STATEMENT

OF

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COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER PROTECTION

HEARING ON

"SECTION 5 AND UNFAIR METHODS OF COMPETITION: PROTECTING COMPETITION OR INCREASING UNCERTAINTY"

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INTRODUCTION

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Joshua Wright and I am now a Professor of Law at the Antonin Scalia School of Law at George Mason University and Senior Of Counsel at Wilson Sonsini Goodrich & Rosati. Until August 2015, I was a Commissioner of the Federal Trade Commission ("FTC"). Before diving into the subject of today's hearing – the FTC's standalone authority to prohibit unfair methods of competition – I want to make clear that the views I express here today are my own.

The FTC's "Section 5 Problem" is one that has been near and dear to my heart for some time. I believe deeply in the FTC's mission of promoting competition and protecting consumers, and believe that the Commission's standalone unfair methods of competition authority can contribute to the FTC's efforts if used wisely. My perspective on the FTC's Section 5 authority is based upon my observations as a four time alumni of theFTC in positions ranging from staff intern to Commissioner, as an antitrust law professor and economist, and most recently, as a Commissioner who made a Section 5 Statement a priority throughout my tenure at the agency – and of course, voted for and vigorously

supported the 2015 Section 5 Statement along with Chairwoman Ramirez, Commissioner McSweeny, and Commissioner Brill.

Almost exactly three years ago I announced in one of my very first speeches as a Commissioner that a Section 5 Statement was my highest priority and that I intended to propose my own Section 5 Policy Statement to start a discussion within the agency about how to move forward.[1] I announced then that "as we approach the FTC's 100th year, I cannot think of any contribution this Commission can make to the FTC's competition mission, or investment it can make to secure the institutional integrity of the agency into the future, than to issue an Unfair Methods Policy Statement."[2] I also declared that I was "optimistic that *this* Commission can put an end to the state of affairs the agency finds itself in – that is, approaching nearly a century of operating without a policy statement articulating its views on the appropriate application of its signature statute in unfair methods of competition cases."[3] I'm very pleased to report that I was correct and am very proud of the bipartisan 2015 Section 5 Statement that emerged from hard work, compromise, and cooperation with my colleagues at the Commission, and especially with Chairwoman Ramirez.

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[1] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, What's Your Agenda?, Remarks at the ABA Antitrust Section Spring Meeting (Apr. 11, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/whats-your-agenda/130411abaspringmtg.pdf.

[2] *Id.* at 12.

[3] *Id.* at 3.

Today, I will address where things stand after the 2015 Policy Statement and what, if anything, Congress might do with respect to oversight of the FTC's unfair methods of competition authority. Doing so requires some understanding of the problems the Commission was trying to solve with the Statement. I will also discuss how the 2015 Policy Statement is likely to resolve much of that problem. I will conclude by offering a few thoughts on FTC process reforms I believe warrant serious consideration by Congress. In particular, I will discuss proposals aimed at improving FTC transparency and performance: further reform of the agency's one-sided administrative litigation process, requiring more frequent closing statements, and integrating further the Bureau of Economics into Commission decision-making.

I. SECTION 5'S PROBLEMS

When Congress enacted the FTC Act in 1914, it delegated to the FTC enforcement authority over the prohibition of unfair methods of competition in Section 5.[4] Congress intended for the FTC to use Section 5 to challenge conduct that falls short of the reach of the Sherman Act and Clayton Act, but it left the task of defining "unfair" to the agency "with broad business and economic

[4] Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-51 (2013)). Congress amended the FTC Act in 1938 to include a prohibition on "unfair or deceptive acts or practices." Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41, 44, 45 & 52-58 (2013)). My remarks only address Section 5's prohibition on "unfair methods of competition."

expertise."[5] As former FTC Chairman Bill Kovacic and Marc Winerman have explained, this design gave Section 5 "the potential to help make the Commission the preeminent vehicle for setting competition policy in the United States."[6] This theoretical promise has gone unfulfilled.

Over the FTC's 102-year history, the Commission's signature, "standalone" Section 5 authority has played a "comparatively insignificant role in shaping U.S. competition policy."[7] Leading FTC scholars have described the FTC's experience with Section 5 as producing a "generally bleak record," and have called for the FTC to "confront this history directly and understand why the list of failures is considerably longer than the list of accomplishments."[8]

There have been two fundamental impediments to Section 5 contributing effectively to the Commission's competition mission. The first and most serious impediment arises from the FTC's century-long failure to define what would constitute an unfair method of competition. In the absence of a Commission statement giving intellectual flesh to the statutory bones of the agency's Section 5 authority, the Commission is able to exact consents from parties whenever it

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[5] *See* James C. Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. ANTITRUST ENFORCEMENT 87, 88 (2015); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2013).
[6] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 932 (2010).
[7] *Id.* at 933.
[8] *Id.* at 940.

desires by simply asserting that conduct is unfair. Numerous commentators, scholars, and Commissioners have filled the Section 5 void by offering competing interpretations of the authority – many of which deviate substantially from the goals of the traditional antitrust laws.

The list of proposed interpretations is lengthy – but a few highlights include the use of Section 5 to bridge the gap between US antitrust law and the law of the European Community or other international jurisdictions,[9] to reduce income inequality,[10] to reach social and environmental harms,[11] or to achieve non-competition goals by condemning "otherwise oppressive" conduct as an unfair method of competition.[12]

The second dimension of the Section 5 problem is the procedural advantages the FTC affords itself in enforcing the FTC Act. Some simple

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[9] Albert A. Foer, FTC Workshop on Section 5, Section 5 as a Bridge Toward Convergence (Oct. 17, 2008), *available at* http://www.ftc.gov/bc/workshops/section5/docs/afoer.pdf.

[10] Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. Online, 1, 23 (2015) ("The FTC could conclude that monopoly pricing or price discrimination targeted at less advantaged consumers can be an unfair practice in violation of Section 5 . . . even if the market power was legitimately obtained.").

[11] Michael Pertschuk, Chairman, Fed. Trade Comm'n, New Directions for the FTC, Remarks Before the Eleventh New England Antitrust Conf. (Nov. 18, 1977), reprinted in 308 Trade Reg. Rep. (CCH) (Supp. 1977) ("[N]o responsive competition policy can neglect the social and environmental harms produced as unwelcome byproducts of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing-stimulated demands.").

[12] *See* Concurring Opinion of Commissioner Jon Leibowitz at 15, Rambus, Inc., FTC Docket No. 9302 (Aug. 2, 2006), *available at* https://www.ftc.gov/enforcement/cases-proceedings/011-0017/rambus-inc-matter (opining that "'actions that are collusive, coercive, predatory, restrictive, or deceitful,' or *other-wise oppressive*" can constitute unfair methods of competition (emphasis added)).

statistics are sufficient to make the point. For nearly 30 years, the FTC has found liability in 100 percent of the cases it has adjudicated under the FTC Act.[13] In other words, when an administrative law judge rules in favor of the FTC, the Commission uniformly affirms liability. When the administrative law judge rules against the FTC – which is not uncommon – the Commission uniformly reverses and finds liability. When combined with the fact that Commission decisions have been reversed by federal courts of appeal more commonly than the decisions of federal district court judges, it is difficult to attribute these figures to anything other than the FTC's institutional and procedural advantages making their mark on case outcomes. At a minimum, however, the figures above suggest that how we conceive of the appropriate time and place to use the Commission's Section 5 authority to further its competition mission ought to take into account institutional features.

Congress,[14] businesses,[15] the antitrust bar,[16] academics,[17] and even Commissioners rightly demanded guidance from the FTC regarding what would

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[13] *See* Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2013).

[14] *See Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 11-13 (2013) (questions for the record for Chairwoman Edith Ramirez), *available at* http://www.judiciary.senate.gov/imo/media/doc/041613QFRs-Ramirez.pdf [hereinafter 2013 Hearing]; *Oversight of the Antitrust Enforcement Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 4 (2015), *available at* http://judiciary.house.gov/_cache/files/62eaf3a4-e51d-4176-be61-f6bf095bfda6/114-33-94604.pdf

constitute an unfair method of competition.[18] This was not and is not a partisan issue. Both Republican and Democrat Commissioners had called for reform of

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[hereinafter 2015 Hearing] (statement of Bob Goodlatte, Chairman, H. Comm. on the Judiciary); *id.* at 4 (statement of Tom Marino, Chairman, Subcomm. on Regulatory Reform, Commercial & Antitrust Law, H. Comm. on the Judiciary).

[15] A. Douglas Melamed, Comments to the Federal Trade Commission, Workshop on Section 5 of the FTC Act as a Competition Statute (Oct. 14, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf.

[16] *See* Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287 (2014); *see also* Joe Sims, *Section 5 Guidelines: Josh Wright as the New King of Corinth?*, CPI ANTITRUST CHRONICLE, Sept. 2013, at 2, *available at* https://www.competitionpolicyinternational.com/section-5-guidelines-josh-wright-as-the-new-king-of-corinth/; Susan A. Creighton & Thomas G. Krattenmaker, Some Thoughts on the Scope of Section 5, Remarks at Workshop on Section 5 of the FTC Act as a Competition Statute (Oct. 17, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/screighton.pdf; Tad Lipsky, *Lessons From the Section 2 Context*, TRUTH ON THE MARKET (Aug. 2, 2013), http://truthonthemarket.com/2013/08/02/tad-lipsky-on-lessons-from-the-section-2-context/ ("The FTC's struggle to provide guidance for its enforcement of Section 5's Unfair Methods of Competition (UMC) clause . . . could evoke a much broader long-run issue.").

[17] *See* Thom Lambert, *Guidelines for the FTC's UMC Authority: What's Clear and What's Not?*, TRUTH ON THE MARKET (Aug. 1, 2013), http://truthonthemarket.com/2013/08/01/thom-**lambert**-on-guidelines-for-the-ftcs-umc-authority-whats-clear-and-whats-not/; Geoffrey Manne, *The Importance of Sensible Guidance for UMC Enforcement*, TRUTH ON THE MARKET (Aug. 1, 2013), http://truthonthemarket.com/2013/08/01/geoffrey-manne-on-the-importance-of-sensible-guidance-for-umc-enforcement/; Tim Wu, *Section 5 Guidelines Would Make the FTC Stronger and Better*, TRUTH ON THE MARKET (Aug. 1, 2013), http://truthonthemarket.com/2013/08/01/tim-wu-on-section-5-guidelines-would-make-the-ftc-stronger-and-better/.

[18] *See* Kovacic & Winerman, *supra* note 6, at 930 ("Among other steps, we see a need for the Commission, as a foundation for future litigation, to issue a policy statement that sets out a framework for the application of Section 5"); Statement of Commissioner Maureen K. Ohlhausen at 3-4 (Nov. 26, 2012), Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012), *available at* http://ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf ("Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition"); Julie Brill, Comm'r, Fed. Trade Comm'n, Remarks at POLITICO Pro's P2012 Policy and Politics Technology Luncheon (Dec. 13, 2012), *available at* http://www.politico.com/story/2012/12/brill-ftc-hopes-to-resolve-google-probe-soon-85049.html (stating that although difficult, "it would be a great idea" to develop guidance as to the contours of Section 5); Jon Leibowitz, Comm'r, Fed. Trade Comm'n, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5, Remarks at Workshop on Section 5 of the FTC Act, as a Competition Statute 4 (Oct. 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf ("If we do use Section 5—and I

the FTC's signature unfair methods of competition authority. The Commission answered the demand for greater guidance August 13, 2015 when a bipartisan majority adopted the Section 5 Statement by a 4-1 vote.[19]

Members of the antitrust community have welcomed the Statement. University of Chicago Law Professor and antitrust expert Richard Epstein opined that upon examination of the Statement, "the FTC has taken a step in the right direction."[20] Academics have described the Statement as "a huge achievement"[21] and "a major win . . . for the American consumer, who will benefit from the

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strongly believe we should—it is essential that we try to develop a standard"); Joshua D. Wright, Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority, Remarks at Symposium on Section 5 of the Federal Trade Commission Act (Feb. 26, 2015) *available at* https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf [hereinafter Wright, Section 5 Revisited]; Joshua D. Wright, *Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority*, Remarks at Executive Committee Meeting of the New York State Bar Association's Antitrust Section (June 19, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf [hereinafter Wright, Section 5 Recast].

[19] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [hereinafter Section 5 Statement].

[20] Richard Epstein, *When Bureaucrats Do Good*, HOOVER INSTITUTION (Aug. 17, 2015), http://www.hoover.org/research/when-bureaucrats-do-good.

[21] Geoffrey Manne, *FTC Commissioner Joshua Wright Gets His Competition Enforcement Guidelines*, TRUTH ON THE MARKET (Aug. 2, 2013), http://truthonthemarket.com/2015/08/13/ftc-commissioner-joshua-wright-gets-his-competiton-enforcement-guidelines/.

increased stability that this policy creates."[22] One former Commissioner described the Statement as "historic."[23]

I would also like to especially thank this Subcommittee for its bipartisan support of the Section 5 Statement.[24] I have no doubt that this Subcommittee's interest in the FTC generally, and its Section 5 enforcement authority specifically, helped spur the sitting Commissioners to the compromise forged in the 2015 Policy Statement.

II. THE 2015 FTC SECTION 5 STATEMENT

I will now turn to how the 2015 Section Statement likely resolves one of the fundamental Section 5 problems and does significantly reduce the second.

First, the Statement defines an "unfair method of competition" in a manner well understood by every practicing antitrust lawyer that gives advice based upon the "rule of reason" standard that governs the traditional antitrust

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[22] Gus Hurwitz, *Will the FTC's UMC Policy Statement Save the Commission from Itself?*, TECH POLICY DAILY (Aug. 18, 2015, 6:00AM), http://www.techpolicydaily.com/technology/ftc-umc-policy-statement/.

[23] Terry Calvani, *The Legacy of Joshua Wright*, TRUTH ON THE MARKET (Aug. 25, 2015), http://truthonthemarket.com/2015/08/25/the-legacy-of-joshua-wright/.

[24] Press Release, Richard Blumenthal, Blumenthal Statement on FTC Authority to Police Unfair Competition (Aug. 13, 2015) http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-statement-on-ftc-authority-to-police-unfair-competition; Press Release, Chuck Grassley, Grassley Comments on the Federal Trade Commission's New Section 5 Guidelines for Businesses (Aug. 13, 2015) http://www.grassley.senate.gov/news/news-releases/grassley-comments-federal-trade-commissions-new-section-5-guidelines-businesses; Press Release, Mike Lee, Lee Commends FTC on Issuing Section 5 Guidelines, Commits to Active Oversight (Aug. 13, 2015) http://www.lee.senate.gov/public/index.cfm/2015/8/lee-commends-ftc-on-issuing-section-5-guidelines-commits-to-active-oversight.

laws. For reasons I will explain, this bipartisan commitment to tethering the FTC's Section 5 authority to the traditional antitrust laws provides a solution to Section 5's vagueness problem.

Second, the Statement improves – but does not entirely resolve – the issues that arise from the FTC's administrative and procedural advantages. It is no surprise that a Section 5 Statement does not resolve these issues entirely – as they are fundamentally institutional design issues and impact all of the FTC's enforcement efforts, not just those under the domain of its unfair methods of competition authority.

The Statement has three key substantive elements. The first two elements address the Section 5's substantive problem by giving it meaning and the third element attempts to address the FTC's procedural advantages in enforcing Section 5.

The first element is fundamental: the Statement establishes as the exclusive goal of Section 5 enforcement the promotion of consumer welfare as that term is generally understood in antitrust precedent.[25]

The Statement clearly rejects the far-reaching interpretations of Section 5 that the Commission has embraced, with problematic consequences, in its recent

[25] Section 5 Statement, *supra* note 19 ("T]he Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare").

history. Critics of the Statement have claimed, however, that this dimension of the Statement accomplishes too little because the Commission has, at least over the past two decades of its century-long history, largely avoided the most egregious abuses of using Section 5 to achieve non-economic ends. This criticism appears to concede that the Statement improves matters but quibbles with the magnitude of the benefit.

There are at least three reasons to think this element offers significant value to the FTC's competition mission, and therefore, to consumers. The first is that without the Statement there is absolutely nothing that prevents the agency, if a majority of Commissioners deem it so, to invoke non-economic goals as the core of Section 5 enforcement. The second is that these problematic interpretations are not just an artifact of antitrust history, but rather captured the hopes of some modern antitrust thinkers for the future of Section 5.[26] The third is that history teaches us that it is the combination of the rule of reason and integration of economic analysis into antitrust jurisprudence that provided the catalyst for its healthy development. The Statement mimics this approach by providing clear guidance, adopting the rule of reason explicitly, and tethering Section 5 to the antitrust laws and their methodological commitment to economic analysis.

[26] *See* Salop & Baker, *supra* note 10.

The Statement's second element articulates a methodological commitment – that is, it commits the FTC to account for both competitive harm and any countervailing efficiencies or other cognizable business justifications when assessing whether conduct constitutes an unfair method of competition.[27] In other words, the Statement commits the FTC to perform rule of reason analysis when assessing potential unfair methods of competition violations. This legal rule and method of analysis are well understood by practicing antitrust lawyers, judges, and scholars. Indeed, the Commission Statement accompanying the Section 5 Statement cites the well-known (to antitrust practitioners) Areeda and Hovenkamp treatise to underscore the point that the type of balancing contemplated by the Statement is *precisely* the sort of balancing common to the antitrust enterprise for decades under the modern rule of reason.[28] The Section 5 rule of reason is not special.[29] Combined, these first two elements provide both

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[27] Section 5 Statement, *supra* note 19 ("[T]he challenged act or practice will be evaluated under a framework similar to the rule of reason, that is, the act or practice must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications").

[28] Fed. Trade Comm'n, Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 1 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf [hereinafter Commission Statement].

[29] Edith Ramirez, Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School 7 (Aug. 13, 2015), *available at* http://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf ("I wish to stress, however, that we are using the term 'rule of reason' in its broad, modern sense.").

meaning and an analytical framework – one that has served the antitrust laws well – to the FTC's Section 5 unfair methods of competition authority.

In my view, while interpretation of these provisions is may involve at least some initial period of uncertainty and adjustments by the agencies, businesses, and courts, the Statement is likely to largely resolve the problems arising from the century-long absence of guidance on the FTC's core competition authority.

Finally, the third element of the Section 5 Statement is an attempt to partially address the interaction of the FTC's procedural and institutional advantage in enforcing Section 5. The Statement acknowledges that the FTC should be reluctant to rely on a standalone Section 5 theory if the traditional antitrust laws are sufficient to address the competitive concern at issue.[30] The most obvious benefit of this element of the Statement – and one that has been widely appreciated – is that it provides a useful limiting principle to Section 5's application because it constrains the Commission's ability to avoid the more arduous standards of proof necessary under the Sherman and Clayton Acts.[31]

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[30] Section 5 Statement, *supra* note 19 ("[A]s a matter of discretion, the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice").

[31] *See* Epstein, *supra* note 20 ("The presumption against using the standalone authority when either the Sherman or Clayton Act 'is sufficient to address' some competitive harm is a useful limiting principle."); Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After*

This anti-circumvention prong is also a somewhat remarkable concession by the Commission in light of the agency's consistent rejection of the proposition that the scope of the traditional antitrust laws, determined by generalist Article III judges, should limit the boundaries of Section 5.

Some contend the anti-circumvention prong does not go far enough because it does not legally preclude the agency from enforcing Section 5 when the traditional antitrust laws apply to the conduct at issue. This criticism belies a misunderstanding of how agency guidelines and informal statements influence behavior. Of course, no set of informal guidelines promulgated by the agency over its 100-year history is capable, without more, of imposing any constraining force upon the agency. But all antitrust practitioners and scholars would agree that, in reality, the "soft" constraints imposed by informal agency guidelines and statements constrain agency behavior.

Some antitrust scholars have recognized the role of soft constraints in constraining agency behavior. For example, Professor Gus Hurwitz has observed that the Statement creates "powerful soft constraints" because it

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the 2015 Commission Statement, ANTITRUST SOURCE, Oct. 2015, at 10, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf ("This third, 'anti-circumvention' prong . . . implicitly acknowledges that using Section 5 to evade the more rigorous standards of proof required by the traditional antitrust laws is inappropriate, and sets forth a limiting principle concerning the scope of Section 5.").

"substantially increases the stakes the Commission faces should it needlessly make use of its Section 5 authority."[32] In other words, a party faced with application of Section 5 that violates the third element of the Statement – that is, an application that is covered by the traditional antitrust laws – may raise the Statement to a district court judge. In an article with Angela Diveley, we elaborate upon the power of this limitation in practice:

> "[T]he anti-circumvention prong of the Statement provides parties the ability, in litigation, to call attention to the fact that the conduct being litigated is covered by the traditional antitrust laws, and thus a less appropriate target for Commission action according to its own standards. While the Statement does not absolutely preclude the Commission from pursuing such a case, it would do so at substantial risk of losing the litigation at hand, of harming its own reputation by creating a perception that it is seeking to evade the more rigorous burden of proof under the traditional antitrust laws, and of providing an environment ripe for judicial interpretation of Section 5 that would further constrain its authority."[33]

The Section 5 Statement is not itself a remedy for the procedural and institutional advantages afforded the Commission when it exercises its unfair methods of competition authority. It does, however, offer significant soft constraints upon the FTC should it attempt to use Section 5 to reach conduct already covered adequately by the existing antitrust laws.

III. WHERE SHOULD SECTION 5 ENFORCMENT GO FROM HERE?

[32] *See* Hurwitz, *supra* note 22

[33] *See* Wright & Diveley, *supra* note 31, at 12.

Having discussed the importance of the FTC's Section 5 Statement and how it is likely to be interpreted by courts and agencies, I would like to turn now to the subject of today's hearing: where Section 5 enforcement goes from here and what, if anything, can be done to reform FTC process to sharpen its implementation.

I want to focus on three points: (1) areas that are appropriate targets for future Section 5 enforcement efforts by the agency; (2) the need for Congressional oversight to ensure that the FTC does not venture into areas that are "escapes" from traditional antitrust; and (3) some process reforms that might help sharpen Section 5's execution in practice.

Let me begin with desirable targets for Section 5 enforcement. Recall that the key contribution of the Section 5 Statement is to align the FTC's unfair methods of competition authority with the concepts and methods of the traditional antitrust laws – and in particular, to tether Section 5 to economic analysis of the consumer welfare consequences of various business practices. That combination of deep integration of economics with law and a singular focus on economic welfare has been cause for an important and intellectually coherent shift in the focus of the antitrust laws and enforcement agencies over the past 50 years. So if Section 5 tethers the FTC's unfair methods of competition authority

to the traditional antitrust laws – what can the FTC do with the former to usefully contribute to its competition mission?

There are several possibilities. I will focus on a handful that play to the agency's comparative advantage over both private litigants and its sister agency, the Antitrust Division. First, it should go without saying that Section 5 should not be used to circumvent the traditional antitrust laws. One of the most damaging criticisms of Section 5 enforcement leading to the Statement was that the FTC had gotten into the habit of using or threatening to use Section 5 when it was unable to uncover evidence that a business practice was actually or likely to be anticompetitive. In such a case, the agency was likely to lose under the traditional antitrust laws – but could maintain a credible enforcement threat and extract a consent decree from parties under Section 5. With the 2015 Statement's third prong, the FTC itself acknowledges that circumventing the traditional antitrust laws is not an appropriate use of Section 5.[34]

So what should the agency do? I offer two possibilities. The first is to focus upon areas where there is no antitrust doctrine to speak of as of yet.[35] In

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[34] Section 5 Statement, *supra* note 19. *See* Wright & Diveley, *supra* note 31, at 10-12; Hurwitz, *supra* note 22.

[35] *See* Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, ANTITRUST SOURCE, Feb. 2009, at 3, 4, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Creighton2_26f.authcheckdam.pdf ("The 'frontier' rationale argues that there are some cases that meet all of the legal requirements for a Sherman Act claim, but involve new forms of anticompetitive conduct

these cases, the agency can play to its strengths. The FTC can leverage its research and reporting functions to collect data, conduct research, and use its expertise and knowledge accumulated through those efforts to lead in the creation of new doctrine. Such leveraging, particularly in areas of emerging behavior, would go a long way toward establishing Section 5 as a key tool for shaping antitrust doctrine – an outcome Congress desired 100 years ago when it articulated that agency's unfair methods of competition authority,[36] but which has, thus far, failed to come to fruition.[37]

Toward this end, the 2015 Statement offers general limits and parameters for its exercise in this way, but the targeted use of Section 5 on novel conduct, for which the existing antitrust laws have do already encountered and resolved, can be an efficient and productive use of agency resources and can promote effectively competition and consumer welfare.[38] The key to these applications of

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that fall outside traditional categories of conduct that have long been subjected to conventional antitrust analysis. . . . To guard against [the risks that the Commission will use Section 5 to circumvent the rigorous standards of the other antitrust laws and that its reliance upon Section 5 might weaken its influence as an expert], the Commission in 'frontier' cases would need to analyze and litigate the case precisely as it would under the Sherman Act.").

[36] *See* Kovacic & Winerman, *supra* note 6, at 932-33; Wright, *supra* note 1, at 6.

[37] *See* Kovacic & Winerman, *supra* note 6, at 933 ("In practice, the FTC's application of Section 5 has played a comparatively insignificant role in shaping U.S. competition policy."); Wright, *supra* note 1, at 6 ("Section 5 has not produced more than a handful of adjudicated decisions with any durable impact on antitrust doctrine or economic welfare. Indeed, it is the Sherman Act and not Section 5 that has proven the more flexible instrument of antitrust law in terms of adjusting to economic learning and changes in market conditions.").

[38] *See* Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission's Section 5 Unfair Methods of Competition Authority*, CONCURRENCES N° 4-2013, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/siting-

Section 5 is that they must satisfy the rigorous economic and evidentiary requirements – in particular, the required demonstration of harm or likely harm to competition – of claims under the traditional antitrust laws.

A second area of potential focus for Section 5 enforcement involves a continuation of the agency's existing enforcement efforts against invitations to collude. Invitations to collude fall outside of the traditional antitrust laws because they lack the agreement required to constitute a violation of Section 1 of the Sherman Act. Nonetheless, while failed attempts to collude and conspire do not result in immediately higher prices or lower output, a concentrated program against invitations to collude is almost certain to deter a few successes on the margin. The FTC effort against invitations to collude is a productive and non-controversial application of Section 5 that has long enjoyed bipartisan support and should continue as the core of the agency's standalone Section 5 efforts.[39]

The second point I want to focus on is that Congressional oversight of the FTC's use of Section 5 after the 2015 Statement is critical to ensure that the agency does not return to prior abuses. I have already discussed what I believe is the key abuse of Section 5 to be avoided: invoking Section 5 as an amorphous

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antitrust-institutions-case-guidelines-recalibrate-federal-trade-commissions-section-5-unfair/concurrences-4-2013.pdf.

[39] *See* Cooper, *supra* note 5, at 100 n.72; Rybnicek & Wright, *supra* note 16, at 1310 ; Wright & Diveley, *supra* note 31, at 3.

super-statute to fill gaps in law and evidence whenever the agency cannot make out a case that a business practice has harmed competition. I believe the 2015 Statement is sufficient to constrain the abuse of Section 5 as a tool to circumvent proof of competitive harm not only for what the document says – it clearly requires such proof and acknowledges the danger of such circumvention – but because it empowers potential litigants to make use of the Statement in litigation.[40] Similarly, Congressional oversight is critical to ensure that the agency remains faithful to its interpretation of its unfair methods of competition authority set forth in the 2015 Statement just as Congress plays an important role in oversight with respect to the agency's application of its other enforcement authorities.

Finally, while my view is that the primary role for Congress when it comes to the narrow question of Section 5 is to "wait and see" what happens with its application, there are other important institutional questions Congress can and should consider to improve FTC performance not only with respect to Section 5, but also in furtherance of its mission generally.

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[40] Hurwitz, *supra* note 22 ("The value of this policy statement is not that it binds the commission. It doesn't. Its value is that it gives us something to point to when the commission does go too far. Dissenting commissioners can point to it; litigants can point to it; judges can point to it; Congress can point to it. They can point to this statement and call out the FTC for ruling by whim instead of by law. They can point to this as evidence from the commission itself that reliance on stand-alone UMC claims, untethered from traditional antitrust law, is problematic. They can point to this as evidence that commission decisions merit reduced deference or greater scrutiny—or that Congress needs to rein in the commission's too-expansive power.").

Recall that the key issues underlying the abysmal performance of the FTC's standalone Section 5 authority were both substantive – the lack of a definition for what acts and practices constitute an "unfair method of competition" – and procedural. The 2015 Statement directly addresses the former. But there are a number of process issues related to FTC performance worthy of your consideration. I will mention two here.

The first is that while the FTC is a law enforcement agency, the overwhelming majority of its work takes place in negotiating consent decrees with parties, bargained for in the shadow of the threat of litigation. When the FTC bargains in the shadow of the threat of litigation, the shadow is an imposing force. After all, the FTC has ruled for itself in administrative litigation in approximately 100 percent of the cases over the past 30 years.[41] That is a serious problem that invokes questions about the fundamental fairness of administrative litigation at the FTC, and whether the one-sided process results in consents that are ultimately harmful for consumers more often than necessary. I should be clear here: I believe that there is hope for administrative litigation at the FTC to play a productive role in shaping antitrust doctrine and helping to promote competition. Indeed, there are one or two examples over the past century where one can argue that bringing a case in administrative litigation rather than federal

[41] *See* Wright & Diveley, *supra* note 13; *see also* Wright & Diveley, *supra* note 31, at 3 n.16.

court made consumers better off. But one or two isn't good enough. If administrative litigation is going to be part of the FTC's competition enforcement mission – as Congress intended – these issues require serious attention.

The second concern is related to the first. The primary consequence of these administrative advantages is that the FTC may well be able to enter into settlement agreements when there is no real economic evidence that the parties' conduct harmed competition; indeed the real fear is that a consent might chill pro-competitive conduct and deprive consumers of the benefit of competition. Here, I offer two concrete suggestions that, from my experience at the agency as an economist, a lawyer, and ultimately a Commissioner, would improve matters significantly.

The first is to require the agency to produce closing statements after investigations wherever possible. Of course, confidentiality concerns prevent the FTC from disclosing the details of its analysis in many cases, but even disclosure of the contours of its theory, or of the types of evidence that the agency requires to analyze particular cases, would increase transparency, promote certainty and the rule of law, and allow businesses to operate with a better understanding of when particular conduct might give rise to antitrust liability. Closing statements would illuminate the rules of the road. Congress should consider exploring

potential vehicles to promote FTC transparency in its enforcement efforts – a value we rightly preach to competition agencies around the world – through the use of closing statements and otherwise.

The second set of suggestions involves increasing the relative influence of the FTC's Bureau of Economics within the agency and facilitating greater incorporation of economic analysis into FTC decision-making.[42] Along those lines, it is my view that two critical elements of FTC reform are prioritizing and ensuring the independence of FTC economic analysis and an agency-level commitment to more deeply incorporating economic analysis into its decision-making.

I offer two specific policy recommendations along these lines. The first should come as no surprise when uttered from an economist: the FTC should hire more full-time economists to balance the staffing ratio – currently about five to one – between lawyers and economists within the agency.[43] Doubling the current size of the Bureau of Economics would be a good start and require a significant increase in agency resources to expand its economic capabilities while maintaining current quality levels.

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[42] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Statement on the FTC's Bureau of Economics, Independence, and Agency Performance (Aug. 6, 2015), https://www.ftc.gov/system/files/documents/public_statements/695241/150806bestmtwright.pdf.

[43] *Id.* at 11.

The second policy recommendation is that Congress consider requiring the FTC to amend FTC Rule of Practice 2.34 to mandate as part of the already required "explanation of the provisions of the order and the relief to be obtained" in matters involving consent decrees that the Bureau of Economics publish a separate explanation of the economic analysis of the Commission's action.[44] The economic analysis conducted by staff is often not described well in, or may be totally omitted from, public documents in many competition cases. The additional explanation I have in mind would be authored solely by the Bureau of Economics and would not require approval of the Commission. The Bureau of Economics explanation could provide the basic economic rationale for its recommendation on top of a high-level and general description of the economic analyses relied upon in recommending or rejecting the proposed consent order.

Requiring the Bureau of Economics to publicly announce its economic rationale for supporting or rejecting a consent decree could result in a number of benefits with few costs. First, it offers the agency economists an avenue to communicate their findings to the public. In doing so, it would provide the public with a better understanding of critical components of the antitrust

[44] *Id.* at 11-12 ("The documents associated with this rule are critical for communicating the role that economic analysis plays in Commission decision-making in cases.").

analysis – which is often and largely lacking today. Second, and relatedly, it breaks the monopoly within the agency the FTC lawyers currently enjoy in terms of framing a particular matter to the public. Third, it reinforces the independent nature of the recommendations offered by the Bureau of Economics. The Bureau of Economics would gain significant internal leverage with the ability to publish such a document, and while that may increase conflict between bureaus on the margin in close cases, it would also provide the economists a more prominent role in the consent process and a mechanism to discipline consents that are not supported by sound economics.

Thank you for your time. I am happy to answer any questions.