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FTC Commissioner Josh Wright is a smart guy in a tough job, assuming he wants to get something useful (from his perspective) done during his tenure. He is a lawyer with a Ph.D. in Economics, or an economist with a law degree—sometimes hard to tell which is dominant, but either way a smart dude. He is also a renowned poker player, but—and most relevant here—a Republican FTC Commissioner who will soon be dealing with a Democratic-majority FTC.

Being a FTC Commissioner, but not the Chairman, can itself be frustrating, since it is only one vote out of five, and not the first among equals. The FTC Chair obviously has the most influence on staff appointments and lots of other things, and mostly needs other Commissioners only when she/he needs a vote on something. As a result, relationships between Chairs and other Commissioners have historically run the gamut from very close to all out war. With today's FTC Chairwoman, the latter seems unlikely, but there will surely be at least occasional conflict between Chairwoman Ramirez and other Commissioners, especially the Republican Commissioners. And that kind of tension is more likely with a Commissioner like Wright, who is smart, confident, and aggressive—not unpleasant, but also not someone who will worry much about rocking the boat.

Thus, it was hardly surprising that one of the first things Commissioner Wright did in his new role was to suggest that it was past time for the Commission to put out guidelines on the use of Section 5. That was followed up shortly by his very specific proposal for what such guidelines should say, which is the focus of this symposium. I would bet money that Section 5 guidelines were not initially high on the agenda of Chairwoman Ramirez. Indeed, she has said that no guidelines are necessary, since the cases provide plenty of insight into how Section 5 will be applied. Excuse me, but if you can take the existing "cases" (none of which are litigated results) and from those tell me what Section 5 covers and what it does not, you are a lot smarter than I am. While admittedly that is not the toughest standard to meet, I defy anyone to articulate a true picture of Section 5's reach from this mish-mash of enforcement actions. And even if one could somehow divine some general guidance here, the one thing we know for certain is that there will always be something new that catches attention but looks hard to attack under the Sherman Act.

The real value of guidelines is that they put some public, visible constraints on what is otherwise just a hope and prayer that the FTC majority will not overreach. Indeed, you could argue that Chairwoman Ramirez' assertions that she will be judicious in application of Section 5 actually show why guidelines are a really good—indeed, the second best—idea for Section 5. (Best would be repeal, but that seems unlikely.) If we have to depend on the personal approach of Commissioners to avoid misuse, that is (with all due respect to the current occupants of those

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seats) a pretty thin reed. Just look at the varying positions taken over the years by various members of the Commission, and you tell me whether that makes you comfortable. It doesn't do it for me.

In any event, Commissioner Wright's proposal (and the useful discussion from Commissioner Ohlhausen, the other Republican Commissioner, that has now followed) have put this issue on the Commission's agenda. That does not mean that anything will actually happen, but the chances have at least slightly increased. Still, my view is that this is probably a Sisyphean effort by Wright and Ohlhausen, since it is very distinctly not in the interest of the Commission majority (or for that matter the Commission staff) to produce such guidelines.

Just being bureaucratic about it, guidelines only crimp your flexibility as staff or decision makers, since you have to either shoehorn your desired result into the guidelines framework or explain why what you want to do is not inconsistent with the guidelines. The neat thing about Section 5 *sans* guidelines is that it can theoretically be applied to anything anytime a Commission majority decides it should, and what regulator would not want to have such a tool handy for when it seems useful? So my guess is that it will be a cold day in FTC-dom—or a different Administration—before any such guidelines are produced.

Still, there is another reason (even apart from the general good government aspects) why even the Commission majority might want to consider guidelines, and that is, as we keep getting reminded by this Administration, elections matter. An election that produced a different Administration and/or Congressional majorities might well be persuaded that repeal or significant adjustment of Section 5 as applied to competition issues was a good idea—especially if in the meantime it starts to wander even more off into the Pertschuckian[2] cosmos of industrial policy on steroids. Better to constrain yourself, in ways you can live with but still offer some opportunities, than to have it done with a meat ax.

Whether the guidelines initiative actually produces anything or not, it is a very useful thing to put the spotlight on Section 5, because it has been sort of sneaking back into the active armory of the FTC after many years shut up in the basement. I have said before that Section 5 is like your appendix—harmless until inflamed but very dangerous if active. It is, if you will pardon my bluntness, an exceptionally stupid statutory provision. This hardly makes it unique; it is part of a very long list of such things, but it is still worth saying. I know there are recent examples of apparently dumb statutes that anyone can point to, but even so, does anyone really believe that, if Section 5 did not exist, it would have even a remote chance of enactment today?

I have seen arguments for years that the Congress passed Section 5, and so it is the obligation of the FTC to use it. Hogwash. The Congress passed the FTC Act a century ago, and we have largely done without Section 5 for all those 100 years. Why is it now more relevant than it has been? And by the way, the legislative history of the FTC Act, and its political context—driven in large part by concern that the invention of the Rule of Reason by the Supreme Court would render the Sherman Act toothless—are both good reasons to continue to ignore it. The proponents of the FTC Act imagined that the FTC would be populated by business experts; does

[2] Mike Pertshuck is a former FTC Chairman during the 1980's who, some argue, personified the idea of an unelected official overstepping his authority.

anyone remember the last such Commissioner? Like most other regulatory appointments, these are now a combination of politics and practice area expertise, with the balance tilting one way on some and the other way on others. But in no way are FTC Commissioners more competent than a very large number of other lawyers (since that is what they mostly are) in deciding whether some business practice is "unfair" or not. And as for the Rule of Reason, a good case can be made that it actually saved the Sherman Act and made it very effective, not the other way around. So, in hindsight, there was probably no real justification for the FTC a century ago—Congress was, as too frequently happens, driven by political preferences and theoretical possibilities that turned out not to be valid. At a minimum, as time has proven, there was certainly no need for Section 5 as it relates to competition policy.

Today, the only possible legitimate reason to even think about using Section 5 would be if there was some compelling (and real, not imagined) competition policy problem that was outside the reach of the Sherman Act. And by outside the reach, I do not mean that the courts have determined that the challenged conduct is not anticompetitive and thus not forbidden by the Sherman Act. By definition, this means it is not a competition problem, whether everyone likes that result or not. Instead, I mean that for some reason some demonstrably anticompetitive act cannot be reached by enforcement of the existing antitrust laws as they have come to be interpreted. Frankly, I always find it amusing that the first example thrown out by those seeking to justify Section 5 use is attempted collusion—conduct that was by definition unsuccessful and had zero competitive effects. Is that really the best argument to unleash Section 5? If so, this debate should be over.

The reality is that most of those who want to disinter Section 5 for competition usage are from the "Can we help?" school of antitrust—interventionists who are more confident than they should be that they can intervene in markets and make them perform better. This has been, of course, a dominant theme in antitrust over the years, but for a long time those instincts could be satisfied by steady expansion of the reach of the Sherman and Clayton Acts. Since the rise of the Chicago School, however, and even more importantly its victory in the marketplace of ideas amongst the judiciary, those who seek a bigger role in markets have looked around and discovered Section 5—with language even broader than the original Sherman Act language and without all that messy baggage of 100 years of judicial gloss that creates limits on how it can be used—and imagined how potentially useful it could be to get around some of what they perceive as inappropriate constraints on competition policy efforts.

Given this history, I completely understand why Commissioners Wright and Ohlhausen have proposed Section 5 guidelines. They are more cautious about intervention and its effects, and they also reflect a view that government regulation should be as transparent as possible. It should never be a surprise to the bar or the business community when the FTC attacks a particular form of conduct as anticompetitive. Obviously, there are always factual issues and differences, but the kind of circumstances when the Commission is likely to attack should be clear to all informed observers. So guidelines would help this cause, but I also know how hard they are to produce.

There is always a strong voice within any agency that to produce guidelines is to tie the agency's hands to some degree. Most government enforcers or regulators are ordinary humans, and thus would prefer fewer constraints than more, more flexibility than less, less oversight, and

more ability to adjust to the circumstances as they see them. I suspect this has always been so, but I remember it very strongly back 40 years ago, when I was at the DOJ Antitrust Division and we were trying to produce sentencing guidelines for the newly-strengthened criminal penalties for Section 1 violations. It was certainly present during all of the various merger guidelines efforts of the last 20 years or so. And it would be a particularly big issue with Section 5 guidelines, since almost anything that was said would, at least potentially, seriously crimp the discretion of the agency.

So this would be a tough task in the best of circumstances. But to do it as proposed by Commissioners Wright and Ohlhausen, by laying out some very real (and in my view appropriate) criteria that have to be met before the elastic language of Section 5 could be employed, will be an even tougher job. And then add in the fact that the proponents of guidelines are the minority Commissioners, and that the practical effect of creating such guidelines would be to constrain the majority. This is why I suspect this is truly a Sisyphean effort, with the boulder never likely to reach the top of the hill.

As you know, in Greek mythology Sisyphus was condemned to his eternal struggle because he was a very crafty (some would say devious) person who angered the gods in various ways. Thus, his ultimate punishment was to roll a huge boulder up a steep hill, but before he got to the top, the stone would roll down, making him start over again, and so on for eternity. I personally find Wright and Ohlhausen perfectly pleasant folks, but maybe they are more devious than I give them credit for, and they have a plan that will get past all these obstacles.

More power to them if so, because any constraints are probably better than none, and those envisioned by Wright and Ohlhausen would prevent the most abusive uses of Section 5, such as trying to evade Sherman Act jurisprudence just because you don't agree with it.

But just in case, I plan to stay away from the bottom of the hill.