the merger since, under the rule, initial unfairness is conclusively presumed. On the other

A. *Categories*

1. *Delineating Categories Based on Size*

Classification of businesses on the basis of size necessarily involves some arbitrariness. A workable rule must draw lines somewhere, and the premise of our model is that the larger the merging firms, the more "unfair" the combination. Our proposal separates firms into three categories based on value[137] and/or annual sales:[138] (1) the $250-million-plus category; (2) the $100-250 million category; and (3) the $100-million-minus category. The proposed rule recognizes that even the largest mergers may produce substantial social benefits and economic efficiencies. In any size category, therefore, defenses are available.

In drawing one critical line at $250 million we sought to identify those firms that possess sufficient resources and capacity to meet almost any economic challenge. In general, firms in the $250-million-plus category have already achieved all economies of scale with regard to research and development.[139] Their size provides access to public and private capital markets on favorable terms.[140] These firms have already demonstrated significant

---

hand, where both parties are in the $100-250 million category, the FTC must prove not only initial unfairness, but also that neither of the defenses apply. Given these circumstances, the merging firms should realize that FTC action is unlikely. Because of this dual function of our proposal—*i.e.*, substantive rule and guideline—the ensuing discussion is couched both in terms of what types of mergers *are* unfair and what types of mergers the FTC should challenge.

Our rule is not intended to foreclose the use of § 5 to reach mergers not involving the acquisition of corporate assets. Nor is it intended to constitute an exclusive definition of when a conglomerate merger is an unfair act. We do suggest, however, that any other definition also be embodied in a rule, and not invoked on an ad hoc basis.

[137] Since book values are so much a product of accounting, we prefer to measure a firm's value by adding the amount of its debt to the market price of its equity securities, or, in the case of an acquired firm, the value put on those securities by the acquirer. In the GE-UI merger, for example (*see* notes 4-11 and accompanying text *supra*). GE put a value of nearly $2 billion on UI's assets, although UI carried those assets on its books at only $1 billion. *See Boards of GE, Utah International Clear Talks for $1.9 Billion Merger*, *supra* note 4; *The Fortune Directory of the 500 Largest U.S. Corporations*, *supra* note 6.

[138] Our proposal lumps value and sales together in drawing distinctions among the three categories of firms. We envision that where a particular firm falls into two categories (*e.g.*, $300 million in sales and $150 million in value) it should be placed in the higher category (*i.e.*, the $250-million-plus category). Ultimately, the best route may be to break down sales and value using different dollar amounts and to combine both value and sales figures in constructing operative categories.

[139] *See* F. SCHERER, *supra* note 131, at 360. Available data indicate that among the 500 largest firms increase in size does not lead to more than a proportionate increase in the input or output of research and development. *Id.*

[140] Large firms are likely to have already issued publicly traded securities, and the

growth through either internal expansion or acquisition.[141] In short, despite wide variations in size, virtually all firms with over $250 million in value or annual sales have such substantial economic capacity that precluding mergers involving them will generally not result in adverse economic consequences.

Firms in the $100-250 million category, on the other hand, may or may not be industry leaders. When a single, integrated cement operation can cost over $150 million,[142] a cement firm in the $100-250 million category may not be viable. Since combinations involving firms of this size vary greatly in resulting efficiencies and social desirability, their social utility or disutility cannot be presumed. Case-by-case analysis is therefore necessary.

Finally, we draw a line at $100 million. Firms in the $100-million-minus category frequently may be unable to reach efficient size. Often, they cannot generate sufficient capital through the securities markets.[143] Mergers involving firms in this size range thus provide the greatest potential for the promotion of economic efficiencies and competition. The unavailability of our rule to attack such mergers also serves to decrease transaction costs for the consolidation of small firms, which are less able to bear the expense of protracted litigation.[144]

2. *Alternatives to Proposed Size-Based Categories*

Measures of value and annual sales are not the only indices of "unfairness." A rule addressing conglomerate mergers could focus instead on the ranks of the acquired and acquiring firms. A rule based on size rather than rank, however, reflects a basic policy underlying our proposal—to maximize the number of large firms in the economy and not merely maintain some set number.

---

substantial public disclosure about their activities will usually overcome any reluctance on the part of investors to consider the merits of an offering. In addition, the size and diversity of most large firms decreases the risk of investing in them.

[141] *See* Leonard, *supra* note 101, at 355-58. But among the nation's 500 largest firms, those below the top 200 have been growing even faster than the 200 largest. *Id.* at 380 n.26.

[142] *See* Wall St. J., May 31, 1977, at 13, col. 4.

[143] The costs and difficulties associated with public offerings can be very great. *See* WHEN CORPORATIONS GO PUBLIC (C. Israels & G. Duff, Jr. eds. 1962). These firms may also encounter serious problems in finding private venture capital investors. *See* Bylinsky, *New Companies That Beat the Odds,* FORTUNE, Dec. 1977, at 76-77. *See also* note 140 *supra.*

[144] Defending a transaction, even against a preliminary investigation, is expensive. Since the benefits perceived by the acquiring company must justify the transaction costs and since acquisition of a smaller company will generally produce a smaller benefit, raising transaction costs for this category of firms could substantially deter desirable acquisitions.

We have thus rejected a rank-based rule. Similarly, we have rejected a formulation focusing on the size of the resulting entity. Because such an approach does not consider the relative significance of the combining firms, it sweeps too broadly; our proposal seeks only to limit mergers between large entities. This is not to say that more workable and useful categories could not be constructed. At the very least, changing economic conditions will necessitate adjustments in our proposed dollar amounts.[145]

B. *Operation of the Proposed Rule*

The proposed rule creates four categories of mergers based on the three size categories: (1) mergers involving two firms in the $250-million-plus range; (2) mergers involving one firm in $250-million-plus category and one in the $100-250 million category; (3) mergers involving two firms in the $100-250 million category; and (4) mergers involving at least one firm in the $100-million-minus range. Our proposed rule treats each of these merger types differently and can be schematically summarized as follows:

| *Value or Sales of Firm 1* | *Value or Sales of Firm 2* | *Treatment of Unfairness Issue* | *Treatment of Defenses* |
|---|---|---|---|
| 250+ | 250+ | conclusively presumed unfair | defendant must prove existence |
| 250+ | 100-250 | FTC must prove | defendant must prove existence |
| 100-250 | 100-250 | FTC must prove | FTC must prove nonexistence |
| 100− | any amount | merger not reviewable under this rule | --------- |

Our proposal conclusively presumes unfairness where each of two merging firms falls into the $250-million-plus category. Drawing upon antitrust principles governing mergers,[146] the presump-

[145] It might be prudent, for example, to peg the dollar figures of our rule to an index reflecting inflation, such as the cost-of-living index.

[146] *See* United States v. Continental Can Co., 378 U.S. 441 (1964). *Cf.* United States v. Marine Bancorp., 418 U.S. 602 (1974) (concentration in acquired bank's market created presumptive probability of anticompetitive effect, rebutted by showing that other means of market entry were impractical for acquirer); United States v. General Dynamics Corp., 415

tion of unfairness would not be directly rebuttable. The merging parties might, however, avert a finding of a section 5 violation by establishing one of the defenses recognized in our proposal.

Where a firm in the $250-million-plus category merges with one in the $100-250 million range, no presumption arises. The merger, however, may be challenged as unfair. By placing businesses on notice of this risk, the rule will encourage acquisitions of smaller firms more likely to benefit from economies of size. Moreover, a case-by-case analysis will maximize the FTC's flexibility in sorting out mergers that may be contrary to the public interest. Where neither party to the merger can point to significant resulting advantages and one of the parties is well over the $250 million threshold, the merger should be deemed unfair. The Commission should also move against combinations resulting in some discernible loss of competitive potential even if the loss is too small to trigger application of the antitrust laws.[147]

Where both merging parties are in the $100-250 million category, our proposal imposes on the FTC the burden of demonstrating that neither defense applies. Although in rare cases such combinations should be challenged under our rule, their regulation will, in general, be left to the antitrust laws.

Finally, the proposed rule precludes reviewability of mergers where either merging firm falls within the $100-million-minus category. Mergers between firms of this size generally do not raise serious public policy questions beyond the probable competitive effect of the transaction, and therefore do not warrant special FTC consideration. These last two provisions free most acquisitions from FTC review under the rule, and will thus permit the Commission to focus its attention on large conglomerate mergers.

### C. *Limitation of the Rule to Acquisitions of Independent Firms*

Our proposed rule does not cover the acquisition of one corporation's assets by another corporation where the transaction does not eliminate an independent entity. Such asset acquisitions do not have the same potential for unfairness as full-fledged mergers.

---

U.S. 486 (1974) (market shares of merging firms made merger presumptively illegal, but showing that acquired firm could not maintain its share justified denying presumption conclusive effect).

[147] Presumably, the standard of competitive effect for invoking § 5 is lower than that for § 7 of the Clayton Act. Incipient anticompetitive conduct, unripened into an antitrust violation, has long been recognized as a basis for invoking § 5. *See, e.g.*, FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966).

Although their asset mixes are altered, buyer and seller both remain active, ongoing entities. We recognize the danger of piecemeal dismemberment that this approach creates. If that risk materializes, additional definitional provisions should solve the problem. Similar responses have worked in the tax[148] and securities regulation[149] fields.

D. *Defenses*

1. *Failing Firm*

Mergers involving failing firms[150] do not eliminate viable independent businesses. Our proposed rule recognizes this fact by establishing a failing firm defense.[151] In applying the failing firm principle, antitrust law would rank prospective buyers by the degree of anticompetitive effect.[152] It is unlikely that such ranking will prove useful in plugging the failing firm defense into "unfair" merger analysis. At the very least it will severely complicate such inquiries.[153] We therefore believe that a showing of a failing condition on the part of the acquired firm and the need for a large conglomerate buyer should justify an otherwise "unfair" merger.[154]

In advocating the failing firm defense, we recognize that without the merger, "failure" might well result in dismemberment of the firm in bankruptcy and the creation of several new entities, perhaps all large corporations. However, we discern in our legal order a clear preference for the preservation and continuation of productive activity, in contrast to the dislocations and upheavals that bankruptcy may entail.

---

[148] *See, e.g.*, I.R.C. § 337; 26 C.F.R. §§ 1.337 to 1.337-6 (1976).

[149] *See, e.g.*, Reclassification of Securities, Mergers, Consolidations and Acquisitions of Assets, 17 C.F.R. § 230.145 (1977).

[150] *See, e.g.*, United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); International Shoe Co. v. FTC, 280 U.S. 291 (1930).

[151] *But cf.* United States v. Third Nat'l Bank, 390 U.S. 171, 189 (1968) (requiring failing bank to explore alternatives to merger).

[152] *See, e.g.*, United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555 (1971); Citizens Publishing Co. v. United States, 394 U.S. 131, 138 (1969).

[153] For example, it would have to be determined whether a merger involving a large acquirer operating in a few lines of business was less desirable than one involving a smaller acquirer operating in many lines of business. For the present, we do not think it necessary to attempt to refine the unfairness analysis to this extent.

[154] We are assuming, however, that all other potential buyers, if any, would also produce unfair combinations.

2. *Substantial Economies or Social Advantages*

Our proposal assumes that a social cost-benefit analysis tips heavily against conglomerate mergers. This premise, we are confident, will generally prove true. In some cases, however, it will not.[155] Our proposal therefore permits merging firms to defend against unfairness charges by demonstrating substantial, specific economic advantages resulting from the transaction. We suggest that if such a showing is made, the merger may not be condemned as unfair, even if its unfair aspects are substantial. Arguably, our position is too lenient. Perhaps the Commission is capable of balancing proven gains against the quantum of unfairness that it perceives in a given merger, and thus forming a rational basis for forbidding even those mergers that involve substantial benefits. In our view, however, judgments of this type entail too great a potential for unjustifiable ad hoc decisionmaking. At least at the outset, therefore, we opt for a limited discretion in evaluating this defense: if it appears that the merger will produce or has produced substantial economies or advantages not otherwise obtainable, it should not be subjected to a balancing test allowing a finding of unfairness.

To make the general rule effective, however, this defense must be rigorously controlled. It is not enough to show private advantage to buyer and seller. Nor is it sufficient to point to vague advantages such as increased productivity. To qualify, the benefit must be sufficiently indentifiable and quantifiable so that its character and value are clear. In addition, the merging parties, when advocating this defense, must persuade the Commission that no lawful, feasible alternative exists for achieving the purported advantage.[156] This requirement is likely to eliminate most financing advantages as a basis for the defense since financing will generally be obtainable in a variety of ways—including joint ventures with other firms.[157] The advantageous nature of the program to be financed will normally, of itself, indicate financibility. These restric-

---

[155] *Cf.* United States v. Marine Bancorp., 418 U.S. 602 (1974) (state law barriers to de novo entry invalidated presumptive anticompetitive effect of bank merger); United States v. General Dynamics Corp., 415 U.S. 486 (1974) (depleted nature of reserves of one merging party made normal competitive inferences invalid).

[156] *See* United States v. Third Nat'l Bank, 390 U.S. 171, 185-92 (1968).

[157] Joint ventures, of course, also involve antitrust risks. *See* Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453 (1976); Pfeffer & Nowak, *Patterns of Joint Venture Activity: Implication for Antitrust Policy*, 21 ANTITRUST BULL. 315 (1976).

tions will ensure that the economic-advantages defense covers only truly unique advantages not otherwise achievable. It thus will serve a useful purpose without swallowing the rule.

E. *Sanctions*

One possible reaction to unfair mergers would be to bar consolidation of the parties or to require immediate divestiture of the acquired company. We reject this view as too shortsighted and inflexible. Our objective is to preserve and increase over the long term the number of independent firms of substantial size in our economy. We therefore perceive no risk in allowing acquisitions immediately preceded by or quickly followed by divestiture of other assets and resulting in no net change in the number of large firms. Large corporations that foresee profitable uses for assets owned by others should be able to acquire those assets as long as they promptly effectuate matching divestitures.[158]

The form of divestiture is important. In general, divestiture should involve the creation of a new viable corporation of roughly the same size as the acquired entity. This can be accomplished through a spinoff[159] or public sale of stock. Alternatively, matching assets can be transferred to some smaller corporation[160] to achieve the same effect—the creation of a major new entity. Speed is also important.[161] The FTC should establish and enforce firm deadlines for divestiture. If deadlines are not met, the FTC should not only impose fines,[162] it should appoint a trustee to take possession of, operate, and dispose of the property.[163]

Corporations making acquisitions they know to be prohibited

---

[158] The Antitrust Division of the Justice Department has adopted this approach in negotiating consent decrees in conglomerate merger cases. *See, e.g.*, United States v. Ling-Temco-Vought, Inc., [1970] TRADE CAS. (CCH) ¶ 73,105 (W.D. Pa.); cases cited in note 27 *supra*.

[159] This is what Procter & Gamble did after its acquisition of Clorox was held illegal in FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[160] We propose that, absent unusual circumstances, such a corporation be in the $100-million-minus category.

[161] For illustrations of the risks and problems attending divestiture, see United States v. El Paso Natural Gas Co., 410 U.S. 962 (1973), *aff'g mem.* 358 F. Supp. 820 (D. Colo. 1972); Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir.) (affirming FTC order to divest), *cert. denied*, 416 U.S. 909 (1972), *enforced*, 542 F.2d 801 (10th Cir. 1976) (denying motion to modify order), *enforced*, [1976-2] TRADE CAS. ¶ 61,162 (10th Cir.) (FTC contempt action held in abeyance pending efforts to bring about divestiture).

[162] *See, e.g.*, United States v. Papercraft Corp., 540 F.2d 131 (3d Cir. 1976).

[163] In the ITT divestiture cases (*see* note 27 *supra*), the court has now named trustees to take, operate and sell some of the assets.

would have a short time to arrange an acceptable divestiture plan with the FTC. This plan would establish deadlines, designate divestable assets, and name a trustee to take charge of them in the event of default. Corporations choosing to litigate the legality of their acquisitions would, upon losing, have to accept the Commission's designation of assets to be divested. This scheme should encourage settlement as well as prompt divestiture.

Allowing divestiture, especially divestiture of assets other than those acquired, is not without risk. The new corporation may not be as strong or able as the old one. It may be saddled with large debt, old plants, bad markets, or weak management. FTC review of conglomerate divestitures will reduce these dangers. Moreover, the Commission will be aided in this regard by the securities laws, which frequently impose liability on various parties for failure to disclose potential weaknesses in corporate structure and management.[164]

## VI

## Assessment

In our proposal to make some mergers illegal regardless of their anticompetitive potential, we have included only those mergers that we view as most troublesome: large conglomerate mergers. Such mergers generally produce no significant social or economic advantages and result in a net social loss even if neutral in economic terms. On the other hand, the threat of acquisition may stimulate efficient corporate behavior, and in some cases large conglomerate combinations will make good economic sense. To protect these interests while simultaneously minimizing the permanent elimination of major independent entities, we have proposed a flexible rule for assessing unfairness. In addition, we have framed a remedy that allows divestiture of alternative assets instead of flatly forbidding all unfair mergers.

Our proposed rule would, to be sure, complicate corporate takeovers planned by large firms. The problem would be far from insurmountable, however, even in cases of violation, since in most massive firms specific units generally possess a high degree of autonomy and can thus be divested without serious difficulty. Although added costs and risks will render marginally profitable

---

[164] *See, e.g.*, Securities Act of 1933, §§ 11, 12, 15 U.S.C. §§ 77k, 77*l* (1976); Securities and Exchange Act of 1934, §§ 10, 14, 18, 15 U.S.C. §§ 78j, 78n, 78r (1976).

takeovers less attractive, our rule should not interfere significantly with combinations expected to generate substantial increases in profit. Nor will our rule stop trends toward concentration of productive assets if such trends reflect genuine efficiencies of size.[165] Nonetheless, by severely restricting the ability of massive firms to merge, our proposal should cause the number of large firms to increase more rapidly than in the past. And by increasing the number of large firms in the economy, the rule will operate to preserve the social, political, and economic advantages resulting from the multiplicity of actors at work in our society, while at the same time retaining whatever advantages bigness produces.

In limiting our proposal to large mergers, we have not rejected the possibility of extending section 5 to cover all acquisitions by large firms or all combinations involving some lesser dollar values. Such an approach, however, will require different justifications from those that support condemnation of large mergers.

In operation, our rule might bar only a handful of mergers. Although precise data are not available, it appears that among more than 500 acquisitions of mining and manufacturing companies in 1976 only thirteen acquired firms had assets exceeding $100 million and only five had assets over $200 million.[166] Our proposal, therefore, will not affect the great majority of acquisitions. It will instead isolate those few combinations with particularly undesirable social and political implications.

Our proposal attempts to avoid the Clayton Act requirement of a showing of a probable "substantial" anticompetitive effect. This approach does not require resolution of the question of whether conglomerate mergers are anticompetitive per se. Economists have only recently begun to address this question, and they are still far from a consensus.[167] We glean a single proposition from this presently muddled state of affairs: conglomerate mergers produce few discernible benefits, whatever their adverse economic effects might be.

---

[165] More than half of past increases in the share of manufacturing assets possessed by the top 200 firms has resulted from internal expansion. Leonard, *supra* note 101, at 360.

[166] *See* FTC BUREAU OF ECONOMICS, *supra* note 14, at 99. This report uses "book asset" figures and does not provide the sales figures or the value of consideration paid in the merger or acquisition. Thus, accurate determination of how many of these mergers would fall within the scope of our rule is not possible.

[167] *Compare* P. STEINER, *supra* note 14, *with* Mueller, *supra* note 37, *and* Markovits, *supra* note 102. Some economists view the issue of anticompetitiveness as varying from market to market. *See* J. NARVER, CONGLOMERATE MERGERS AND MARKET COMPETITION (1969). Others see mergers as manifestations of managerial power that are contrary to efficiency and shareholder interests. *See* S. REID, MERGERS, MANAGERS AND THE ECONOMY (1968).

We recognize a potential objection to our method of curtailing large mergers as an evasion of the appropriate legislative route or as an undue delegation of administrative power. We invoke section 5, however, partly for pragmatic reasons. Congress reacts better than it initiates.[168] It may alter or eliminate FTC jurisdiction as to a class of cases, and it has done so in the past.[169] FTC implementation of our proposal would force Congress to consider explicitly what rules should govern conglomerate mergers. Moreover, initial regulation by administrative rules allows more flexible application and alteration than regulation by statute.

Beyond these pragmatic arguments, we believe that the history of section 5, its expansion by Congress in 1938, and the recent amendments designed to clarify procedures for implementing the sweeping "unfairness" standard indicate a congressional policy favoring the broad construction of FTC powers to deal with matters of business conduct. The unfairness standard is unspecific by design. Congressional silence charges the FTC with applying it to specific problems.

The vagueness of the unfairness standard does not, however, provide the FTC with unbridled authority to apply its collective conscience as it chooses. The *S & H* case, even as it expanded the agency's prerogatives, required that principles of unfairness rest on well-established public policy. More important, *S & H* mandates that the FTC explain the underlying bases of its decisions. *S & H* correctly expands the policies on which the FTC might rely; but careful identification and articulation of the nexus between those policies and proposed Commission action remains essential. If "unfairness" proves too general a guide, Congress retains the authority and responsibility to alter it. Congress, after all, passed the FTC

---

[168] For example, initial FTC regulatory action on cigarette advertising triggered specific congressional legislation. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 5, 79 Stat. 282 (1965), *as amended by* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified at 15 U.S.C. § 1334 (1976)). Similarly, court construction of statutes has frequently led to congressional legislative clarification. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (applying § 7 of Clayton Act to bank mergers, leading Congress to amend Federal Deposit Insurance Act (12 U.S.C. §§ 1811-1832 (1976)) to exempt consummated bank mergers from certain antitrust laws); Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958) (disapproving FMB's shipping rate structure, inducing passage of Act of Oct. 3, 1961, Pub. L. No. 87-346, 75 Stat. 762).

[169] *See, e.g.*, The Wheeler-Lea amendment, ch. 49, § 3, 52 Stat. 111 (1938) (amending Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719) (codified at 15 U.S.C. § 45(a)(1) (1976)) (*see* notes 73-76 and accompanying text *supra*). Congressional action on cigarette labeling and advertising (*see* note 168 *supra*) preempted FTC regulations, but did not entirely remove Commission jurisdiction. *See* 15 U.S.C. § 1336 (1976).

Act. We merely propose that the Commission exercise the powers granted to it to their fullest.[170]

## CONCLUSION

Section 7 of the Clayton Act provides the primary legal device for challenging conglomerate mergers. Section 7's requirement of probable anticompetive effect has, however, frustrated attempts to block such combinations. By eliminating vital independent entities, massive mergers undercut antitrust policy and contravene significant social policies. These effects, in our view, mark such mergers, regardless of their anticompetitive impact, as "unfair" acts prohibited by section 5 of the Federal Trade Commission Act.

We propose a rule that the FTC could adopt to combat these mergers. This rule would represent a major step toward bringing conglomerate mergers under effective legal control.

---

[170] The constitutional problems inherent in broad congressional grants of discretionary authority to administrative agencies are beyond the scope of this Article. It is to be noted, however, that the history of courts sustaining such grants of authority is a long one. *See, e.g.*, FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); United States v. Rock Royal Co-op., Inc., 307 U.S. 533 (1939).