United States of America
Federal Trade Commission

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Before the United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Concerning
"Section 5 and 'Unfair Methods of Competition':
Protecting Competition or Increasing Uncertainty?"

Washington, D.C.
April 5, 2016

I. Introduction

I submit this written statement for the record in connection with the hearing on Section 5 of the Federal Trade Commission (FTC or Commission) Act held by the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the U.S. Senate Committee on the Judiciary on April 5, 2016. I appreciate the opportunity to provide my perspective on the proper scope of Section 5, which prohibits, among other things, unfair methods of competition (UMC). This statement addresses the Commission's so-called standalone Section 5 authority—that is, the agency's UMC enforcement that is separate from actions to enforce the antitrust laws.

As I have explained on several occasions since becoming a Commissioner, I believe that the agency's standalone Section 5 authority ought to extend only a very limited amount beyond

[1] The views expressed in this statement are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

the antitrust laws.[2] I also have raised concerns about the lack of transparency and predictability in the Commission's use of its Section 5 authority. I dissented in the 2012 and 2013 Google/Motorola Mobility matters, taking issue not only with the specific application of Section 5 in those cases, but also the lack of guidance on the Commission's UMC authority that the agency had provided to businesses subject to its jurisdiction.[3]

Unfortunately, the Policy Statement[4] issued by the Commission last August implicates much broader reach for Section 5 than I and many others would prefer and believe is justified. I therefore voted against the issuance of the Statement. I voiced my many concerns with the Statement—both substantive and procedural—in my dissent,[5] as well as in a speech before the U.S. Chamber of Commerce last September.[6] Rather than repeating those concerns here, I will identify several steps that the Commission ought to take with respect to its standalone Section 5 authority.

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[2] See, e.g., Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Section 5: Principles of Navigation, Remarks before the U.S. Chamber of Commerce, at 1-5 (July 25, 2013), http://ftc.gov/speeches/ohlhausen/130725section5.pdf (discussing the proper scope of Section 5 and reasons for

II. Threshold Inquiry: Do Consumers Really Benefit from an Expansive Reading of Section 5?

First, as a threshold matter, the Commission should give serious consideration to whether and how consumers and competition w

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effect that no showing of a dangerous probability of recoupment is necessary to make out a predatory pricing-type claim under Section 5.[13] Notably, the Commissioners supporting the Policy Statement did not disclaim Intel

not harm competition or the competitive process.[15]

such reading be as narrow as possible—it ought to pursue a new enforcement policy statement that is both developed and presented in a more suitable manner than the one issued last year.

With respect to the development of any future statement, the Commission should establish a better process. In my dissent from the Policy Statement, I noted the lack of internal deliberation and external consultation surrounding the 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. Many, including former Chairman Pitofsky, had urged the Commission to seek public comment on any proposed Section 5 policy statement before adopting it.[16]

With respect to the substance, any future policy statement on Section 5 should also provide more guidance to businesses subject to the FTC Act. The August 2015 Policy Statement left unanswered many important questions. In fact, divergent readings of the Statement by its signatories within days of its issuance demonstrated just how ambiguous it is.[18] Further, the client alerts issued by the antitrust bars since the Statement was issued make it clear that the bar also sees little in the Statement to help them counsel their clients.[19] I also agree with the opinion expressed by the U.S. Chamber of Commerce that the Policy Statement is "disappointing as it fails to establish an objective standard that closes the door to varying interpretations."[20]

Moreover, unlike the detailed analysis in the Commission's policy statements on deception and unfairness on the consumer protection side,[21] the UMC statement failed to

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[18] Chairwoman Ramirez argued that the Statement was merely reaffirming the principles used by the Commission in Section 5 cases, while then-Commissioner Wright argued that the Statement significantly restricted the Commission's use of Section 5. *Compare* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Address before George Washington University Law School Competition Law Center, at 6 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf ("Our policy statement today simply makes these time-honored principles explicit; it does not signal any change of course in our enforcement practices and priorities."), *with* Kelly Knaub, FTC Commissioner Joshua D. Wright to Step Down, COMPETITION LAW360 (Aug. 17, 2015) ("Wright . . . praised the agency's decision to embrace a rule-of-reason type of test for Section 5, calling it a 'significant constraining force' that, in his view, controversial cases such as ones brought against Intel Corp. and [Data] would not have survived.")

[19] See, e.g., Nixon Peabody LLP, FTC Issues Unprecedented but Vague Guidance on Unfair Methods of Competition, at 1 (Aug. 20, 2015) ("It turns out that the guidance is significant only because it is the first ever [illegible]

mention, much less grapple with, the existing case law. As I previously noted, the courts repeatedly rebuffed the FTC when it last tried to assert broad Section 5 authority.[22] 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. As just one example, it did not explain why invitations to collude, which the Commission has pursued since issuing the Policy Statement, are considered an unfair method of competition.

Let me also briefly address one of the objections that I have heard to a more detailed Commission policy statement. In her speech announcing the Policy Statement, the Chairwoman rejected the notion of issuing "a detailed and comprehensive code of legitimate business conduct."[23] However, that is not what agency stakeholders, including Congress, have sought from the Commission. Rather, those parties 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.

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With respect to the second principle, the Statement does not explain in what way "a framework similar to the rule of reason" differs from a traditional rule of reason analysis. In her speech announcing the Statement, the Chairwoman stressed that the majority was using the term "rule of reason" in its "broad, modern sense."[24]

our scarce resources and that we are not pursuing matters with high legal and political risks for little consumer benefit.

B. Factor 2: Lack of Procompetitive Justification/Disproportionate Harm Test

I grounded my second proposed factor in the need to avoid false positives. The tendency to deter the use of some new, efficient business practice has been a recurring problem in the history of Section 5.[30] Even recently, the Commission's action in the Intel case that targeted above-cost discounting has been strongly criticized for its potential for chilling procompetitive business conduct.[31] The FTC thus should challenge conduct as an unfair method of competition only in cases in which: (1) there is a lack of procompetitive justification for the conduct,[32] 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.[33] The disproportionate harm test would focus our UMC enforcement on conduct that is most likely to harm competition. It also avoids

[30] See, e.g., Herbert Hovenkamp, The Federal Trade Commission and the Sherman Act, 62 FLA. L. REV. 871, 874 (2010) ("Reaching beyond what the Sherman Act reaches is likely to condemn practices that are not economically harmful and that might even benefit consumers. Indeed, historical experience provides considerable warrant for that position.") (discussing FTC v. Brown Shoe Co., 384 U.S. 316 (1966)); id. at 885 ("The FTC's contemplated relief [in Intel] may lead the FTC down the same unfortunate road it travelled in the 1970s and earlier, when the FTC condemned practices that really were not anticompetitive. In the process the actions benefitted competitors but caused consumers more harm than good.").

[31] In re Intel Corp., FTC File No. 061 0247, Complaint, at 17-78 (Dec. 16, 2009), http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf (alleging monopolization, attempted monopolization, unfair methods of competition, unfair acts or practices, and deceptive acts or practices violations).

[32] See, e.g., Hovenkamp.o3n1(ovBDC)5.1( ). /.

D. Factor 4: Grounding Section 5 Enforcement in Robust Economic Evidence

My fourth proposed factor goes to the evidence required for any Section 5 enforcement action We should anchor any effort to expand Section 5 beyond the antitrust laws in robust