RESPONSES TO WRITTEN QUESTIONS
FROM THE SUBCOMMITTEE

for the

SENATE COMMITTEE ON THE JUDICIARY,
SUBCOMITTEE ON ANTITRUST, COMPETITION POLICY,
AND CONSUMER RIGHTS

on

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

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1) **The Commission's guidance indicated that so-called standalone Section 5 cases would be evaluated under a "framework similar to the rule of reason." What should this framework look like and what factors should be considered?**

The Guidance should state that the analysis in standalone Section 5 cases will be the same as the rule of reason analysis used in Sherman Act cases and that the substantive legal standards will also be the same. There is no other practical way to avoid the great ambiguity in the current reference to the rule of reason.

The rule of reason varies depending on the circumstances. It would be an enormously complicated and difficult challenge for the Federal Trade Commission to attempt to define the rule of reason in detail, and it is almost inconceivable that the Commissioners could agree on any precise definition or explanation.

For the reasons summarized in my Prepared Statement and my oral testimony, I also believe that it would be inappropriate for the Commission to come up with its own definition that departed from Sherman Act standards. Any such definition would be unavoidably ambiguous and would be subject to change by future Commissions.

2) **As I indicated in my opening remarks, one concern I have regarding Section 5 is that an overly expansive interpretation may lead to a greater regulatory burden on some businesses as compared to others, because the FTC and DOJ split antitrust enforcement between different industries and markets.**

   a. **Would such expansive use raise the same concerns regarding divergence across the antitrust agencies that are driving interest in enacting the SMARTER Act?**

The concerns are similar to those that the SMARTER ACT is intended to address, but they are not identical. The SMARTER ACT is addressed to differences between the FTC and DOJ with respect to merger enforcement. There are two key differences. First, the standards applied by federal courts in deciding whether to issue preliminary injunctions are lower (i.e., easier for the government) in cases brought by the FTC than those used by the courts in cases brought by DOJ. Because issuance of a preliminary injunction is often as a practical matter the death knell for mergers, this difference means that as a practical matter the substantive merger standards applicable to FTC cases are often very different from those applicable to DOJ standards.

Second, when FTC merger cases are subject to comprehensive litigation on the merits, the trial is conducted before an FTC hearing examiner, and the facts are found de novo by the FTC Commissioners. To that extent, the Commissioners function as both prosecutor and judge in the same matter. DOJ cases are litigated in federal court, which is of course an independent tribunal. The same substantive legal standards apply to final litigation on the merits of both FTC and DOJ merger cases.

Expansive use of standalone Section 5 authority would be similar in that it could lead to different results depending on whether the matter is subject to review by the FTC or DOJ. The problem might be worse in that case because the ultimate substantive standards applied by the FTC would be different from those applied by DOJ.

b. What can the agencies do to avoid this?

DOJ does not have authority to enforce Section 5, so if Section 5 were construed in an expansive way, the FTC would be applying different and broader substantive law from that applied by DOJ. There is nothing the agencies would be able do about that difference, as long as the FTC applied Section 5 more broadly than the Sherman and Clayton Acts.

Some have suggested that the problem could be ameliorated to the extent that DOJ refers matters that it does not think warrant challenge under the Sherman or Clayton Acts to the FTC for possible challenge in a standalone Section 5 proceeding. As I explained in my Prepared Statement, however, this possibility is unlikely to ameliorate the problem to any significant extent and would, if used, create different problems. DOJ would be very unlikely to refer to the FTC all matters that the FTC would regard as warranting enforcement in a standalone Section 5 proceeding. Moreover, to the extent that DOJ did refer such matters to the FTC, businesses subject to DOJ enforcement, but not those subject to FTC enforcement in the first instance, would be subject to costly and duplicative proceedings before both agencies.

3) The Commission's Unfairness Statement on the consumer protection side requires substantial harm to establish that an act or practice is unfair under the FTC Act. Should the "unfair methods of competition" Statement also include a requirement of substantial harm to competition?

The "unfair methods of competition" statement should state, as then-Commissioner Wright proposed, that a violation of Section 5 requires, among other things, the same proof of harm to competition as that required in Sherman Act cases. While I think the idea of harm to competition is well understood in the Sherman Act context, details about its application – in particular, how much harm is required and whether likely future harm, instead of proven harm in the past, will suffice – sometimes vary depending on the circumstances.

As I suggested in my response to question (1) above, I think it would be both a difficult challenge for the FTC to attempt to spell out the injury to competition requirement in detail and unlikely that the Commissioners would agree on any precise statement of the requirement. I also believe, for reasons summarized in my Prepared Statement, that it is better for the FTC to incorporate the standards applicable to the Sherman Act, instead of trying to come up with new and different standards for use in Section 5 cases. Different standards for Section 5 would be unavoidably ambiguous and would expose different businesses to different legal standards, and reliance by the FTC on such different standards would divert the FTC from the more important task of contributing to the ongoing evolution and development of Sherman Act standards. The best solution, therefore, is for the FTC simply to adopt and incorporate by reference the standards that have been developed under the Sherman Act.

4) Would it make sense to balance Section 5's broader reach with limited remedies by taking disgorgement off the table in standalone Section 5 cases?

Yes, but that would not solve the problem. Many of the injunctive remedies that the Commission has used or asserts the right to use in standalone Section 5 cases could require

substantial changes in the way affected companies do business. In some instances, those injunctive remedies could be far more costly and burdensome to the affected companies than exposure to treble damage or disgorgement remedies. If, as I understand, the purpose of taking disgorgement off the table is to avoid the chilling effect that exposure to ambiguous Section 5 standards might have on procompetitive business conduct or to protect companies from the unfairness of being subject to onerous sanctions for violation of such ambiguous standards, the scope of remedies available in standalone Section 5 cases should be narrowed much more than by taking just disgorgement off the table. All remedies other than a simple cease and desist order directed at conduct found to be illegal should be off the table.

5) What next steps should the Commission take to provide additional guidance and clarity to the businesses it regulates?

The Commission should state explicitly (1) that standalone Section 5 cases require proof both that the defendant engaged in anticompetitive conduct and that that conduct injured or threatened to injure competition and (2) that, with respect to both of those elements of the offense, it will apply the same substantive standards as those applicable under the Sherman Act. That would enable the Commission to bring standalone Section 5 cases to challenge conduct that is beyond the reach of the Sherman and Clayton Acts (e.g., invitations to collude) without departing from or undermining the key substantive principles embodied in Sherman Act jurisprudence as it has developed over the past 125 years.

Any realistic departure from Sherman Act standards with respect to the conduct and injury-to-competition issues would create unavoidable ambiguity because the standards would not be clear and would be subject to change by future Commissions. The Commission could avoid ambiguity by defining specific offenses with precision, but it is my understanding that proponents of standalone Section 5 enforcement want the Commission to be able to use such enforcement with respect to a broader and not fully defined set of offenses.

6) Is there a risk that foreign antitrust enforcement agencies may use the ambiguities in the FTC's approach to Section 5 to justify a broad application of their own respective competition laws?

Yes. Many foreign antitrust or competition law enforcement agencies are located in legal systems that are very different from ours and in countries that have less experience with and a less strong commitment to market-based competition. These agencies are often uncomfortable with aggressive or creative forms of competition that threaten rivals. These agencies also often tend to slide, deliberately or otherwise, into a regulatory model in which their task is to oversee competition and impose forward-looking remedies to achieve what they regard as improved outcomes. Together, these two factors sometimes cause foreign competition agencies to intervene in markets too often, to do so on the basis of ambiguous legal standards that deter procompetitive conduct and sometimes prohibit efficient conduct, and to do so in order to protect incumbent firms from competition that new entrants (including U.S. firms) might otherwise provide or on occasion in order to further non-competition goals.

The U.S. antitrust agencies have for many years attempted to persuade these nations to move their competition law regimes more toward law enforcement based on clear legal rules that leave firms free to compete aggressively and creatively and prohibit only conduct that both is anticompetitive (i.e., to oversimplify, conduct that is not based on efficiency) and injures

competition (i.e., creates additional market power for the defendant or an entity acting in collaboration with the defendant). The U.S. agencies have had substantial but incomplete success in that effort, and it remains a difficult challenge. The U.S. agencies' ability to persuade foreign counterparts to employ a law enforcement approach, and to eschew regulation and interventions that interfere with efficient conduct in order to protect rivals or further other objectives, would be diminished to some extent if the FTC asserts broad or ambiguous standalone Section 5 authority. Such conduct by the FTC would to some extent both undermine the credibility of some of the U.S. agencies efforts to persuade foreign agencies and give foreign agencies an excuse to reject the positions advocated by the U.S. agencies.

A broad interpretation of Section would undermine U.S. efforts to persuade foreign counterparts to adopt sound competition law principles in another way, too. One of the most important and difficult challenges facing the U.S. agencies is persuading foreign competition agencies to adopt rigorous procedural rules that give putative defendants ample means to defend against charges of wrongdoing, ensure the development of a complete and unbiased factual record, and provide for resolution of both factual and legal issues by an independent tribunal. Standalone Section 5 matters are litigated in administrative proceedings in which the FTC Commissioners function as both prosecutors and judges. Increased use of such proceedings makes it more difficult for the U.S. agencies to persuade other nations to use independent decision-makers in competition matters and more generally makes it more difficult for the U.S. agencies to persuade foreign counterparts to adopt rigorous procedural rules.

1. **It is my understanding that China is considering revising its competition laws to make it an unfair business practice for one party to use a comparative advantage related to capital, technology, distribution networks, or other factors to gain advantage over another party that cannot easily switch business partners. This broad comparative advantage standard, if implemented, will likely chill much pro-competitive conduct. Do you agree that China and other countries could use the ambiguities in the FTC's current enforcement principles for unfair methods of competition under Section 5 as justification for implementing their own broad and unrestrained unfair competition standards?**

Yes, absolutely. China both has different attitudes about market competition and sometimes uses its competition laws to further objectives that we would not regard as competition objectives. One such objective is China's current, intense push for what it calls "indigenous innovation." China wants to move up the economic value chain by owning more high-end technology. It intends to gain such technology both by developing it internally and by appropriating technology developed in the U.S. and other nations. China has manifest an interest in using competition law to appropriate such technology by requiring companies that have uniquely valuable technology assets to make those assets available to Chinese firms. Any steps taken in the U.S. to relax otherwise rigorous competition law principles that respect property rights and are sensitive to incentives for investment are likely to be seized upon in China and elsewhere by those who are seeking to legitimize using competition laws in aid of strategic, non-competition objectives.

More broadly, relaxing our rigorous competition law standards by adopting a more flexible and ambiguous "unfair methods of competition" standard will be used by officials in other countries to support increased economic regulation in the name of competition law. As I noted in my earlier submissions, many foreign antitrust or competition law enforcement agencies are located in legal systems that are very different from ours and in countries that have less experience with and a less strong commitment to market-based competition. These agencies are often uncomfortable with aggressive or creative forms of competition that threaten rivals; and they often tend to slide, deliberately or otherwise, into a regulatory model in which their task is, not to articulate clear rules to guide private conduct, but rather to use regulatory discretion to oversee competition in order to achieve what they regard as improved outcomes. Such regulation can undermine the very market-based competition that is the objective of our antitrust laws.

2. **One argument against clarifying the Commission's enforcement powers under Section 5 regarding unfair methods of competition is that cabining the Commission's discretion will limit its ability to respond to new competitive threats. Does this argument hold water? Is there a reason the Commission *needs* such broad discretion under Section 5?**

I do not believe this argument is correct or that the Commission needs such broad discretion under Section 5. The Sherman Act and the Clayton Act, as they have been elaborated by 125 years of case law, embody broad, sound, intelligible principles that apply to a wide and changing array of business conduct. At a high level, they prohibit collaborations among competitors that restrict market-wide output and conduct that creates

market power that excludes rivals other than as a result of superior efficiency. These broad principles have proven that they can be applied to new and changing types of business conduct. Thus, for example, the antitrust laws have in recent years prohibited new forms of anticompetitive conduct such as bundled discount, loyalty discounts, reverse payments in pharmaceutical settlements, and misrepresentations to standard setting bodies regarding intellectual property. Those laws will continue to evolve and to address new competitive threats in the future.

As I explained in my written statement, it is very difficult to imagine conduct that is both truly anticompetitive and beyond the reach of the antitrust laws because the principles embodied in those laws are broad enough to encompass almost every form of anticompetitive conduct. So-called "invitations to collude," which are situations in which one party invited an rival to agree on an unlawful course of conduct but the rival refused, are often cited as a kind of conduct that is both beyond the reach of the antitrust laws and anticompetitive; and several cases involving invitation to collude have been brought under Section 5. That conduct is, to be sure, often beyond the reach of the antitrust laws. Because there was by definition no agreement, the unsuccessful invitation does not violate Section 1 of the Sherman Act; and it would be an unlawful attempt to monopolize in violation of Section 2 of the Sherman Act only if the parties to the exchange could have had monopoly power if they had acted in concert. Notably, however, invitations to collude are failed attempts that did not actually injure competition. More important, proponents of a broad reading of Section 5 have failed to identity any other type of conduct that is both truly anticompetitive and beyond the reach of the antitrust laws.

Not only is Section 5 not needed to address new forms of anticompetitive conduct, but construing Section 5 to give the Commission broad discretion would have deleterious consequences. It would make the laws governing market competition unavoidably ambiguous and would thus undermine the purpose of those laws, which is to promote robust market competition. Such competition requires that businesses are able to know that rules of the road so that they can compete vigorously without fear of unforeseen legal sanctions.

Construing Section 5 to give the Commission broad discretion would undermine the antitrust laws in another way as well. The antitrust laws have stood the test of time because they have adapted to new market circumstances, economic learning and business practices. If the Commission is armed with broad discretion under Section 5, it will be greatly tempted to bring difficult cases – cases that involve new business practices or require reexamining old and obsolete antitrust precedents – under Section 5 instead of the Sherman or Clayton Acts. In so doing, the Commission would be diverted from its role in helping the antitrust evolve, and the development of those laws would to that extent be impaired.