A SMARTER Section 5

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I. Introduction

Good morning. Let me thank Sean Heather of the U.S. Chamber of Commerce (Chamber) for inviting me to speak today. I am honored to be back at the Chamber to discuss the Federal Trade Commission's (FTC) unfair methods of competition (UMC) authority under Section 5 of the FTC Act and my agency's recently issued policy statement.[2] As you may recall, the Chamber hosted in me in 2013 when I set out my views on Section 5 in a speech I called "Principles of Navigation."[3] Since that time, there have been some developments that, in my view, amount to little real progress and include some serious missteps.

Now, it is certainly entertaining to vi tcer(nd i)-2(nc)4(li30J -0.0( )][ao h)-4(av)-4(e b)-4(e b)-a36ng( )]T

[1] The views expressed in this speech are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I am grateful to my attorney advisor, Greg Luib, for his invaluable assistance in preparing this speech.

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[3] Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, *Section 5: Principles of Navigation*, Remarks before the U.S. Chamber of Commerce (July 25, 2013), *available at* http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf.

whether implicit or explicit. This misses what I believe is the crucial question about a policy statement that purports to be guidance to those subject to our standalone Section 5 oversight and enforcement. Do you—business interests and the members of the bar who advise you—believe the new policy statement provides what the courts have demanded: a "workable standard" "for what is or is not to be considered an unfair method of competition under § 5" or will this policy statement instead lead to "uncertain guesswork rather than workable rules of law."[4] This standard does not come from me but from the court that rejected the last litigated FTC standalone Section 5 challenge, the *Abbott Labs* case.

The reaction that I have seen from the bar and industry to the policy statement thus far suggests that the large majority of you do not perceive this as a workable standard that will, in practice, reduce uncertainty and guesswork. As I stated in my dissent from the statement, I also do not view this as meaningful guidance. What I want to make clear today is that this is not simply a weak stab at guidance and a missed opportunity for the Commission. Rather, the few principles the statement does clearly embrace amplify already existing concerns about the FTC's role in antitrust enforcement that are animating legislation to change our antitrust oversight powers.

In my remarks this morning, I will review the statement and my objections, elaborating on some of the points I made in my dissent. I will next briefly revisit my arguments for why Section 5 largely should be limited to the antitrust laws and the factors I would have included in the statement. I will then turn to the SMARTER Act, recently proposed legislation aimed at standardizing merger review across the FTC and Department of Justice (DOJ). As I will explain,

[4] FTC v. Abbott Labs., 853 F. Supp. 526, 535-36 (D.D.C. 1994) ("The Second Circuit stated emphatically that some workable standard must exist for what is or is not to be considered an unfair method of competition under § 5. Otherwise, companies subject to FTC prosecution would be the victims of 'uncertain guesswork rather than workable rules of law.'") (quoting E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984)).

I believe the open-ended Section 5 statement implicates the same core concerns driving the SMARTER Act, including undue leverage for the FTC and different liability standards across the two antitrust agencies.

II. My Objections to the Section 5 Policy Statement

As many of you know, I voted against issuing the policy statement and in my dissent explained my objections—both procedural and substantive—to the Commission's stated views on the scope of Section 5. As I quickly run through my main objections, I will offer additional reactions that I and others have had since the statement issued.

As a preliminary matter, I agree that the statement will restrain the Commission from pursuing Section 5 to its broadest theoretical extent to reach conduct that is in bad faith, fraudulent, or oppressive without any possible relation to competition. With your indulgence, here I will revive the nautical analogy from my previous Section 5 speech to illustrate what the Commission actually did. It basically said it will not sail off the "competition chart" in interpreting UMC. This means it will not do this:

One should ask if the Commission was likely to pursue that course without a statement, however. Regardless of the few remarks by individual Commissioners in speeches and the urging of a handful of law professors to go beyond competition concerns, in actual practice the Commission has not reliein t

forty-some years. Thus, as practitioners have noted, the statement constrains very little, if anything, in this regard.[5]

Turning to my dissent, I took issue with the statement's lack of content. Unlike the detailed analysis in our policy statements on deception and unfairness on the consumer protection side,[6] the UMC statement fails to mention, much less grapple with, the existing case law. Although the majority might like to sweep that unfortunate history under the rug, the fact is that the courts repeatedly rebuffed the FTC when it last tried to assert broad Section 5 authority, with the *Abbott Labs* case mentioned above being the fourth and final loss.[7] Further, implicitly disregarding the *Abbott* court's suggested path, the UMC statement includes no examples of either lawful or unlawful conduct to provide practical guidance on how the Commission will implement its enforcement policy.

I want to address a few of the objections that I have heard to a more detailed policy statement. First, some have stated that it is hard to draft a comprehensive policy statement. Yes, that is most certainly true. However, the Commission was able to do that on the consumer protection side for its unfair acts or practices authority, which was quite a bit more controversial at the time.[8] Second, the Chairwoman in her speech announcing the policy statement rejected

the notion of issuing "a detailed and comprehensive code of legitimate business conduct."[9] However, that is a straw man—and not what agency stakeholders, including the Chamber, have sought from the Commission. Rather, you have asked for something more along the lines of the Unfairness and Deception Statements—in terms of both guidance and constraint on future agency discretion. After a hundred years, I think the agency's many stakeholders, particularly the firms subject to our jurisdiction, deserved better than what they got here.[10]

In addition, I noted the lack of internal deliberation and external consultation surrounding this policy statement—as opposed to the topic of Section 5 more generally. In particular, the Commission's lack of interest in any public input troubled me. Putting the statement out for public comment would have allowed the Commission to hear from key stakeholders, including Congress, the Antitrust Division, the business community, and the antitrust bar.

Unfortunately, this appears to be a bad habit for the Commission of late: making significant shifts in enforcement policy without seeking input from key stakeholders. That is not going to help maintain the support for the agency's mission that is so crucial for it to be effective.[11]

Turning back to the substance, it is certainly the case that no policy statement can anticipate all issues or questions that are likely to arise in the enforcement of a statute. However, I argued that this statement raises many more questions than it answers. The client alerts issued by the antitrust bar make it clear that they also see little in this statement to help them counsel their clients. As one firm put it, "It turns out that the guidance is significant only because it is the first guidance that the FTC has issued regarding enforcement under Section 5 of the FTC Act."[12] I agree with the Chamber's opinion that the policy statement is "disappointing as it fails to

theory)? Or will the efficiencies be given short shrift in a Section 5 analysis? It is particularly puzzling to me that some who have repeatedly asserted that the FTC overlooks or undervalues efficiencies in its merger review would take comfort from a vague commitment to "take into account cognizable efficiencies" in a much less settled area of law.

Similarly, the Chairwoman and others tout the fact that Section 5 now incorporates widely-used antitrust concepts, such as "harm to competition" and "cognizable efficiencies"—as though those concepts are well-settled, rather than frequently debated terms of art in traditional antitrust law. Further, as the Chamber observed, although the rule of reason standard may be acceptable for the antitrust laws, Section 5 needs a more stringent standard.

Turning to the statement's third and final principle, it gives the Commission wide latitude to pursue under Section 5 conduct that it considers insufficiently addressed by the antitrust laws. Specifically, the majority said it is merely "less likely" to use Section 5 in those circumstances. That leaves the Commission with a tremendous amount of leeway to pursue Section 5 claims when the antitrust laws have already established the boundaries of legal conduct. Under the policy statement, the Commission can take the same approach it did in the *Intel* case, which is to allege that conduct, such as loyalty discounts or bundling, is a Section 2 and/or a Section 5 violation.[15] Even worse, perhaps, if the Commission believes the Section 2 case law in a given area is too restrictive, it can recast the same conduct as a Section 5 violation, with a lower liability standard. For example, the *Intel* complaint included an assertion to the effect that no showing of a dangerous probability of recoupment is necessary to make out a predatory pricing-

[15] In *Intel*, the Commission's complaint identified the same conduct—including the offering of loyalty discounts to key customers—

type claim under Section 5.[16] Perhaps *Intel* is an outlier; but the Commissioners supporting the policy statement did not disclaim it. In fact, the Chairwoman repeatedly emphasized that the statement changes nothing about the Commission's modern approach to UMC.

Although commenters have rightly focused much attention on what the statement lacks, an examination of the principles a majority of the Commission explicitly embraces is even more troubling for businesses who are under the authority of both the FTC and the DOJ. One of the few guiding principles included in the statement is the pronouncement that Section 5 covers conduct that "contravenes the spirit of the antitrust laws" or which, "if allowed to mature or complete, could violate" the antitrust laws. First, with respect to the ethereal spirit of the antitrust laws, as Professor Hovenkamp observed, "[T]he spirit and letter of the antitrust laws are identical."[17] That is, "[n]othing prevents [the Sherman and Clayton Acts] from working their own condemnation of practices violating their basic policies."[18] Thus, what territory outside the letter of the antitrust laws does the Commission want to claim?

Similarly, by invoking incipiency as a guiding principle, the statement opens the door to significant expansion of Section 5—particularly into areas of conduct that are legal under the Sherman Act. Although it is true that antitrust law focuses on mergers to stop anticompetitive behavior that has not yet occurred, the UMC statement clearly states that it may apply to conduct that the Sherman and Clayton Act do not condemn. Does this mean the Commission will pursue matters that are insufficiently incipient for the antitrust laws but incipient enough for Section 5?

The main problem with the incipiency doctrine is identifying the precise moment when nascent conduct transforms into a true threat to competition. At what market share should a firm without monopoly power be concerned about triggering an incipient violation through its otherwise lawful conduct? I have often talked about what Friedrich Hayek calls the knowledge problem that hampers regulators trying to predict the future, particularly in fast-moving industries.[19] The Commission's expressed interest in pursuing incipient antitrust violations under Section 5 will only exacerbate that problem.

More importantly, the policy statement's combined claim of authority over conduct outside the letter of the antitrust laws, invocation of incipiency, and vague limitations about when to use Section 5 for conduct reachable under the antitrust laws raises the specter of the FTC using UMC to rewrite well-settled areas of antitrust law. To return to my nautical theme, the Commission could try to sail the FTC boat onto lands already mapped by antitrust law.

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The statement also explicitly permits the Commission to pursue conduct under Section 5 in the absence of substantial harm to competition. As I noted, however, our Unfairness Statement contains a substantial harm requirement, and thoughtful commentary from leading antitrust scholars suggests that such a requirement be included in any UMC statement. 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.

Some have expressed the view that having any Section 5 policy statement—no matter how open-

agency's key stakeholders more generally. That support is dependent—in large part—on a clearly stated mission for the agency. Congress, the courts, the business community, and the antitrust bar have raised significant concerns regarding the reach of our Section 5 authority. Unfortunately, in issuing the statement, the Commission did not try to build support among its key stakeholders for a broader Section 5 by seeking public comment.

Finally, there are several substantive reasons why the Commission's UMC authority should be very limited in scope.

crucial question: Why will consumers and competition be better off in the future with the FTC defining its Section 5 authority expansively?

The first factor I proposed is substantial harm to competition. The FTC's unfair methods of competition authority should be used solely to address substantial harm to competition or the competitive process, and thus to consumers.[25] The substantiality requirement I proposed would mirror the one in our Unfairness Statement on the consumer protection side.

I grounded the second factor in the need to avoid false positives. The FTC should challenge conduct as an unfair method of competition only in cases in which: (1) there is a lack of any procompetitive justification for the conduct;[26] or (2) the conduct at issue results in harm to competition that is disproportionate to its benefits to consumers and to the economic benefits to the defendant. The more demanding this test, the more confidence we will have that we are challenging conduct that is something other than competition on the merits.

My third proposed factor is a requirement to avoid, or at least minimize, imposing different liability standards on business conduct than does the DOJ Antitrust Division, which also enforces the Sherman and Clayton Acts, but not Section 5. Nor should the FTC use its Section 5 authority to rehabilitate a deficient Sherman or Clayton Act claim. If there is a viable

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Order seeks to ensure that a regulation does more good than harm for the public. *See* Ohlhausen, *Principles of Navigation, C56 72 221.28 Tm i7. c21.28 Tm 0.759. Tc 0 06 Tc 1 Tf ET 72 235.86.48 /TT06.48 0.196. 1 Tf 256 TcBDC /TT0 1 Tf 8.4*

claim under those Acts that the FTC can pursue for a particular type of conduct, then we should not use Section 5 in such a case.

My fourth proposed factor goes to the evidence required for any Section 5 enforcement. We should anchor any effort to expand Section 5 beyond the antitrust laws in robust economic evidence that the challenged practice is anticompetitive and reduces consumer welfare. Prior to filing an enforcement action targeting particular business conduct, the agency, through its policy research and development efforts, should acquire substantial expertise regarding such conduct and its effects on consumer welfare.

My fifth proposed factor calls for the agency to consider its non-enforcement tools as an alternative to any Section 5 enforcement. The FTC has often sought to address a competitive concern in the marketplace via its many non-enforcement tools, such as conducting research, issuing reports and studies, and engaging in competition advocacy.

My final proposed factor requires the FTC to provide clear guidance in the Section 5 area. Fundamentally, this means that a firm must be reasonably able to determine that its conduct would be deemed unfair at the time it undertakes the conduct and not have to rely on an after-the-fact analysis of the impact of the conduct that was not foreseeable.[27] I believe the case law on Section 5, such as the *Abbott Labs* decision I already mentioned, demands this type of f

V. Section 5 and the SMARTER Act

The reasons counseling against expanding UMC much beyond the borders of traditional antitrust law bring me to the next topic I would like to address: the nexus between a broadly defined Section 5 and the SMARTER Act, also known by its full name as the Standard Merger and Acquisition Reviews through Equal Rules Act (the Act). For those of you not familiar with the different versions of the legislation,[28] the bills generally would implement two reforms to the FTC Act. First, they would harmonize the preliminary injunction (PI) standards that the FTC

some have recently pointed out,[30] the FTC seems to be doing just fine without a lower PI standard.

The Part III amendments in the SMARTER Act raise slightly more complicated issues. As I have discussed on numerous occasions, the FTC has many unique institutional features, including its administrative litigation, research capabilities, and bipartisan composition, which it has used to improve the antitrust laws over the past three decades, racking up an impressive 6-1 record at the Supreme Court in the process.

However, there are several important considerations in assessing the various proposed Part III amendments. First, the Commission's unique features have been utilized much more frequently in conduct matters, which would not be affected by the SMARTER Act,e0matter

The second relevant consideration for me is the fact that the Commission has not pursued a Part III proceeding following a PI loss in federal court for twenty years. Opponents of the SMARTER Act cite this fact as a basis for arguing that there should be minimal concern about any misuse or overuse of our Part III authority. However, the lack of use over the past twenty years cuts both ways: it also means the Commission would not be losing a frequently used tool.

Further, I share the concerns created by past Commission statements expressing its intention to pursue Part III litigation no matter the outcome in federal court.[34] That is one of the reasons I championed the change to our internal rules earlier this year. Very briefly, the rule at issue, Rule 3.26, addresses the situation where the FTC has lost a PI proceeding in federal court and is considering whether to nonetheless continue with the Part III administrative litigation. The rule change flipped the presumption in that situation to withdrawal of the Part III case from litigation following a motion by the respondent.[35] I understand that proponents of the SMARTER Act appreciated the rule change, but are justifiably interested in making that change to our Part III authority more permanent and restrictive.

Finally, I appreciate the concerns that have been raised regarding any increased leverage the FTC gains from the prospect of Part III proceedings and the potential for differing liability standards across the two antitrust agencies. Those concerns have even more resonance with me following the Commission's issuance of this expansive policy statement, which will only widen divergent legal standards between the FTC and DOJ, as the former explores the outer reaches of statutory authority that the latter does not share. As I mentioned previously, I am concerned that

[34] *See*

VI. Conclusion

Let me return to Section 5 and provide some concluding remarks.

The business community, the antitrust bar, and Congress will ultimately be the judges of this policy statement—in terms of both the guidance it may (or may not) provide and any limitation it may put on the FTC's Section 5 authority. The statement gives the majority nominal cover with respect to Congressional interest in some type of Section 5 policy statement. However, I believe Congress should and will continue to keep a very close eye on the Commission and its use of Section 5.

To be fair, we may not know for some time whether the Commission will use this statement to expand significantly the scope of Section 5 enforcement or to exert additional leverage in its enforcement of the Sherman and Clayton Acts. In her speech announcing the statement, Chairwoman Ramirez conveyed her view that the issuance of the statement does not reflect a change in Section 5 policy for the Commission.[39] That, however, is her view alone. There is nothing in the policy statement itself, or the accompanying majority statement, that reflects such a view. At the same time, I take the Chairwoman at her word. I do not think she (herself) is interested in significantly expanding Section 5 beyond the territory that it has covered over the past five years or so that she has been on the Commission. Still, the Commission's definition of Section 5 over the past decade has already been too expansive for my taste.

Thank you for your attention. I would be happy to address any questions you may have.

[39] *See* Ramirez, *supra* note 9, at 6.