**EMBARGOED UNTIL 9:00 AM EDT, JUNE 19, 2013**

# Federal Trade Commission

**Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority**


**Remarks of Joshua D. Wright***
**Commissioner, Federal Trade Commission**


**at the**

**Executive Committee Meeting of the New York State Bar Association's Antitrust Section**

**New York City, NY**

**June 19, 2013**

Good morning. Thank you for the kind introduction and warm welcome. I am delighted to be here today. I'd like to thank the Antitrust Section of the New York State Bar Association and Hogan Lovells for hosting me this morning, and Eric Stock for the invitation to share my views.

---

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my advisors, Derek Moore, Jan Rybnicek, and Joanna Tsai for their invaluable assistance in preparing this speech and the accompanying proposed Policy Statement.

## I. INTRODUCTION

Today I would like to talk about the Commission's authority to prosecute "unfair methods of competition" as standalone violations of Section 5 of the Federal Trade Commission ("FTC") Act.[1] As you all are no doubt familiar, Section 5 provides, in pertinent part, that "unfair methods of competition in or affecting commerce . . . are hereby declared unlawful."[2] Congress intentionally framed the statute in general terms rather than providing a list of unfair methods of competition because any such list necessarily would have been incomplete and likely would have become outdated or left loopholes susceptible to easy evasion.[3] The task of identifying unfair methods of competition therefore was assigned to the Commission. However, nearly one hundred years after the agency's creation, the Commission has still not articulated what constitutes an unfair method of competition, leaving many wondering whether the Commission's Section 5 authority actually has any meaningful limits.

In the absence of agency guidance, the question of what acts or practices constitute an unfair method of competition has become the subject of considerable debate. There is no shortage of opinions as to the proper scope of the Commission's

---

[1] These remarks are limited to the Commission's authority to prosecute unfair methods of competition as standalone violations of Section 5, and do not address the Commission's use of Section 5 as the vehicle for prosecuting violations of the traditional federal antitrust laws, namely the Sherman Act and the Clayton Act.

[2] 15 U.S.C. § 45(a) (2012).

[3] *See* H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.) (observing if Congress "were to adopt the method of definition, it would undertake an endless task").

authority to prosecute conduct under Section 5. Some commentators have argued that Section 5 should be no broader than the Sherman Act and the Clayton Act, effectively relegating the statute to serving the relatively perfunctory role of providing the vehicle by which the Commission challenges violations of the traditional federal antitrust laws.[4] Other commentators have articulated a multitude of theories as to why and how the Commission can and should use Section 5 to reach conduct outside the scope of the traditional federal antitrust laws. To name just a few, some have argued the Commission should use Section 5 to create convergence among international jurisdictions,[5] to shift the attention of competition policy from economic welfare to consumer choice,[6] or even to incorporate behavioral economics into modern antitrust.[7] Still others have claimed that the Commission should use Section 5 to free itself from some of the strict requirements established in Sherman Act jurisprudence because of a belief—a mistaken one in my view—that those requirements came only as a response to

---

[4] *See, e.g.*, Doug Melamed, Comments to Fed. Trade Comm'n Workshop Concerning Section 5 of the FTC Act (Oct. 14, 2008), *available at* http://ftc.gov/os/comments/section5workshop/537633-00004.pdf; Joe Sims, *A Report on Section 5*, GLOBAL COMPETITION POLICY ONLINE, Nov. 2008, *available at* http://www.jonesday.com/files/Publication/c597157d-198a-48b9-a842-af0f2ad22bdd/Presentation/PublicationAttachment/f9f6a38c-b154-4bbb-9378-b848acef7437/Sims-Nov08%20%281%29.pdf.

[5] Albert A. Foer, *Section 5 as a Bridge Toward Convergence*, ANTITRUST SOURCE, Feb. 2009, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Foer2_26f.authcheckdam.pdf.

[6] Robert Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, ANTITRUST SOURCE, Feb. 2009, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust _source/Feb09_ Lande2_26f.authcheckdam.pdf. *But see* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013) (demonstrating the advantages of economic welfare over consumer choice as an antitrust objective).

[7] Amanda Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1583-85 (2011).

undesirable features that arise in private litigation and that should not constrain agency enforcement.[8] Members of Congress also have weighed in on the Section 5 debate, suggesting that the Commission's use of its unfair methods of competition authority is too expansive and potentially unauthorized.[9] The recent and historical Congressional interest in Section 5 raises the prospect that Congress could very well decide that its best response to the agency's failure to provide clear guidance is to revoke or to severely restrict the Commission's authority under Section 5.

For my part, I have made no secret of the fact that I think the Commission's record with respect to Section 5 is uninspiring if not bleak.[10] As I will discuss in more detail a bit later, I believe the historical record reveals a remarkable and unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application in practice by the Commission. I have echoed the comments of others, including former and current Commissioners, in calling for the Commission to

---

[8] *See, e.g.*, Statement of Chairman Leibowitz & Commissioner Rosch, *In the Matter of Intel Corporation*, FTC Docket No. 9341 (Dec. 16, 2009); Howard Shelanski, Bureau of Economics Deputy Director for Antitrust, Fed. Trade Comm'n, Statement Before the House of Representatives Committee on the Judiciary Subcommittee on Courts and Competition Policy, *Is There Life After* Trinko *and* Credit Suisse*? The Role of Antitrust in Regulated Industries* (June 15, 2010).

[9] *See, e.g.*, *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Sen. Judiciary Comm.*, 113th Cong. 11-13 (2013) (questions for the record for Chairwoman Edith Ramirez), *available at* http://www.judiciary.senate.gov/resources/documents/113thCongressDocuments/upload/041613QFRs-Ramirez.pdf.

[10] *See* Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Remarks at the Antitrust Section of the American Bar Association Spring Meeting, *What's Your Agenda?* (Apr. 2013), *available at* http://www.ftc.gov/speeches/wright/130411abaspringmtg.pdf.

articulate in a policy statement precisely what constitutes an unfair method of competition in order to bridge the gap between that theoretical promise and the Commission's track record of Section 5 enforcement.[11] I also have shared my belief that *this* Commission is more than capable of achieving that goal and finally— more than a century since the FTC's creation—articulating a position on the appropriate application of the agency's signature competition statute. I believe that doing anything less would betray our obligation as responsible stewards of the Commission and its competition mission, and may ultimately result in the Commission having its Section 5 authority defined for it by the courts, or worse, having that authority completely revoked by Congress. If we are to avert this result and preserve a sustainable and positive role for Section 5 enforcement consistent with the Commission's competition mission, we must offer an analytically coherent policy for the application of our unfair methods of competition authority.

[11] *See* Statement of Commissioner Maureen K. Ohlhausen at 3-4 (Nov. 26, 2012), *In re Robert Bosch GmbH*, FTC File No. 121-0008 (Nov. 26, 2012) *available at* http://ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf ("Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition"); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930-31 (2010) ("Among other steps, we see a need for the Commmission, as a foundation for future litigation, to issue a policy statement that sets out a framework for the application of Section 5"); Julie Brill, Comm'r, Fed. Trad Comm'n, Remarks at POLITICO Pro's P2012 Policy and Politics Technology Luncheon (Dec. 13, 2012), *available at* http://www.politico.com/story/2012/12/brill-ftc-hopes-to-resolve-google-probe-soon-85049.html (stating that although difficult, "it would be a great idea" to develop guidance as to the contours of Section 5); Jon Leibowitz, Comm'r, Fed. Trad Comm'n, *"Tales from the Crypt" Episodes '08 and '09: The Return of Section 5*, Remarks at Section 5 Workshop 3, at 4 (Oct. 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf ("If we do use Section 5—and I strongly believe we should—it is essential that we try to develop a standard").

To that end, while speaking at the annual ABA Antitrust Spring Meeting in Washington, D.C. a few months ago, I promised that I would distribute publicly a proposed policy statement outlining my views as to how the Commission should use its unfair methods of competition authority. Today I would like to share with you the core principles of that proposed Policy Statement, which will be available in its entirety on the Commission's website, and discuss how the Commission can recast Section 5 to promote more consistently its mission of protecting competition in order to promote consumer welfare.

Before I begin, I want to be clear about my objectives in laying out a detailed proposed Policy Statement on the limits of the Commission's Section 5 authority. My primary objective is for this Policy Statement to serve as a starting point for a fruitful discussion among the antitrust bar, consumer groups, the business community, and my colleagues at the Commission. I look forward to receiving feedback on this proposal and hearing others' views on how guidance and limits can fruitfully be imposed upon the Commission's unfair methods authority. As an academic, I have great faith in the marketplace for ideas. It is my hope that offering my own views in the concrete and specific form of a proposed Policy Statement is the best way I can effectively contribute to the Commission and participate in that marketplace. Through an open and frank discussion about the proper uses of Section 5, I believe this Commission can reach agreement on a policy statement that benefits consumers and the business community by strengthening the agency's ability to target anticompetitive conduct and providing clear guidance about the boundaries of the Commission's Section 5 authority.

Until that time comes, however, now appears to be an appropriate time to pause to mention that the views I express today are my own and not necessarily those of the Commission or any other Commissioner. With that disclaimer out of the way, let me begin by briefly addressing a critical threshold question I have already touched upon: why do we need an unfair methods of competition policy statement?

## II. WHY IS A SECTION 5 POLICY STATEMENT NECESSARY?

There are at least two principle reasons for issuing a policy statement regarding the Commission's unfair methods of competition authority. The first is that the ambiguity associated with the current state of the Commission's application of its unfair methods of competition authority can lead to overbroad enforcement that creates uncertainty in the business community about the legality of various types of business conduct. This uncertainty potentially has grave consequence for our nation's economy because it inevitably deters some firms from engaging in efficiency-enhancing conduct for fear that that the conduct may draw the ire of the Commission. The second reason is that, in mapping out the Commission's institutional blueprint, Congress envisioned that Section 5 would play a key role in the Commission's mission by leveraging its unique research and reporting functions to develop evidence-based competition policy. This promise has remained largely unfulfilled, in part because the Commission has failed to articulate a coherent framework for applying its unfair methods of competition authority. I will briefly discuss each of these concerns in turn.

**a. Uncertainty in the Business Community**

In the absence of any meaningful limiting principle distinguishing lawful conduct from unlawful conduct under Section 5, the breadth of the Commission's authority to prosecute unfair methods of competition creates significant uncertainty among members of the business community. Without a policy statement that clearly articulates how the Commission will apply its Section 5 authority, businesses must make difficult decisions about whether the conduct they wish to engage in will trigger a Commission investigation or worse. Such uncertainty inevitably results in the chilling of some legitimate business conduct that would otherwise have enhanced consumer welfare but for the firm's fear that the Commission might intervene and the attendant consequences of that intervention. Those fears would be of little consequence if the Commission's Section 5 authority was clearly defined and business firms could plan their affairs to steer clear of its boundaries.

In practice, however, the scope of the Commission's Section 5 authority today is as broad or as narrow as a majority of the commissioners believes that it is. This lack of institutional commitment to stable definition of an unfair method of competition leads to at least two sources of problematic variation in Section 5 interpretation by the agency. One is that an agency's interpretation of the statute in different decisions need not be consistent even when the individual Commissioners remain constant. Another is that as the members of the Commission change over time, so does the agency's Section 5 enforcement policy, leading to wide variation in how the Commission prosecutes unfair methods of competition. These two sources of variation give firms little if any ability to plan long-term strategies that may involve conduct that one Commission might consider permissible while another Commission might find offensive. Thus, it should come as no surprise that even when a Commissioner articulates his or her position on the scope of Section 5, that position often has been so vague as to provide little reassurance to the business community. Take for instance the position offered by one commissioner who several years ago stated that conduct can constitute an unfair method of competition when it includes "actions that are collusive, coercive, predatory, restrictive, or deceitful, or other-wise oppressive, and does so without a justification that is grounded in legitimate, independent self-interest."[12] I do not know any antitrust practitioners who would have felt comfortable providing guidance to clients on how to avoid the "otherwise-oppressive" prong of an unfair method claim.

The uncertainty surrounding the scope of Section 5 is exacerbated by the administrative procedures available to the Commission for litigating unfair methods claims. This combination gives the Commission the ability to, in some cases, take

---

[12] Concurring Opinion of Commissioner Jon Leibowitz at 15, *In re* Rambus, Inc., No. 9302 (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

advantage of the uncertainty surrounding Section 5 by challenging conduct as an unfair method of competition and eliciting a settlement even though the conduct in question very likely would not violate the traditional federal antitrust laws. This is because firms typically will prefer to settle a Section 5 claim rather than going through lengthy and costly administrative litigation in which they are both shooting at a moving target and have the chips stacked against them. Such settlements only perpetuate the uncertainty that exists as a result of ambiguity associated with the Commission's Section 5 authority by encouraging a process by which the contours of the Commission's unfair methods of competition authority are drawn without any meaningful adversarial proceeding or substantive analysis of the Commission's authority.

Critics have offered at least two rejoinders in response to claims that the uncertainty surrounding Section 5 may chill legitimate business conduct. The first is that the courts have provided sufficient guidance on the scope of Section 5 to alleviate concerns about its imprecise boundaries.[13] The second is that they claim the Commission has used Section 5 very judiciously and only in appropriate circumstances.[14] Neither argument is particularly compelling. On the first point,

---

[13] *See* Geoffrey Manne, *Time for Congress to Stop the FTC's Power Grab on Antitrust Enforcement*, BUSINESS IN THE BELTWAY, FORBES (Dec. 20, 2012), http://www.forbes.com/sites/beltway/2012/12/20/time-for-congress-to-stop-the-ftcs-power-grab-on-antitrust-enforcement/ (discussing a letter from members of the House Judiciary Committee that argues that "concerns about the use of Section 5 are unfounded").

[14] *See, e.g.*, *Roundtable Conference with Enforcement Officials: American Bar Association Section of Antitrust Law Spring Meeting, Washington, D.C.*, ANTITRUST SOURCE, June 2011, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/jun11_fullsource.authcheckda

although the Supreme Court has decided a handful of cases in which it examined the scope of the Commission's authority under Section 5, no court has set out the elements necessary to challenge conduct that falls outside the traditional federal antitrust laws. Moreover, the Supreme Court has not examined the breadth of Section 5 in nearly four decades. This suggest that a policy statement actually is more important today in light of dramatic changes in antitrust jurisprudence since the Supreme Court last considered the Commission's authority under Section 5.[15] Quite a bit has happened within antitrust jurisprudence during this timeframe. The Supreme Court has issued nearly one hundred decisions since 1972 that can be explained in large part with a move toward bringing modern antitrust law in line with economic thinking.[16] No serious antitrust scholar argues that merger law would better serve consumers by relying exclusively upon the language in *Brown Shoe*[17], *Von's Grocery*[18], and *Pabst Brewing*[19] rather than the updated economic thinking provided by the Horizontal Merger Guidelines.[20] Similarly, court decisions from the early 1970s are not a serious argument

---

m.pdf (Chairman Leibowitz stating "we are going to use our Section 5 authority where appropriate, although we like to think that we will us it judiciously").

15 *See FTC v. Sperry Hutchinson Co.*, 405 U.S. 233, 244 (1972).

16 *See generally* Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL'Y INT'L, Autumn 2007.

17 *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

18 *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

19 *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

20 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

against providing agency guidance on Section 5; rather, they are evidence demonstrating the need for it.

With respect to the second point, the naked assertion that the Commission only uses Section 5 judiciously, and only in appropriate circumstances, provides very little comfort to a firm who must guess how any particular Commission will apply its unfair methods of competition authority to the firm's business practices, whether that Commission's views will remain consistent, or whether the views of any particular Commission will survive a change in membership. Take for example the position articulated by one FTC Chairman just over three decades ago that who said that "no responsive competition policy can neglect the social and environmental harms produced as by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of producer-stimulated demands."[21] Now, I do not think that any of my colleagues would endorse such an expansive use of Section 5, but the point is that under the current state of affairs where the Commission has not committed itself to a coherent operational framework, what the Commission's Section 5 enforcement looks like can vary dramatically from commissioner to commissioner, and Commission to Commission. No amount of pointing to recent cases as examples of the Commission's

[21] Chairman Michael Pertschuk, Remarks before the Annual Meeting of the Section on Antitrust and Economic Regulation, Association of American Law Schools, Atlanta, Ga. (Dec. 27, 1977).

"judicious" use of Section 5 and no number of Commissioner speeches—including this one—can be counted upon to supply businesses with the information they require to ensure that they do not violate the statute.

**b. Leveraging Institutional Advantages to Steer Competition Policy**

The second reason for issuing a policy statement with respect to the Commission's unfair methods of competition authority is that Congress intended Section 5 to play a key role in the Commission's competition mission.[22] Specifically, Congress intended for the Commission to use Section 5 to reach business conduct outside the scope of the traditional federal antitrust laws. A key rationale for creating a competition statute that reaches behavior not otherwise unlawful under the Sherman Act and Clayton Act is that the Commission, as an expert administrative tribunal, could interpret its operative statute in a manner that is flexible to changes in the marketplace and capable of expanding beyond current judicial interpretations. In order to expand beyond current judicial interpretations, Congress authorized the Commission not only to bring enforcement actions, but also to conduct studies of business practices in order to understand their competitive implications.[23] These institutional design features were

---

[22] *See* Kovacic & Winerman, *supra* note 11, at 930-31 ("Through repeated exposure to competition policy problems, the FTC would use distinctive research and data collection powers to develop, apply, and assess doctrine.").

[23] *See* Report of the Senate Committee on Interstate Commerce, S. REP. NO. 597, 63d Cong., 2d Sess. 8-9 (1914) (stating the FTC would have the "information, experience, and careful study of the business and economic conditions of the industry affected").

intentional and were undertaken with the hope that, as former Chairman Bill Kovacic and Marc Winerman have described, Section 5 would "help make the Commission the preeminent vehicle for setting competition policy in the United States."[24]

Specifically, the Commission's unique policy authority would allow competition policy research and development that would complement the agency's enforcement mission and guide Commissioners in identifying the appropriate standards of liability. Ultimately, "courts would eventually look to the Commission for guidance about how to frame and apply antitrust rules."[25] The combination of these institutional design features and expertise would generate sound competition rules and reliable guidance for the business community. This promise, however, has remained largely unfulfilled.[26] In fact, the evidence suggests that the Commission's use of Section 5 has done very little to influence antitrust doctrine and even less to inform judicial thinking or to provide guidance to the business community. In my view, this is in large part because the Commission has failed to articulate a coherent framework for the application of Section 5.

---

[24] *See* Kovacic & Winerman, *supra* note 11, at 932.

[25] *See id.*

[26] *See id.* at 942 ("The Commission has done relatively little to inform judicial thinking, as the agency has not issued guidelines or policy statements that spell out its own views about the appropriate analytical framework. This inactivity contrasts with the FTC's efforts to use policy statements to set boundaries for the application of its consumer protection powers under Section 5.").

Having outlined the reasons why issuing an unfair methods of competition policy statement is important, I will now turn to the key features of my specific proposal.

## III. SECTION 5 UNFAIR METHODS OF COMPETITION DEFINED

To establish a framework for the application of Section 5 that sufficiently distinguishes between lawful and unlawful conduct and that promotes the Commission's mission of protecting competition and promoting consumer welfare, the Commission must define what precisely constitutes an unfair method of competition. In undertaking this task, I think it is important to recall why the Commission's use of Section 5 has failed to date. In my view, this failure is principally because the Commission has sought to do too much with Section 5, and in so doing, called into serious question whether it has any limits whatsoever. In order to save Section 5, and to fulfill the vision Congress had for this important statute, the Commission must recast its unfair methods of competition authority with an eye toward regulatory humility in order to effectively target plainly anticompetitive conduct.

With this in mind, and in light of the case law, legislative history, and the Commission's institutional capabilities, I believe that an unfair method of competition should be defined as: an act or practice that (1) harms or is likely to harm competition significantly and that (2) lacks cognizable efficiencies. There are several benefits to this definition of an unfair method of competition. First, this definition allows the

Commission to reach beyond the scope of the Sherman Act and Clayton Act, as Congress intended, while explicitly tethering the agency's enforcement actions to the modern economic concept of harm to competition. Second, this definition also allows the Commission to leverage its expertise to target conduct that is most likely to harm consumers. Third, this definition reduces the risk of potentially deterring welfare-enhancing conduct and provides the business community with guidance as to what conduct will be considered unlawful under Section 5.

In the remainder of my remarks, I will explain in more detail the two elements of an unfair methods of competition claim as defined in my proposed Policy Statement.

**a. Unfair Methods of Competition Must Harm Competition**

The first element of an unfair methods of competition claim as I have defined it here is that the act or practice in question must result in, or likely result in, significant harm to competition as that term is understood under the traditional federal antitrust laws. One of the most important features of this element is that it focuses Section 5 at conduct that actually is anticompetitive. This element prevents the Commission from considering non-economic factors, such as whether the practice harms small business or whether it violates public morals, when deciding whether to prosecute conduct as an unfair method of competition.[27] This is a simple commitment but eliminates one source

[27] *See id* at 8 ("The FTC should expand its reach to bring in some conduct that does not fall within the coverage of the Sherman and Clayton Acts as currently interpreted . . . . [But] the practices it condemns

of variation in Section 5 enforcement while making the agency's own interpretation of its authority consistent with well-developed federal jurisprudence and the legislative history of the FTC Act.[28]

Focusing Section 5 only upon conduct that harms competition in the economic sense allows the Commission to prosecute conduct that is anticompetitive, but that does not necessarily constitute a violation of the Sherman Act or Clayton Act. At the same time, I have proposed in my Policy Statement that the Commission would not challenge conduct as an unfair method of competition where there is well-forged case law under the traditional federal antitrust laws. This limitation is important because the Commission does not necessarily hold an institutional advantage over the courts in discerning competitive effects where the courts have analyzed the business conduct at issue and constructed an analytical framework to determine liability. Moreover, prosecuting conduct under disparate standards depending upon whether the claim is brought under Section 5 or, for example, Section 2 of the Sherman Act, may unfairly blur the line between lawful and unlawful behavior.[29]

---

must really be 'anticompetitive' in a meaningful sense. That is, *there must be a basis for thinking that the practice either does or will lead to reduced output and higher consumer prices or lower quality in the affected market*." (emphasis added)).

[28] 51 CONG. REC. 12220 (1914) (Senator Newlands stating "the legal significance is the same as the economic significance").

[29] *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (stating that where there is "well-forged" case law governing the challenged conduct, the Commission cannot prosecute the conduct under Section 5 because doing so might "blur the distinction between guilty and innocent commercial behavior").

Harm to competition is a concept that is readily understandable and that has been deeply embedded into antitrust jurisprudence at least since the Supreme Court's articulation of the rule of reason in *Chicago Board of Trade*.[30] Conduct challenged under Section 5 must harm competition and cause an anticompetitive effect. That is to say, as the D.C. Circuit has explained, the conduct "must harm the competitive *process* and thereby harm consumers"—"harm to one or more *competitors* will not suffice."[31] By tethering Section 5 to the modern antitrust concept of harm, the key question in enforcing Section 5 therefore becomes whether the practice is one that, as the Supreme Court articulated in *BMI*, "restrict[s] competition and decreases output . . . or instead [is] one designed to increase economic efficiency and render markets more, rather than less, competitive."[32]

Now, the Commission can rely upon a variety of indicators to assess whether a practice harms competition. Perhaps the most relevant evidence is evidence that the challenged conduct has a harmful impact on price or output.[33] More broadly, there are numerous methods and techniques to examine the economic evidence and determine the effect of the conduct in question on competition. For instance, conduct that results in harm to competition, and in turn, in harm to consumer welfare, typically does so

---

30 *B. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

31 *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam).

32 *Broad. Music, Inc. v. Columbia Broad. Sys.,* 441 U.S. 1, 19 (1979) (internal quotation marks omitted).

33 *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986).

through increased prices, reduced output, diminished quality, or weakened incentives to innovate.

One important area in which my definition of unfair methods of competition goes beyond the traditional federal antitrust laws is in allowing the Commission to prosecute those practices that have not yet resulted in harm to competition but are likely to result in anticompetitive effects if allowed to continue. As one federal court has observed, "[a] major purpose of [the FTC] Act was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained."[34] In assessing whether an act or practice that has not yet harmed competition is an unfair method of competition, the Commission must assess both the magnitude and probability of competitive harm to determine whether it is an unfair method of competition. Where the probability of competitive harm is smaller, the Commission should not find an unfair method of competition without reason to believe the act or practice poses a risk of substantial harm. This approach ensures that even in cases of likely harm to competition, the Commission's analysis is tethered to sound economic reasoning.

Under my definition of unfair methods of competition, there are two broad categories of conduct that the Commission can pursue even though the conduct has not yet caused harm to competition. The first category is those cases in which a firm seeks

[34] *Triangle Conduit & Cable Co. v. FTC*, 168 F.3d 175 (7th Cir. 1948).

to form an illegal restraint of trade but its efforts are thwarted before an agreement can be reached. These so-called "invitation to collude" cases satisfy the harm to competition element of an unfair method of competition claim, whether or not it ultimately results in increased prices, reduced output, or other harm to competition, because it creates a substantial risk of competitive harm. In such circumstances, what the Commission must determine is the probability the conduct in question will harm competition. This determination cannot be based on mere speculation, but must be rooted in sound economic analysis that calculates—or at a minimum provides the intuition for understanding—the magnitude and probability of the purported harm to competition.

The second category of cases involve the use by a firm of unfair methods of competition to acquire market power that does not yet rise to the level of monopoly power necessary for a violation of the Sherman Act, yet harms competition. Consider for example a situation in which Firm A has 30 percent of the ice cream market and makes deceptive claims to supermarkets that its shelf-space contracts allow it to remove Firm B's and Firm C's products from the retail shelf display. If Firm A is able to acquire market power as a result of its deceptive conduct, the Commission could challenge Firm A's conduct as an unfair method of competition under Section 5.

### b. Unfair Methods of Competition Must Lack Cognizable Efficiencies

The second element of an unfair methods of competition claim as I have defined it here is that the act or practice in question must not generate cognizable efficiencies. Under my proposed Policy Statement, the Commission therefore would not challenge conduct as an unfair method of competition if cognizable efficiencies exist. The efficiencies screen is important for at least three reasons. First, it helps establish a test with clear and predictable results that prevents arbitrary enforcement of the Commission's Section 5 authority. Second, it focuses the agency's scarce resources on conduct most likely to harm consumers. Third, it avoids deterring consumer welfare enhancing business practices. The efficiencies screen also has the benefit of offering an effective and practical approach to enforcing Section 5 because it leverages the Commission's considerable expertise in identifying the presence of cognizable efficiencies in the merger context and explicitly ties the analysis to the well-developed framework offered in the Horizontal Merger Guidelines.

In articulating a framework for prosecuting conduct under Section 5, it is important for the Commission to use a standard that clearly distinguishes between acceptable business practices and business practices that constitute an unfair method of competition in order to provide firms with adequate guidance as to what conduct may be unlawful. Articulating a clear and predictable standard for what constitutes an unfair method of competition is particularly important because the Commission's authority to condemn unfair methods of competition allows it to break new ground and challenge conduct based upon theories not previously enshrined in Sherman Act or Clayton Act jurisprudence.[35] As I have already mentioned, under my proposed Policy Statement, Section 5 would not be used for conduct for which there is well-forged case law under the traditional federal antitrust laws because the Commission does not have an institutional advantage beyond that of the courts in such cases and prosecuting conduct under varying standards raises questions about fairness. Section 5 therefore most commonly will be used where the Commission has devoted its institutional research and reporting capabilities to investigate business practices unexamined by the courts and has determined that those business practices harm consumers. Under circumstances where the conduct in question has not be analyzed by the courts, there is a particularly great risk that, in the absence of a clear and predictable standard, firms may engage in conduct without any meaningful notice that they may be prosecuted. The efficiency screen thus provides firms with certainty that conduct can be challenged as an unfair method of competition only when the conduct lacks cognizable efficiencies.

Moreover, because the Commission is an administrative body with changing membership, there is a significant risk that different Commissions may apply Section 5

[35] *See E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984) ("A test based solely upon restraint of competition, even if qualified by the requirement that the conduct be "analogous" to an antitrust violation, is so vague as to permit arbitrary or undue government inference with the reasonable freedom of action that has marked our country's competitive system.").

differently. The efficiency screen significantly reduces this problem by linking the definition of an unfair method of competition to the Commission's analytical framework for mergers as articulated in the Horizontal Merger Guidelines. The Commission has developed significant expertise and articulated clear standards in the merger context for which efficiencies are cognizable and which are not.[36] Relying upon those standards in the efficiency screen contemplated in unfair methods analysis reduces the risk that different Commissions will balance the costs and benefits of conduct differently and potentially reach different results.

Another reason to use an efficiency screen when identifying unfair methods of competition is to more efficiently target the business conduct that is most likely to harm consumers. As with all law enforcement agencies, the Commission must allocate its scarce resources in a manner that best achieves its mission. Congress has charged the Commission with promoting competition and furthering consumer welfare by preventing anticompetitive business practices without unduly burdening legitimate business activity. Given the size of the national economy and the range of business

---

[36] Since incorporating the concept of cognizable efficiencies into the revised 1997 Horizontal Merger Guidelines, the Commission has regularly applied efficiency analysis as part of its merger review. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (providing guidance on how efficiencies are to be identified); U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines 49-59 (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf (explaining the analytical process for assessing efficiencies); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1992, rev. 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf (incorporating the concept of cognizable efficiencies into merger analysis).

practices employed by firms within it, the Commission must identify those patterns of conduct that are most likely to harm consumers so that it can target enforcement efforts to maximize consumer welfare. Anticompetitive conduct that lacks cognizable efficiencies is the most likely to harm consumers because it is without any redeeming consumer benefits.[37]

The efficiency screen also works to ensure that welfare enhancing conduct is not inadvertently deterred. Firms engage in a variety of business practice that create efficiencies and thus enhance the firm's ability and incentive to compete. These efficiencies can result in lower prices, improved quality, better services, new products, and other benefits that enhance consumer welfare. Some of these practices also may harm competition and consumers under certain specific circumstances. Where conduct plausibly produces both costs and benefits for consumers it is fundamentally difficult to identify the net competitive consequences associated with the conduct.[38] This is particularly true if business conduct is novel or is being applied to an emerging or rapidly changing industry, and thus where there is little empirical evidence about the

---

[37] Such conduct also may be relatively inexpensive to implement, making it a low-cost, and thus common, strategy for firms seeking to avoid or impair the competitive process, making it an even more appealing target for agency action. *See* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005) (stating that because "firms are likely to prefer low-cost strategies to achieve [market or monopoly power], we expect that cheap exclusion would be relatively more common").

[38] *See United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam) ("Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern").

conduct's potential competitive effects.[39] The Supreme Court has long recognized that erroneous condemnation of procompetitive conduct significantly reduces consumer welfare by deterring investment in efficiency-enhancing business practices.[40] To avoid deterring consumer welfare-enhancing conduct, my proposed Policy Statement limits the use of Section 5 to conduct that lacks cognizable efficiencies.

One obvious question raised by my Policy Statement is why should the Commission employ a bright line efficiencies screen rather than engage in a rule of reason-styled balancing of a conduct's procompetitive efficiencies against its anticompetitive harm? Why should the Commission not challenge under Section 5

---

[39] *See* ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 32 (2007) (recommending that "in industries in which innovation, intellectual property, and technological change are central features . . . antitrust enforcers should carefully consider market dynamics in assessing competitive effects"); R.H. Coase, *Industrial Organization: A Proposal for Research*, *in* POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 67 (Victor R. Fuchs, ed., 1972) ("[I]f an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of ununderstandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.").

[40] *See Pac. Bell. Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 451(2009); *Credit Suisse (USA) LLC v. Billing*, 551 U.S. 264, 283 (2007); *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2005); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226-27 (1993). Scholars have also recognized the social welfare costs associated with judicial error in antitrust cases. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 932, 935 (2001) ("Whenever an antitrust court is called on to balance efficiency against monopoly, there is trouble; legal uncertainty, and the likelihood of error, soar."). Although erroneously failing to identify and challenge anticompetitive conduct also has social costs, market forces offer at least some correction with respect to such errors whereas erroneous challenges of procompetitive conduct has no readily available fix. *See* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L. J. 659, 675 (2001) ("efficiencies are hard to measure, and the benefit of the doubt should go to defendants, not to plaintiffs; otherwise, the continued generation of the large efficiency benefits responsible for raising our standard of living will be jeopardized"); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) ("[T]he economic system corrects monopoly more readily than it corrects judicial errors.").

conduct that has very significant anticompetitive effects but only small efficiencies? I have already given a number of reasons for why the efficiencies screen is important, but the overarching rationale that unites each of these is a desire to articulate a framework that recasts the Commission's unfair methods of competition authority in a way that has modest but clear objectives and that is calibrated to best enhance consumer welfare. To save Section 5, and fulfill its promise, the Commission must confine its unfair methods of competition authority to those areas where the agency can leverage its unique institutional capabilities to target the conduct most harmful to consumers. This recasting of the Commission's Section 5 unfair methods authority in no way requires the Commission to let anticompetitive conduct run rampant. The Commission can still challenge such conduct where appropriate by bringing a claim under the traditional federal antitrust laws. The current formulation of the Commission's unfair methods of competition enforcement has proven unworkable in large part because it lacks boundaries and is ambiguous. It is no answer in the face of Section 5's track record to claim the agency will continue to balance harms and benefits as it sees fit. Where the agencies seek to challenge conduct that has both competitive harms and benefits it is fully capable of making its case to federal courts. The efficiencies screen plays an important role in remedying this problem by clearly distinguishing between lawful and unlawful conduct. The Commission can harness the significant expertise and scarce resources it devotes to Section 5 unfair methods enforcement away from novel theories applied to conduct with ambiguous welfare consequences and toward the conduct most likely to harm consumers.

## IV. CONCLUSION

Congress intended Section 5 to play a key role in the Commission's competition mission by allowing the agency to leverage its institutional advantages to develop evidence-based competition policy. I believe the Policy Statement that I have outlined puts the Commission on the path to fulfilling that promise by providing a framework for the Commission's authority to prosecute unfair methods of competition authority. The Policy Statement articulates a definition of unfair methods of competition that is tethered to modern economics and antitrust jurisprudence and avoids deterring consumer welfare-enhancing competition while targeting conduct most harmful to consumers. In doing so, I believe this Policy Statement would strengthen the Commission's ability to target anticompetitive conduct and provides clear guidance about the contours of its Section 5 authority.

In closing, let me reiterate that my goal is for this proposed Policy Statement to serve as a starting point for a fruitful discussion about potential standards and limits we can impose upon the Commission's unfair methods authority. As I have said, I have great faith in the marketplace for ideas and it is my hope that by offering my own views I can effectively participate in that marketplace and contribute to the Commission. I believe it is our responsibility as stewards of the Commission to articulate a position on the appropriate application of the agency's signature competition statute. I look forward to working with my fellow commissioners to achieve this long overdue goal.

* * * * *

Thank you again for having me here today. I am happy to take a few questions.