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

First, the content of today's policy statement is seriously lacking. Unlike the detailed analysis in our policy statements on Section 5's prohibition of "unfair or deceptive acts or 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 policy statements, this statement includes no examples of either lawful or unlawful conduct to provide practical guidance on how the Commission will implement this open-ended enforcement policy.[4]

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[1] Like many interested parties, I have called for Section 5 guidance on several occasions during my time on the Commission. *See, e.g., In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen (Jan. 3, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen (Nov. 26, 2012), *available at* https://www.ftc.gov/sites/ default/files/documents/cases/2012/11/121126boschohlhausenstatement.pdf.

[2] *See* Fed. Trade Comm'n, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, 104 F.T.C. 1070, 1071 (1984) (*appended to In re* Int'l Harvester Co., 104 F.T.C. 949 (1984)) [hereinafter Unfairness Statement], *available at* http://www ftc.gov/bcp/policystmt/ad-unfair.htm; Fed. Trade Comm'n, Policy Statement on Deception (*appended to In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984)), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept htm. *See also* J. Howard Beales, *Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission*, 72 ANTITRUST L.J. 1057, 1058 (2005) ("Each policy statement clarified and refined the legal standards that the Commission would apply, and each narrowed the range of the Commission's discretion. In their own ways, each statement has had a substantial impact on the development of the law.").

[3] *See, e.g.*, E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984) (*Ethyl*); Boise Cascade Corp. v. FTC, 637 F.2d 573, 582 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980) (*OAG*).

[4] *See, e.g.*, William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5, 25 (2000) ("Good guidance goes beyond commonplace knowledge to offer specifics, to bridge gaps, to resolve ambiguities. It has an edginess; and because it provides details, it limits agency discretion.").

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 in the ancillary market for commuter airline services. That would seem sufficient to satisfy the majority's "consumer welfare" requirement. It would also enhance competition in the market for air travel, a market in which the monopolist at issue in the case did not actually participate. That would not seem to be a bar UMC liability, however, because competition would be enhanced somewhere and that ought to suffice under the second prong of the majority's statement. Finally, traditional antitrust laws do not provide the remedy the Commission sought to impose in *OAG*; however, pursuing such remedy likely would not be precluded by the statement's third prong.[5] Similarly, incidents of simple oligopolistic interdependence, like the kind seen in *Ethyl*[6] or *Boise Cascade*,[7] are now arguably fair game under this framework. Because the policy statement fails to address past case law or give examples of lawful and unlawful conduct, however, the business community and other agency stakeholders are left guessing whether these previous theories of liability are now revived.

Turning to the substance of the brief statement, if the Commission is going to issue a policy statement in this controversial area, it should provide meaningful guidance to those subject to our jurisdiction. This statement, however, provides no such guidance. Although no policy statement can anticipate all issues or questions that are likely to arise in the enforcement of a statute, this statement raises many more questions than it answers.

For example, to what extent will the Commission be "guided by the public policy underlying the antitrust laws"? In what way does "a framework similar to the rule of reason" differ from a traditional rule of reason analysis? Does "taking into account any associated cognizable efficiencies" mean the Commission will actually balance any such efficiencies against the alleged harms, or is there some other formula anticipated by the majority? Further, given the statement's embrace of incipiency as a guiding principle, at what point are harms or efficiencies measured? At what market share should a firm without monopoly power be concerned about triggering an incipient violation through its otherwise lawful conduct? What factors will the Commission consider in deciding whether to pursue under Section 5 conduct that it considers insufficiently addressed by the antitrust laws?[8]

Although short on details and constraints, one of the few guiding principles included in the statement is the pronouncement that Section 5 covers conduct that "contravenes the spirit of

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[5] *See OAG*, 630 F.2d 920.

[6] *See Ethyl*, 729 F.2d 128 (challenging unilateral pricing practices in oligopolistic industry).

[7] *See Boise Cascade Corp.*, 637 F.2d 573 (challenging use of base point pricing system as incipient threat to competition).

[8] The brief majority statement that accompanies the policy statement does not meaningfully add to its contents. For example, how will the Commission determine that the antitrust laws are not "sufficient" or "appropriate"? When will the Commission use a traditional rule of reason analysis, and when will it use Section 5 "in a manner similar to the case-by-case development of the other antitrust laws"?

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.[12]

Thus, the possibilities for expansive use of Section 5 under this policy statement appear vast. The majority's reading of Section 5 could easily accommodate a host of controversial theories pursued or considered by the Commission over the past four decades, including breach of standard-setting commitments, loyalty discounts, facilitating practices, conscious parallelism,

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[9] The statement may very well constrain the Commission from pursuing Section 5 to its broadest possible extent to reach conduct that is in bad faith, fraudulent, or oppressive without any possible relation to competition. *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972). In practice, however, the Commission has not relied solely on such a rationale to support a UMC violation for several decades. Thus, in practice the statement constrains very little, if anything, in this regard.

[10] *See* Unfairness Statement, *supra* note 2, at 1073 ("First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms.").

[11] *See, e.g.*, SECTION OF ANTITRUST LAW, PRESIDENTIAL TRANSITION REPORT: THE STATE OF ANTITRUST ENFORCEMENT 2012 20 (2013) ("Standalone Section 5 enforcement should be used, if at all, only when the conduct involves substantial competitive harm."); Transcript of Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute at 130 (Oct. 17, 2008) [hereinafter Section 5 Workshop], *available at* https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf ("[M]y proposal was for where the practice causes very substantial harm, the remedy does not affect efficiencies or other good business reasons, and a clear line can be developed that allows predictability.") (Robert Pitofsky). *See also* Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 878-79 (2010) ("[T]he practices that [the FTC] condemns must really be 'anticompetitive' in a meaningful sense. That is, there must be a basis for thinking that the practice either does or will lead to reduced output and higher consumer prices or lower quality in the affected market.").

[12] *See, e.g.*, *In re* Negotiated Data Solutions LLC, FTC File No. 051-0094, Statement of the Federal Trade Commission, at 2 & n.5 (Jan. 23, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf (stating that Section 5 reaches conduct that is "oppressive and coercive" but also stating: "The process of establishing a standard displaces competition; therefore, bad faith or deceptive behavior that undermines the process may also undermine competition . . . ."); *In re* Intel Corp., FTC File No. 061-0247, Statement of Chairman Leibowitz and Commissioner Rosch, at 2 (Dec. 16, 2009), *available at* https://www.ftc.gov/system/files/documents/public_statements/568601/091216intelchairstatement.pdf ("We take seriously our mandate to find a violation of Section 5 only when it is proven that the conduct at issue has not only been unfair to rivals in the market but, more important, is likely to harm consumers, taking into account any efficiency justifications for the conduct in question.").

business torts, incipient violations of the antitrust laws, and unfair competition through violation of various laws outside the antitrust context.[13]

To provide certainty regarding future enforcement under Section 5, a Commission policy statement must constrain the agency in some meaningful way. In truth, the open-ended "similar to the rule of reason" framework – to the extent I understand how it may be applied – does not seem to differ meaningfully from the existing case-by-case approach heretofore favored by a majority of the Commission. Indeed, my experience as a Commissioner leads me to believe that my colleagues, who have diverse views about antitrust law, would apply this policy statement to reflect these significant differences. No interpretation of the policy statement by a single Commissioner, no matter how thoughtful, will bind this or any future Commission to greater limits on Section 5 UMC enforcement than what is in this exceedingly brief, highly general statement.

Although some may argue that the courts will be an adequate check on this authority, many commenters have raised concerns about how frequently the FTC settles Section 5 cases and how infrequently courts review our UMC enforcement.[14] I see no reason why this policy statement will change the incentives for settlement on either side or affect the infrequency of judicial scrutiny of FTC enforcement under Section 5.

The effect of this expansive policy statement also raises issues for our dual antitrust enforcement framework. Principles of fairness and predictability require that divergence in liability standards between the two agencies resulting from enforcement of Section 5 be minimal.[15] Otherwise, firms may face liability (or not), depending solely on which agency reviews their conduct. One can only imagine how this policy statement will affect the clearance process under which the agencies allocate matters, which is now primarily based on industry expertise. Even worse from a fairness standpoint is the prospect of the Commission leveraging its expansive Section 5 authority to pursue conduct by a firm whose time-sensitive merger happens to be under review by the Commission.[16]

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[13] My colleagues have not ruled out any of these theories in their policy and majority statements.

[14] *See, e.g.*, William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 941 (2010) ("As influences on doctrine and firm behavior, though, settlements are weak substitutes for decisions by the appellate courts that affirm FTC rulings based on Section 5. One can have confidence in a theory's power and durability only when it has been tested in adversarial proceedings and endorsed by reviewing courts . . . ."); James Campbell Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. ANTITRUST ENFORCEMENT 87, 95 (2015) ("Even if the courts are the *de jure* arbiters of what constitutes an unfair method of competition, as long as the Commission avoids litigation, it becomes the *de facto* decider. This state of affairs calls into question the legitimacy of the FTC's modern Section 5 cases. As long as the FTC's theories remain untested in an adversarial proceeding, and unratified by appellate decisions, uncertainty will remain about the true reach of Section 5.").

[15] *See, e.g.*, ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 139 (2007) (addressing merger context and concluding: "So long as both agencies retain authority to enforce the antitrust laws, such divergence should be minimized or eliminated.").

[16] *See, e.g.*, *In re* Robert Bosch GmbH, FTC File No. 121-0081, Decision and Order (Nov. 26, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf (consent order settling simultaneous merger and standalone Section 5 investigations). Indeed, concerns about the FTC having additional

In addition, the lack of internal deliberation and consultation surrounding this policy statement – as opposed to the topic of Section 5 more generally – is unfortunate.[17] Many, including former Chairman Pitofsky, have urged the Commission to seek public comment on any proposed Section 5 policy statement before adopting it.[18] Doing so here would have allowed the Commission to receive input from key stakeholders, including Congress, the Department of Justice (DOJ) Antitrust Division, the business community, and the antitrust bar on this particular policy formulation.[19] Such input would have helped ensure that the Commission is offering durable and practical guidance around the fundamental question of whether and when this agency will reach beyond well-settled principles of antitrust law to impose new varieties of UMC liability.[20] It would also have allowed more careful consideration of how this expansive policy may be viewed by other antitrust regimes around the world.[21]

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leverage over merging parties as compared to the DOJ have led to proposed legislation to strip the FTC of its ability to challenge an unconsummated merger in administrative litigation. *See* H.R. 5402, 113th Cong. (2014); *Hearing on The "Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2014, Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (statement of Deborah A. Garza, former Chair, Antitrust Modernization Commission) (raising concerns about the FTC's "potentially enormous advantage vis-à-vis DOJ and leverage over the parties with respect to the mergers it chooses to challenge"). The effect of today's policy statement may well be to increase that perceived leverage.

[17] The majority cites to a 2008 workshop to claim adequate discussion of our enforcement authority under Section 5. That workshop took place seven years ago, before any sitting member of the Commission was in office.

[18] *See, e.g.*, Section 5 Workshop, *supra* note 11, at 67 ("If the FTC, by the way, is going to publish a rule along this line or any line, it should be put out for public comment so that people can react to it.") (Robert Pitofsky); U.S. Chamber of Commerce, *Unfair Methods of Competition under Section 5 of the FTC Act: Does the U.S. Need Rules "Above and Beyond Antitrust"?*, CPI ANTITRUST CHRONICLE 8-9 (Sept. 2009) ("Any additional movement toward the use of Section 5 should be preceded by hearings and substantial time for debate among the antitrust community to ensure appropriate notice and guidance is provided to the business community and other interested constituents.").

[19] I also objected to the Commission's withdrawal, without any public input, of its policy statement on pursuing disgorgement in competition matters in 2012. *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), *available at* http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf.

[20] Such consultation is especially warranted given the serious debate about the need to reach beyond the antitrust laws at all. *See, e.g.*, II PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 302h, at 31 (4th ed. 2014) ("Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anticompetitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.' Nothing prevents those statutes from working their own condemnation of practices violating their basic policies."); *In re* Negotiated Data Solutions LLC, FTC File No. 051-0094, Dissenting Statement of Chairman Majoras, at 2-3 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf ("Although Section 5 enables the Commission to reach conduct that is not actionable under the Sherman or Clayton Acts, we have largely limited ourselves to matters in which respondents took actions short of a fully consummated Section 1 violation (but with clear potential to harm competition), such as invitations to collude. This limitation is partly self-imposed, reflecting the Commission's recognition of the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement.") (footnotes omitted).

[21] *See, e.g.*, James J. O'Connell, *Section 5, 1914, and the FTC at 100*, 29 ANTITRUST 5, 6 (Fall 2014) ("[T]he FTC does not operate in a vacuum but rather as part of an international enforcement community, the newer members of which study very closely the practices and policies of more experienced agencies. . . . [I]n the absence of clear

Finally, I disagree with the view that having an expansive UMC policy statement is better than having no statement at all. Arming the FTC staff with this sweeping new policy statement is likely to embolden them to explore the limits of UMC in conduct and merger investigations. The majority is also likely to pursue new UMC enforcement, else why bother to put out a statement with so little internal deliberation and no provision for public input? I fear that this will ultimately lead to more, not less, uncertainty and burdens for the business community.

I would prefer that any Section 5 policy statement be put out for public comment before adoption and include, among other things: (1) a substantial harm requirement; (2) a disproportionate harm test; (3) a stricter standard for pursuing conduct already addressed by the antitrust laws; (4) a commitment to minimize FTC-DOJ conflict; (5) reliance on robust economic evidence on the practice at issue and exploration of available non-enforcement tools prior to taking any enforcement action; and (6) a commitment generally to avoid pursuing the same conduct as both an unfair method of competition and an unfair or deceptive act or practice.[22]

For all of these reasons, I dissent from the issuance of this policy statement.

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limiting principles the FTC runs the risk of its [standalone Section 5] enforcement being seen by newer agencies as following a kind of 'We know it when we see it' approach, one which translates into other languages and cultures all too easily as a kind of implicit endorsement of arbitrary exercises of agency power.").

[22] For a detailed discussion of factors that I believe should be included in a Section 5 statement, see Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2014).