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I. INTRODUCTION

The proper scope of the U.S Federal Trade Commission's ("FTC's") Section 5 enforcement authority has been a recurring issue in antitrust enforcement. In recent months there has been renewed attention to the issue of formal guidance on Section 5 enforcement, generated largely by FTC enforcement actions and related statements and speeches by FTC Commissioners. Given the views of the majority of the Commission, however, this most recent spike in attention seems unlikely to lead to any immediate formal written guidance.

Moreover, the discussion to date has mostly been focused on broad statements and general principles that do not yet reach the level of detailed guidance that would be most useful for companies potentially subject to Section 5 enforcement. Although companies and their counsel would welcome additional guidance from the Commission, for the foreseeable future, recent FTC enforcement actions are the best Section 5 "roadmap" available.

II. SCOPE OF SECTION 5

Section 5 of the Federal Trade Commission Act prohibits "[u]nfair methods of competition."[2] The FTC has jurisdiction to enforce the Clayton Act, and, through Section 5, the Sherman Act, but it is the FTC's use of Section 5 as a source of "standalone" enforcement authority that creates controversy.[3] Section 5 grants the FTC power "to define and proscribe an unfair competitive practice" and bring an enforcement action to end such conduct.[4] In *Brown Shoe*, the Supreme Court noted that the FTC's "broad power" to declare unlawful certain unfair business practices under Section 5 "is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts *even though such practices may not actually violate these laws*" (emphasis added).[5]

Thus, for many years it has been accepted that standalone Section 5 authority extends beyond the bounds of the Sherman Act and the Clayton Act. Exactly how far beyond the bounds of the Sherman Act and the Clayton Act this standalone Section 5 authority extends is the question that engenders such uncertainty and dispute.[6]

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[2] 15 U.S.C. § 45; *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). Section 5 also proscribes "unfair and deceptive acts and practices," 15 U.S.C. § 45, although this provision is routinely used as part of consumer protection enforcement actions. This article will focus on unfair methods of competition and its use as the basis for standalone Section 5 enforcement.

[3] 15 U.S.C. § 21(a) (Clayton Act Enforcement); 15 U.S.C. § 45 (Sherman Act); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

[4] *See FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 244 (1972).

[5] *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (emphasis added).

[6] *See* 15 U.S.C. § 45; *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

Two factors have contributed to this ongoing debate. First, the FTC Act, much like the Sherman Act and the Clayton Act, provides only a very general standard and leaves significant room for interpretation. Second, unlike the Sherman Act and Clayton Act, there have been relatively few judicial decisions regarding the scope of Section 5 because there are few standalone Section 5 enforcement actions.

The FTC's recent use of Section 5—in particular in the standard-setting context—has led to renewed calls for the FTC to more clearly define the limits of its standalone Section 5 authority. However, no Commission majority has developed in support of formal written guidance, and it is more likely that the Commission will continue to rely on enforcement actions, and any decisions reviewing those enforcement actions, in lieu of formal guidance.

III. ENFORCEMENT GUIDELINES

As summarized in Table 1 below, the Commission is split on whether the FTC should issue Section 5 enforcement guidelines. Two current Commissioners (Commissioners Ohlhausen and Wright) are in favor of Section 5 guidelines. Those who advocate guidelines cite a number of reasons, most commonly and most importantly that the FTC has an obligation to formally define the parameters of standalone Section 5 authority, both to provide some limiting principle for enforcement and to offer the business community a clear, detailed explanation of how Section 5 will be applied, as distinct from the Sherman and Clayton Acts.[7]

Commissioner Wright has recently been active in advocating this position. He has made several speeches on the topic and in 2013 published a proposed policy statement regarding the proper use of standalone Section 5 authority.[8] He believes 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 (2) lacks cognizable efficiencies.[9] In later public statements, Commissioner Wright has also offered support for a standard that weighs the harms and the benefits from the conduct at issue.[10]

Commissioner Ohlhausen is also an advocate for formal written guidance, and has proposed defining unfair methods of competition to require conduct (1) resulting in substantial

[7] W. Kovacic & M. Winerman, *Competition Policy and the Applications of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L. J. 929, 944 (2010).

[8] *See, e.g.*, Remarks of Joshua D. Wright, Comm'r, FTC, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority*, at 5 (Feb. 26, 2015) *available at* https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf; Joshua D. Wright, Comm'r, FTC, *The Need for Limits on Agency discretion & The Case For Section 5 Guidelines* (Dec. 16, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/need-limits-agency-discretion-case-section-5-guidelines/131216section5_wright.pdf.

[9] Statement of Commissioner Joshua D. Wright, Comm'r, FTC, *Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, at 2 (June 19, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf [hereinafter *Wright Statement*].

[10] Joshua D. Wright, Comm'r, FTC, *The Need for Limits on Agency discretion & The Case For Section 5 Guidelines*, at 15-16 (Dec. 16, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/need-limits-agency-discretion-case-section-5-guidelines/131216section5_wright.pdf.

harm to competition, but (2) having no pro-competitive justification (or be such that the harm is disproportionate to the benefits).[11]

Table 1: Summary of FTC Commissioner Views Calling for Section 5 Guidance

Commissioner	Proposed Approach
Wright (R)	• Unfair method of competition is an act or practice that: (1) harms or is likely to harm competition significantly and (2) lacks cognizable efficiencies. • "[A]mbiguity 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." • "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, but failed to articulate a coherent framework for applying its unfair methods of competition authority."[12] • The "vague and ambiguous nature of Section 5" is in effect a lost opportunity to apply Section 5 "in a manner that consistently benefits rather than harms consumers."[13]
Ohlhausen (R)	• Unfair method of competition requires: (1) substantial harm and (2) no pro-competitive justification or harm disproportionate to the benefits. • "Section 5 (properly interpreted) should not play a significant role in the FTC's competition enforcement efforts."[14] • "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 . . . ."[15] • "[T]he Commission's actions fail to provide meaningful limiting principles regarding what is a Section 5 violation…."[16]

[11] Maureen K. Ohlhausen, Comm'r, FTC, Remarks before U.S. Chamber of Commerce, *Section 5: Principles of Navigation* (July 25, 2013), *available at* https://www.ftc.gov/public-statements/2013/07/section-5-principles-navigation [hereinafter *Ohlhausen Statement*].

[12] *Wright Statement*, *supra* note 9, at 2.

[13] Remarks of Joshua D. Wright, Comm'r, FTC, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority,* at 5 (Feb. 26, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf.

[14] *Ohlhausen Statement*, *supra* note 11, at 19.

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

[16] *In re Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 5 (Jan. 3, 2013), *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

IV. COMMON LAW

Chairwoman Ramirez and Commissioner Brill have made it clear that they prefer the status quo "common law" approach to Section 5 enforcement. They have taken the position that there is sufficient guidance in past Commission policy actions,[17] Section 5 cases, and consents previously filed, such that the precise boundaries of the FTC's Section 5 authority need not be separately defined (*see* Table 2). Those who take this position argue that just as the common law of the Sherman and Clayton Acts has developed and changed over time, the scope and role of Section 5 enforcement can and should develop over time.

Table 2: Summary of FTC Commissioner Views Suggesting the Common Law Approach[18]

Commissioner	Proposed Approach
Chairwoman Ramirez (D)	• Need a showing of harm to competition, and there should be a balancing of efficiencies – "condemn conduct only where, as with invitations to collude, the likely competitive harm outweighs the cognizable efficiencies."[19] • "I favor the common law approach, which has been a mainstay of American antitrust policy since the turn of the twentieth century."[20] • "In my view, our enforcement actions themselves provide useful guidance for the business community."[21]
Brill (D)	• Demonstrable adverse effect on competition • "…it's pretty clear that Congress intended Section 5 . . . to be a common law statute, the interpretation of which would be developed through case-by-case analysis."[22]

Although the formal guidance approach preferred by Commissioners Ohlhausen and Wright offers the prospect of more detailed guidance, it is notable that the standards that both recommend are very similar to the standards that Chairwoman Ramirez and Commissioner Brill

[17] Such as the workshop on the topic in 2008: "Section 5 of the FTC Act as a Competition Statute," Oct. 17, 2008, *available at* http://www.ftc.gov/news-events/events-calendar/2008/10/section-5-ftc-act-competition-statute.

[18] Although Commissioner McSweeny has not formally expressed her views publically, she has referenced the FTC's use of Section 5 in the standard-setting context without questioning those actions or calling for particular guidance. *See, e.g.*, Remarks of Commissioner Terrell McSweeny, Comm'r, FTC, Cravath/NYC Bar Institute for Corporate Counsel, at 7 (Dec. 10, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/604511/mcsweeny_-_cravath_nyc_bar_corporate_counsel_keynote_12-10-14.pdf ("The FTC has been – and will continue to be – very focused on the licensing practices surrounding FRAND-encumbered standards essential practices.").

[19] Edith Ramirez, Chairwoman, FTC, *Unfair Methods and the Competitive Process*, George Mason Univ. Symposium, at 6 (Feb. 13, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf.

[20] *Id*. at 8.

[21] *Interview with Chairwoman Edith Ramirez*, THE THRESHOLD (ABA Sec. of Antitrust L. Mergers & Acquisitions Committee), Spring 2014, at 9, *available at* http://www.ftc.gov/system/files/documents/public_statements/294181/140326thresholdspringissue_0.pdf.

[22] *Interview with Julie Brill*, ANTITRUST SOURCE (Feb. 2012), at 6, https://www.ftc.gov/sites/default/files/documents/public_statements/interview-ftc-commissioner-julie-brill/120229antitrustsource.pdf.

believe flow from the common law approach. It seems that all the Commissioners agree that competitive harm should be the linchpin of a standalone Section 5 action, and that the Commission would need to balance any such harm against cognizable efficiencies.

The Commissioners also seem comfortable using Section 5 to take action against invitations to collude, on the grounds that such conduct, although not a violation of the Sherman Act, is without any redeeming pro-competitive benefit.[23]

Although the Commissioners generally agree that "competitive harm" should serve as the standard under Section 5, there is a divergence of opinion on what role Section 5 should take in FTC's enforcement efforts. Commissioner Ohlhausen believes that "Section 5 (properly interpreted) should not play a significant role in the FTC's competition enforcement efforts" – the FTC should instead focus on making "valuable contributions to the antitrust laws, not in how it can pursue expansive UMC [unfair methods of competition] cases under Section 5."[24]

Similarly, Commissioners Ohlhausen and Wright have expressed a view that the FTC's recent standard-setting cases overstep the proper scope of the FTC's standalone Section 5 authority, partly based on a view that the economic basis for those enforcement actions remains unsettled and thus do not justify what they consider to be an expansive use of Section 5.

These differences in enforcement approach are not likely to be erased, even by fairly detailed guidance. Indeed, similar conflicts arise in most areas of antitrust enforcement, including, for example, merger analysis, which is often guided by the highly detailed Horizontal Merger Guidelines. Thus, with no immediate prospect of formal, detailed written guidance (and knowing that even if such guidance were to emerge it might not immediately provide substantially greater insight into how the Commission views the appropriate application of Section 5), companies and their counsel are best served, at least for the moment, by viewing recent Commission enforcement actions for direction regarding how its standalone Section 5 authority is likely to be used.

The types of conduct that the Commission has repeatedly pursued under its standalone Section 5 enforcement authority are summarized in Table 3. These include "invitations to collude" cases, various forms of "opportunistic" conduct in the standard-setting context, and exchanges of competitively sensitive information. Given the views of the majority of the Commission, these practices currently should be considered "high risk" under Section 5.

[23] *See, e.g.*, Press Release, *Two Barcode Resellers Settle FTC Charges That Principals Invited Competitors to Collude*, FTC, Jul. 21, 2014, *available at* https://www.ftc.gov/news-events/press-releases/2014/07/two-barcode-resellers-settle-ftc-charges-principals-invited (5-0 Commission vote to challenge an invitation to collude under Section 5).

[24] *Id*. at 19, 21.

Table 3: Summary of Recent FTC Section 5 Enforcement—Unfair Methods of Competition

Conduct/Practice	Recent Cases	Guidance
Invitations to collude[25]	• *InstantUPCCodes.com* (Jul. 21, 2014) • *U-Haul* (June 9, 2010) • *Valassis Communications* (Apr. 28, 2006)	• Solicitations or invitations to collude on price or output violate Section 5 • No agreement/acceptance of invitation required • Public or private solicitations are prohibited
Standard-setting conduct[26]	• *Bosch* (Dec. 3, 2012) • *Google/MMI* (Jan. 11, 2013) • *N Data* (Jan. 31, 2008) • *Rambus* (Aug. 2, 2006)	• "Opportunistic conduct" in the standard-setting context may violate Section 5 • No agreement required • Seeking injunctive relief on FRAND-encumbered standard-essential patents may violate Section 5
Exchanges of competitively sensitive information[27]	• *Bosley* (Apr. 8, 2013)	• Exchange of competitively sensitive non-public information with and about competitors violates Section 5 • No agreement required

Although not recent, there is Court of Appeals precedent, albeit somewhat limited, defining the parameters of and imposing limits on standalone Section 5 enforcement. The three most-prominent Court of Appeals decisions, each of which reversed FTC attempts to use its standalone Section 5 authority, are summarized in Table 4 below:

[25] *InstantUPCCodes.com* (July 21, 2014); *U-Haul Int'l, Inc.*, 75 Fed. Reg. 35,033, Jun. 9, 2010; *Valassis Communications*, April 28, 2006.

[26] *In re Robert Bosch GmbH*, 77 Fed. Reg. 71,593, Dec. 3, 2012; *In re Motorola Mobility LLC & Google Inc.*, 78 Fed. Reg. 2,398, Jan. 11, 2013 (relying on Section 2 court decisions involving bad faith and deceptive conduct and the FTC's *N-Data* decision to show that "under its stand-alone Section 5 authority, the Commission can reach opportunistic conduct that takes place after a standard is adopted that tends to harm consumers and undermines the standard-setting process"); *In re Negotiated Data Solutions, LLC (N-Data)*, 73 Fed. Reg. 5,846, Jan. 31, 2008; *In the Matter of Rambus Inc.*, Opinion of the Commission, Docket No. 9302, Aug. 2, 2006, *available at* https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802commissionopinion.pdf.

[27] Complaint, *In the Matter of Bosley, Inc. et al.*, Apr. 8, 2013, *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130408bosleycmpt.pdf.

Table 4: Prominent Section 5 Court of Appeals Decisions

Case	Holding	Reasoning
Ethyl Corp. (2d Cir. 1984)	No liability for parallel acts/tacit agreement without (1) evidence of anticompetitive intent or purpose or (2) the absence of an independent legitimate business reason for its conduct.[28]	In context of allegations of price-signaling via use of uniform delivered pricing the Court warned against "arbitrary and capricious administration of §5" and noted that the FTC must more clearly articulate how conduct that it challenges is "'unfair' within the meaning of § 5 . . . to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable."[29]
Boise Cascade (9th Cir. 1980)	No liability for conscious parallelism without evidence/finding of actual effect on competition.[30]	Court found that in multiple cases FTC had allowed delivered pricing in similar contexts and that the FTC had offered no evidence of actual effect on competition.
Official Airline Guides (2d Cir. 1980)	No liability for refusing to deal with a particular class of customers, even if it harms them: "We think that even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains this right."[31]	Publisher of a flight schedule publication refused to deal with a particular type of customer (commuter airlines for a flight schedule publication) and court found that "enforcement of the FTC's order . . . would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[32]

The FTC's recent round of standard-setting cases were resolved with consent decrees and thus were not subject to review in federal court. However, the D.C. Circuit, in reviewing and dismissing the FTC's Section 2 claims in the *Rambus* case, expressed "serious concerns about the strength of the evidence relied on to support some of the Commission's crucial findings" in relation to its "stand-alone § 5 action."[33] Further, the Court held that the Commission had failed to make a key finding—that Rambus had obtained its monopoly power as a result of deceptive conduct within the standard-setting organization.[34] Without such a finding, the Court held that the conduct at issue could not be the basis of liability under the Sherman Act or Section 5. *Rambus* thus provides at least one clear boundary for Section 5 enforcement.[35]

V. LIKELY PATH FORWARD?

There is no question that more information and detailed guidance regarding the FTC's Section 5 enforcement principles would be welcome. And, given the prominence of the issue in recent months and years, the Chairwoman and individual Commissioners are more frequently issuing detailed statements at the conclusion of FTC enforcement actions. Although these

[28] *See E.I. Dupont de Nemours & Co. v. FTC* 729 F.2d 128 (2d Cir. 1984) (also known as *Ethyl Corp.)*.

[29] *Id.* at 138.

[30] *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980).

[31] *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).

[32] *Id.* at 927.

[33] *Rambus Inc. v. FTC*, 522 F.3d 456, 467 (D.C. Cir. 2008).

[34] *Id.* at 467-69

[35] *Rambus* also demonstrates a commonsense, but important point in the "guidelines vs. common law" debate: whether or not there is FTC guidance on Section 5, the Courts of Appeals (and possibly the Supreme Court) will be the ultimate arbiter of the FTC's use of Section 5.

statements fall short of a uniform policy statement, they nevertheless prove helpful to businesses navigating similar issues. For example, Chairwoman Ramirez describes the *Google/MMI* order relating to standard-setting in just that way, noting "the broad principles embodied in the order provide a roadmap for parties that want to avoid FTC scrutiny to follow under similar circumstances."[36]

However, despite the recurring calls for a Section 5 policy statement or enforcement guidelines, there has been no public indication that the FTC has any current plans to issue such guidance. Even if the Commission were to issue a Section 5 policy statement today, there is no guarantee that the statement would provide substantial detail or even that it would survive as the Commission's composition (or political majority) changes over time.[37]

Thus, at least for the foreseeable future, Chairwoman Ramirez's view states the rule: Recent FTC enforcement actions and the Commissioners' statements in those actions are the best "roadmap" for Section 5 enforcement.

[36] E. Ramirez, Chairwoman, FTC, *Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective*, 8th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center, at 6-7 (Sep. 10, 2014).

[37] Other enforcement guidelines have had a mixed record of utilization and longevity – the DOJ/FTC Horizontal Merger Guidelines (detailing factors for liability under Section 7 of the Clayton Act) have been updated several times to reflect current agency practice and are widely relied upon by practitioners and frequently cited by courts, while the DOJ's 2008 Section 2 report (detailing factors for liability under Section 2 of the Sherman Act) was quickly rescinded, and the FTC's Policy Statement on Monetary Equitable Remedies in Competition Cases, originally issued in 2003, was withdrawn in 2012. *See* Press Release, Justice Department Withdraws Report on Antitrust monopoly Law, May 11, 2009, *available at* http://www.justice.gov/atr/public/press_releases/2009/245710.htm; *see also* Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, U.S. Dep't of Justice, 2008, *available at* http://www.justice.gov/atr/public/reports/236681.pdf; Press Release, FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law, July 31, 2012, *available at* https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies.