

DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN
FTC Act Section 5 Policy Statement
August 13, 2015

I appreciate the effort to issue some form of guidance on the scope of Section 5 of the FTC Act’s prohibition of “unfair methods of competition” (UMC).¹ However, I voted against the issuance of *this* policy s

issue of competition policy is too abbreviated in substance and process for support. Moreover, what substance the statement does offer ultimately provides more questions than answers, undermining its value as guidance. In addition, the Commission’s public input has deprived us of guidance from key stakeholders on this particular issue of Section 5. Finally, the Commission’s official embrace of such an unbalanced UMC is almost certain to encourage more frequent exploration of this authority in merger investigations and standalone Section 5 enforcement by the Commission.

First, the content of today’s policy statement is seriously lacking. Unlike our previous analysis in our policy statements on Section 5’s prohibition of “unfair or deceptive practices,”

² this Section 5 statement does not mention, much less grapple with, the existing case law. While the majority might like to sweep that unfortunate history under the rug, the fact is that the FTC was repeatedly rebuffed by the courts when it last tried to reach well beyond settled principles of antitrust law in asserting its Section 5 authority.³ Instead, the Commission acts as if it is writing on a clean slate for UMC. Further, and again in contrast to the consumer protection

Google Inc., FTC File No. C210020 & Dissenting Statement

en (Jan. 3, 2013), available at

documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf

¹ Google Inc., FTC File No. C210020 & Dissenting Statement; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen (Nov. 26, 2012), available at

To understand the impact of these deficiencies, it is instructive to consider, for example, the basic facts in the Commission's 1980 defeat in *Official Airline Guides* and how such facts could be analyzed under this new rubric. Requiring a monopolist provider of flight information to publish additional information on commuter airlines, as the Commission attempted to do, would undoubtedly benefit consumers

the antitrust laws” or which, “if allowed to mature or complete, could violate” the antitrust laws. These two extremely broad characterizations of the scope of Section 5 contribute to the vagueness of this statement.

The statement also explicitly permits the Commission to pursue conduct under Section 5 in the absence of substantial harm to competition.⁹ A substantial harm requirement, however, is found in our Unfairness Statement,¹⁰ and thoughtful commentary from leading antitrust scholars has suggested that such a requirement be included in any UMC statement.¹¹ In any case, the fact that this policy statement requires some harm to competition does little to constrain the Commission, as every Section 5 theory pursued in the last 45 years, no matter how controversial or convoluted, can be and has been couched in terms of protecting competition and/or consumers.

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