UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

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Hearing on

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

April 5, 2016

TESTIMONY OF AMANDA P. REEVES
BEFORE THE COMMITTEE ON THE JUDICIARY
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Protecting Competition or Increasing Uncertainty?

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Mr. Chairman, Ranking Member Klobuchar, and distinguished Members of the Subcommittee, thank you for inviting me to testify before you today about Section 5 of the Federal Trade Commission Act.[1] I am a partner in the law firm of Latham & Watkins LLP, resident in the firm's Washington D.C. office and serve as Global Co-Chair of Latham's Antitrust and Competition Practice Group. I present this testimony on my own behalf, based solely on my own experience and understanding of the FTC's current and historical use of Section 5. My views do not necessarily coincide with those of any other individual or entity, including Latham & Watkins LLP or its clients.

The issue before you today is one of significant importance to the antitrust bar, the business community, and, of course consumers. It is also of tremendous importance internationally: enforcers all over the world look to the U.S. to be a leading example of effective competition enforcement and, in many if not most cases, model their approach after ours. It is also an issue that I have thought about from multiple angles. I previously served at the FTC as an attorney advisor to Republican Commissioner Tom Rosch and in that role, I worked closely with Commissioner Rosch, who pressed relentlessly for a vigorous role of Section 5. I also, however, have addressed Section 5 on the other side in private practice, where I routinely advise

[1] 15 USC § 45(a)(1) ("Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful."). All references herein to "Section 5" relate to its prohibition of "unfair methods of competition" and not to its prohibition of "unfair or deceptive acts or practices."

and represent clients on issues related to alleged anticompetitive conduct. Finally, I have had to think about these and other conduct issues from a more neutral perspective in my roles as co-chair of the ABA's Antitrust Law & Economic Institute for Judges, editorial co-chair of the *Antitrust Source*, and as a non-governmental advisor to the International Competition Network.

There is no question that when Congress gave the FTC authority to go after "unfair methods of competition," Congress handed the FTC a powerful and undefined tool. The question that has pervaded antitrust law over the last 100 years and the one that we are here to address today is whether the guidance that the FTC has provided regarding how and when it will use this tool remains so undefined that it does more harm than good? In light of both the FTC's use to date of its free-standing Section 5 authority and its continued efforts to provide guidance – including the guidance provided in the most recent "Statement of Principles Regarding Section 5 as a Competition Statute"[2]– the answer to that is no.

In my comments here, I outline why I have come to this conclusion. First, I provide context regarding the debate over the need for further Section 5 guidance and why providing such guidance in a way that is meaningful is easier said than done. My purpose here is to explain that the group of four bipartisan Commissioners that agreed on the Statement faced a significant task and one that I believe they addressed appropriately at this stage in Section 5's history. Second, I will explain why I do not believe that the FTC's Statement has the effect of chilling procompetitive conduct. The short answer is that the combined infrequency with which the Commission uses Section 5 and the limited remedies available to it do not, in my experience, lead companies to alter their decisions based on concerns related to Section 5. Third and finally,

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[2] Federal Trade Commission, Statement of Principles Regarding Section 5 As A Competition Statute ("Statement") (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

I will offer some initial thoughts on what work remains to be done and provide some thoughts on a cautious path forward that may successfully thread the needle so as to offer greater guidance to the business community without doing so in a way that either chills procompetitive conduct or dampens the purpose of Section 5 as Congress originally envisioned.

The Challenge With Drafting Guidelines Regarding Anticompetitive Conduct

To understand why I believe the Commission's recent Statement constitutes progress, it is useful to step back and consider the task at hand: the FTC's mission if it chooses to accept it (and, until now, it has not) is to draft guidance regarding a statute that even by antitrust standards is extremely vague and open-ended. Moreover, its task is to do so notwithstanding (1) the Commission's limited use of Section 5 to date, (2) a miniscule amount of common law precedent on the subject, and (3) the fact that firms may engage in anticompetitive conduct through a multitude of different forms that one cannot perfectly predict. That is a tall ask of any antitrust expert, and it is an even taller ask given the requirement that a majority of the Commission (and, ideally, a bipartisan majority) must reach agreement on forward-looking standards. This is not to say that the FTC should throw up its hands and say the task is simply too hard, but it is to acknowledge that the job of articulating Section 5 guidance is perhaps even more challenging than it is when it involves other areas of antitrust law that, practically speaking, are more doctrinally built out. It also arguably makes its responsibility all the more paramount.[3]

Against this backdrop, a recurring strand of the Section 5 critique asks the following: if the agencies can jointly issue very detailed Horizontal Merger Guidelines and update them with

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[3] William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 470 (2003) ("In the field of economic regulation, the antitrust laws of the United States are unique for their generality. The open texture of many antitrust statutes ... elevates the importance of the design and capability of institutions assigned to implement them.").

some frequency, then why is it so hard for the FTC standing alone to issue robust Section 5 Guidelines? A significant part of the answer to this question resides in the vastly different potential categories of conduct at issue. Horizontal mergers present a relatively predictable fact pattern with which the agencies have very extensive experience: two companies want to merge and the issue is whether the deal is likely to enable the merged entity to substantially harm competition. Certainly, there are areas of disagreement in horizontal merger law, including how to define markets, how to evaluate innovation competition, the time horizon for evaluating new entry, and other "inputs" into the analysis that may affect the conclusion. Those inputs, however, are mostly finite and are known at this point. Moreover, both the agencies and practitioners have sufficient experience with horizontal mergers that there can be a spirited debate on those topics such that the agencies can reach an informed determination on how to address them (if at all) in the Guidelines. This wide body of experience and precedent coupled with a well-established doctrinal framework means that the agencies' job is more to fill in the contours of that framework than it is to paint it on a blank canvass.

Anticompetitive conduct is a completely different kettle of fish. Firms may engage in anticompetitive conduct in a myriad of ways that range from pricing and output related conduct (such as below-cost pricing[4] and anticompetitive settlements of IP rights that constrain competition[5]) to non-price conduct (such as predatory innovation[6] or refusals to deal[7]), to more

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4 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993).

5 *FTC v. Actavis,* 133 S. Ct. 2223 (2013).

6 Compare *United States v. Microsoft Corp.*, 253 F.3d 34, 50-51, 80-81 (D.C. Cir. 2001) (analyzing alleged predatory innovation under the rubrics of monopolization and attempted monopolization claims); with *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group*, 592 F.3d 991 (9th Cir. 2010) (rejecting *Microsoft* analysis and holding that predatory innovation is per se legal).

complex hybrids (such as bundling and certain forms of exclusive dealing[8]). Predicting those categories of conduct and reaching agreement on the doctrinal tests that should apply to them in the abstract is an extremely difficult task—as the various circuit splits on these issues over time reflect, courts have a hard enough time reaching agreement on the proper legal standards when faced with *actual facts*.

Along these lines, whether or not one agrees with the Section 2 Report issued by the Department of Justice in 2008,[9] one needs only to look at the ensuing disagreement between the FTC and the DOJ[10] and the disagreement between the different leaderships at the Antitrust Division[11] to see just how difficult a task it is to reach agreement on standards for liability for anticompetitive conduct in the abstract. And, notwithstanding that disagreement, reasonable minds can at least agree that the parties to that Section 2 debate had two legally binding tools at their disposal: (1) the fundamental Section 2 framework that the Supreme Court articulated in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), which helpfully – albeit very broadly – set

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[7] Compare *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (Section 2 covers anticompetitive refusals to deal); with *Verizon Commcn's Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (refusing to find refusal to deal where a pervasive telecommunications regulatory scheme displaced the need for antitrust enforcement).

[8] Compare *LePage's Inc. v.* 3M, 324 F.3d 141, 154–57 (3d Cir. 2003) (en banc) (condemning above cost bundled discounts); with *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 900–03 (9th Cir. 2008) (rejecting *LePage's* and requiring proof of below-cost pricing to condemn bundled discounts).

[9] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), http://www.usdoj.gov/atr/public/reports/236681.pdf

[10] *See* Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (2008), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf.

[11] Department of Justice Press Release, *Justice Department Withdraws Report on Antitrust Monopoly Law* (May 11, 2009), https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

out the modern two-step analysis that applies to evaluate alleged monopolistic conduct today;[12] and (2) a more robust body of cases, including from the Supreme Court, interpreting *Grinnell*.

There is comparatively far less law to draw from – particularly if one focuses on recent enforcement actions – in formulating a concrete and coherent characterization of what Section 5 does and does not cover.[13] The challenge is to therefore formulate Section 5 guidance in a doctrinal vacuum. Yes, the Commission has the benefit of insights from the 2008 workshop held under the leadership of then-Chairman Kovacic[14] as well as numerous thoughtful speeches from many current and prior commissioners. It also has the more recent lessons from its enforcement actions which generally have related to invitations to collude, standard setting conduct,[15] and its foray into the thicket that constitutes an anticompetitive course of conduct in *Intel*. But against that comparatively very limited backdrop, it is not at all clear to me that it is beneficial to the business community *or* consumers to have the Commission outlining in the abstract more specific theories of liability or sub-categories of anticompetitive conduct at this time.

This brings me to the FTC's August 2015 Statement. As the title reflects ("Statement of Principles Regarding Section 5 as a Competition Statute"), the Statement does not purport to be Guidelines. Rather, much as the Supreme Court's decision in *Grinnell* did for Section 2, it more simply suggests a foundational doctrinal framework modeled after the "modern rule of reason"

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[12] 384 U.S. at 570-71 ("The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

[13] Separate from the desire to have guidance, I suspect that many in the business community would agree that silence is a good thing since it reveals a paucity of Section 5 enforcement.

[14] See Federal Trade Commission Workshop, "Section 5 of the FTC Act as a Competition Statute" (Oct. 17, 2008), http://www.ftc.gov/bc/workshops/section5/index.shtml.

[15] *Matter of Robert Bosch GmbH*, FTC File No 121-0081; *Matter of Motorola Mobility LLC and Google Inc.*, FTC File No 121-0120.

for Section 5 going forward. That framework provides a robust place for the application of economic principles and to consider unique attributes of specific conduct in the context of the industry and market dynamics that underlie any particular act(s). Perhaps most significantly, the rule of reason framework places the burden on the government out of the gate to identify anticompetitive effects and only once those effects are identified, does the defendant need to justify its conduct, which it can do by showing that its conduct has a legitimate business justification.[16]

Although it is tempting to throw stones at the Commission for not providing more guidance after such a long wait, doing so is a mistake. In Section 5's history, the Commission has never gone so far as to state what framework (if any) that it will apply across the board, let alone that it will apply the rule of reason framework and the associated 125 years of case law. In the Statement's text and the accompanying Statement of Chairwoman Ramirez and Commissioners Brill, Wright, and McSweeny, it essentially did just that.[17] To be sure, reasonable minds may differ on whether the rule of reason itself is the optimal framework for

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[16] The Statement states that "the act or practice will be evaluated under a framework *similar* to the rule of reason" – not that the Commission will apply the rule of reason. Nevertheless, I would expect targets of potential investigations – as well as this Committee – to call the FTC out if it departs from the rule of reason framework given that federal courts will reasonably look to the wide body of law governing the application of the rule of reason in evaluating on any standalone Section 5 claims. To the extent that the FTC departs from this settled framework, it will have a very heavy burden of explaining why it is doing so.

[17] Statement of the Federal Trade Commission on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) ("Our statement makes clear that the Commission will rely on the accumulated knowledge and experience embedded within the 'rule of reason' framework developed under the antitrust laws over the past 125 years—a framework well understood by courts, competition agencies, the business community, and practitioners.").

conducting modern antitrust analysis.[18] However, as a lawyer who defends large companies against allegations of anticompetitive conduct, there are few places in antitrust law that I would rather be—other than perhaps in the almost non-existent safe house of representing a client allegedly engaged in conduct that is per se legal.

I am also not sure that more guidance at this initial point would be helpful to anyone, including businesses that themselves are accused of engaging in such conduct. For one, antitrust cases are incredibly fact specific. A market share of less than 30% in one market may be functionally meaningless, where as in another it may give *AmEx* the ability to cause significant anticompetitive harm.[19] A duty to deal with one's competitor may simply not exist in a vast majority of situations, but courts have been willing to depart from recent precedent (at the FTC's urging) when it is a brand pharmaceutical company's refusal to deal a new entrant that thwarts generic competition.[20] These examples illustrate that there will almost never be a one-size fits all approach to analyzing conduct; articulating a principle broad enough to sweep in various plausible scenarios might not be a useful principle at all.

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[18] Critics of the rule of reason complain that the standard itself is too vague to be useful and that sweeping statements that conduct should be judged under the rule of reason unaccompanied by any practical guidance regarding how to apply the rule of reason raise more questions than answers. There is some merit to that critique in certain instances, *see, e.g.*, *FTC v. Actavis*, 133 S. Ct. 2223 (2013), but it extends well beyond Section 5 and arguably encompasses not just Section 1 vertical restraint law, but potentially significant swaths of conduct proscribed by Section 2 as well.

[19] See *United States v. American Express Co*. ("AmEx"), 2015 U.S. Dist. LEXIS 20114 (E.D.N.Y. Feb. 19, 2015) (finding that *American Express* violated Section 1 of the Sherman Act through a variety of anticompetitive practices, notwithstanding the fact that it only had 26.4 percent of the relevant market of credit and charge cards).

[20] *See, e.g.*, Transcript of Oral Opinion, *Mylan Pharmaceuticals Inc. v. Celgene Corp.*, No. 2:13-cv-02094-ES (D.N.J. Dec. 22, 2014) (upholding generic challenge to a brand's refusal to deal where the brand refused to supply drugs needed to prove bioequivalence); Transcript of Motions Hearing, *Actelion Pharm. Ltd. v. Apotex, Inc.*, 1:12-cv-05743 (D.N.J. Oct. 21, 2013) (same).

Second and relatedly, there is a bit of a "be careful what you wish for" concern. The Commission has at various points batted around potential Section 5 theories based on everything from facilitating practices to information sharing to the "course of conduct" theory that the Commission adopted in *Intel*.[21] While any given fact pattern may raise significant antitrust concerns in a particular context, extrapolating broad Section 5 principles from those fact patterns divorced from the economic and documentary evidence in those cases is a very risky endeavor and could generate a greater chilling effect than the absence of such guidance. If the goal is not to chill procompetitive conduct, there is a plausible argument in the current very aggressive antitrust enforcement climate that less is in fact more.

Third and at a more practical level, apart from what Congress intended, it seems highly unlikely that a majority of the Commission would ever go so far as to tie future Commissions down and provide a complete list of the sorts of conduct that violate Section 5. As a result, even a more robust set of Section 5 Guidelines would likely include caveats to note that that the "examples" the Commission provided are just that and we would all be right here debating whether one could drive a truck through that caveat.

Does The FTC Statement Have A Chilling Effect?

From both a public policy and an antitrust perspective, the question that one must ask about any FTC action with regard to Section 5 (and the question for any antitrust enforcer more generally) is whether, on balance, the actions create an enforcement climate that is sufficiently aggressive or ambiguous that it reasonably chills procompetitive conduct? I do not think the FTC's Statement has that effect.[22]

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[21] *In re Intel*, Complaint, FTC File No. 061-0247 (Dec. 16, 2009).

[22] In my experience, it is not Section 5 or any particular statute that is responsible for potentially making companies think twice before acting, but rather the enforcement climate more

For starters, to the extent that one wants Section 5 guidance, there are several FTC complaints, analyses to aid public comments, briefs, speeches, and testimony on the subject. I appreciate that some critics believe that the FTC should have engaged more directly with each of those precedents in its Statement, but the Commission's decision not to address those specific actions individually does not mean that they do not exist.

Additionally, whether the threat of Section 5 enforcement rationally "chills" procompetitive conduct is a function of whether companies reasonably believe the FTC is likely to investigate and challenge their conduct and what remedies the FTC can seek. On the case selection side, the FTC's use of Section 5 over the last 30 years does not seem to objectively trigger that concern—indeed, outside of the invitation to collude and standard setting context, the FTC's use of Section 5 has been extraordinarily limited.[23] In terms of remedies, the Commission does not seek disgorgement in standalone Section 5 cases.[24] This means that the

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generally. By all accounts, we are currently in a period of very aggressive antitrust enforcement by both antitrust agencies and if anything it is the mere fact that companies perceive that enforcement climate at a more general level that alters their behavior, rather than any specific legal theory or statute.

[23] The two instances where one might be able to argue that the FTC's use of Section 5 has have a chilling effect relates to invitations to collude (i.e., firm A says to firm B: "will you price fix with me?") and standard setting related conduct. On the former, the rules of road are well settled and it is hard to see any defense for not chilling invitations to collude. On the latter (conduct related to standard setting), it is not simply Section 5, but the much broader debate at both the FTC and DOJ as well as the parallel private litigation regarding standards for antitrust liability tied to patent enforcement actions that invariably cause patent holders in FRAND disputes to seek antitrust counsel before proceeding to file suit against an actual or potential competitor. Thus, if companies are finding their conduct chilled before engaging in conduct related to the enforcement of standard essential patents or the standard setting process more generally, it seems unlikely that Section 5 is the primary culprit.

[24] Statement of the Commission, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases n.6 (July 31, 2012), https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf ("The scope of the Commission's Section 5 enforcement authority is inherently broader than the antitrust laws, in keeping with Congressional intent to create an agency that would couple expansive jurisdiction with more limited and, typically, forward-

company's only risk if it is subject to a Section 5 enforcement action is that its conduct will be subject to a cease-and-desist order. That is it as far as the FTC is concerned. Apart from legal costs associated with defending one's conduct before the FTC,[25] the other factor that I and others routinely discuss with clients that are evaluating whether to proceed with potentially anticompetitive conduct is the risk of follow on class actions. This risk has always been a bit of an enigma when it comes to follow-on federal claims because if the FTC brings a claim under a standalone Section 5 theory, the assumption is that the Sherman Act does not provide such relief so there is no basis for a private right of action under the Sherman Act. Further, there is no follow-on federal cause of action under Section 5. Defending against claims brought under state little FTC acts, however, raise more significant concerns. While I do not see those potential costs as chilling potentially procompetitive conduct, that analysis would be something for this Committee and the antitrust bar more generally to continue to scrutinize.

One final observation that is often neglected in the Section 5 debate is the fact that while the conventional wisdom is that Section 5 enforcement is good for consumers, but bad for business insofar as it chills procompetitive conduct, *that characterization vastly oversimplifies reality*. During my time working for Commissioner Rosch, we routinely heard from businesses both big and small that encouraged the FTC to use Section 5 to go after conduct that they perceived as harming the competitive process. Likewise, on the private sector side, I have counseled clients on several occasions to reach out to the FTC to express concern about conduct

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looking remedies. We do not intend to use monetary equitable remedies in stand-alone Section 5 matters.").

[25] That option can of course be extremely expensive, which may be why so many companies settle. And if there is significant evidence that companies are routinely settling Section 5 claims that lack merit because the costs of litigating are too high, then that would raise a legitimate concern. Based again on the FTC's relatively limited use of Section 5, I have not seen evidence to suggest that this is the case when it comes to Section 5.

that is anticompetitive and a potential Section 5 violation; and it may come as a surprise that I have done that with a greater frequency than I have seen clients decide not to engage in plausibly procompetitive conduct because of the advised risk of standalone Section 5 enforcement.

Can the Commission Do More?

The remaining topic that I would like to briefly address is whether the Commission can and should do more. As my remarks today suggest, I believe that the Commission's bipartisan contribution to the debate advanced the Section 5 doctrine forward and provides greater clarity. The Commission has committed that it will only go after conduct that causes (or is likely to cause) anticompetitive harm, that it will credit cognizable efficiencies and business justifications, and that it is "less likely" to challenge an act or practice as an unfair method of competition on a standalone basis if the conduct can be challenged under the Sherman of Clayton Acts. Despite calls stretching back decades for further guidance, the four Commissioner that joined the statement under Chairwoman Ramirez's leadership were the first that were able to respond to this call by settling on these important first principles. That is a very significant step forward.

I appreciate the critiques on the other side of the debate and, in particular, I am sensitive to themes that pervade Commissioner Ohlhausen's thoughtful dissent from the Commission's statement, including her desire to see more specificity when it comes to what first principles should govern the Commission's application of Section 5.[26] Looking ahead, I would hope and expect that just as the Horizontal Merger Guidelines have evolved over time (they have been updated five times since the agencies originally adopted them in 1968), the Commission will do the same as it applies the Statement and considers new fact patterns in the future—and gains

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[26] See Dissenting Statement of Commissioner Maureen K. Ohlhausen – FTC Act Section 5 Policy Statement (Aug, 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.

some distance from some of the hot issues of today, which may very well still be percolating in other forms at the FTC and DOJ. This experience and the ability to view that conduct through the lens of both Section 5 as well as the Commission's statement may, in turn, provide it with a greater depth of experience to identify additional first principles and/or useful illustrations that govern when conduct does or does not cross the Section 5 line.

For now, however, if the issue is whether the business community and the antitrust bar have a greater sense now than they did prior to the Statement's issuance of what sort of analysis the FTC is likely to apply, I believe the needle rests squarely in the favor of an antitrust world where things are more transparent than they were before. If nothing else, defense lawyers now have a clear doctrinal target to shoot at in debates with the Commission and in Section 5 litigation, if and when that day comes. I would much prefer to be debating whether conduct violates the rule of reason (or even a standard "similar" to the rule of reason, whatever that may be) then left to simply explain why, as a matter of law, it does not rise to an "unfair method of competition."

Conclusion

In closing, I thank the Committee for its attention to this critically important issue, for continuing the debate, and for inviting me to participate today. As Voltaire, Franklin Delano Roosevelt, Winston Churchill, and Spiderman (among others) have all said in one form or another at various points in history: with great power comes great responsibility. No quote better summarizes the burden on the FTC when it comes to Section 5. The Commission's first foray into articulating principles that govern Section 5's application reflect an earnest exercise of that responsibility. The burden will be on the current and future Commissions to continue building on the foundation that the Commission thoughtfully put into place in 2015.