

1 STATEMENT OF AMANDA P. REEVES, PARTNER, LATHAM &
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3 Ms. Reeves. Chairman Lee, Ranking Member Klobuchar,
4 and distinguished members of the Subcommittee, thank you for
5 inviting me to testify before you today. I present this
6 testimony on my own behalf, and my views do not reflect
7 those of my law firm, Latham & Watkins, or its clients.

8 There is no question that when Congress gave the FTC
9 authority to go after unfair methods of competition,
10 Congress handed the FTC a powerful and, like all of the
11 antitrust laws, an ambiguous tool. The question for today
12 is whether the guidance that the FTC has provided regarding
13 how it will use Section 5 remains so undefined that it does
14 more harm than good.

15 In light of both the FTC's very limited use to date of
16 its freestanding Section 5 authority and its continued
17 efforts ~~to provide guidance, I believe that the answer to that question is no.~~
18 ~~efforts-- [microphone off] actually having the chilling--~~
~~18 [microphone off] insofar as it chills-- [microphone off].~~

19 Now, part of that may be because conduct that might be
20 chilled is also chilled by the Sherman Act, which is to say
21 that risky conduct is risky.

22 Further, while the FTC's use of Section 5 has certainly
23 drawn critics, its use has been sparing and overwhelmingly
24 confined to conduct associated with price-fixing attempts,
25 such as invitations to collude and unjustifiable information

First, in my day-to-day practice, I do not see Section 5 chilling conduct that is otherwise Procompetitive.

1 exchanges, and as has been referenced, the standard-setting
2 world.

3 Indeed, since the 1990s, and outside of the invitation-
4 to-collude context, the FTC has used Section 5 in just
5 roughly half a dozen cases. Additionally, the penalty for
6 violating Section 5 is a cease-and-desist order. There is
7 no monetary fine, the FTC does not seek disgorgement, and
8 there is no vehicle for a follow-on Federal class action.

9 Now, there is, to be sure, follow-on class action risk
10 at the State level, and those cases can impose a significant
11 cost. Those State class action risks exist regardless,
12 however. And so while I get that there is something to the
13 FTC calling out conduct in a consent^{order} and framing it up for
14 the class action bar, I am, again, not convinced that
15 procompetitive conduct is chilled because of the risk that
16 those cases may bring.

17 Second--and this surprised me while I was at the FTC--I
18 do see private parties availing themselves of Section 5 when
19 they believe it is a credible and appropriate tool to combat
20 anticompetitive conduct. And by private parties, I mean
21 large corporations.

22 During my time working for Commissioner ^{Rosch}~~Rush~~, a
23 Republican himself who pushed for a very vigorous use of
24 Section 5, we routinely heard from large companies that
25 encouraged the FTC to use Section 5 to go after conduct that

1 they believed harmed competition and was, arguably, outside
2 of the Sherman Act's reach.

3 Likewise, I have encouraged companies that perceived
4 themselves to be the victims of anticompetitive conduct that
5 is not squarely covered by the Sherman Act to raise concerns
6 with the FTC precisely because of its Section 5 authority.
7 It is a tool not just for the FTC, but for third parties to
8 reap the benefits of as well.

9 Third, I would like to address the FTC's August 2015
10 statement, which I view as a significant step forward in the
11 Section 5 debate.

12 Now, prior to that statement, if I was asked to explain
13 what the framework is that the FTC would apply to analyzing
14 whether something violated Section 5, I was left to describe
15 what the FTC had done to date in the invitation-to-collude
16 cases and the half a dozen others, and then look at various
17 speeches and try and form a concrete view on where each
18 Commissioner stood on Section 5--and I thank Commissioner
19 Wright and the numerous other Commissioners for the wealth
20 of speeches they have provided on this topic--and then make
21 a guess.

22 So what we now have from the FTC is a statement
23 basically saying they will apply the rule of reason, which
24 is a framework with a rich body of law and 125 years of
25 precedent. It compels a showing of anticompetitive effects

1 and allows a company to defend its conduct by arguing that
2 its conduct was justified by a legitimate business purpose.
3 That is progress forward, in my view.

4 Now, does it mean that we can all now say with
5 confidence what conduct will and will not violate Section 5
6 with precision? No. But that is a flaw that exists with
7 the rule of reason and antitrust law more generally to the
8 extent ^{that} the courts have chosen to adopt balancing tests. And
9 as between a world with a flexible Section 5 and one with no
10 Section 5 that allows conduct beyond the Sherman Act's reach
11 to cause anticompetitive effects and go undetected, I
12 believe the approach Congress originally adopted has served
13 us well.

14 In closing, the statement is not perfect, and I am
15 sympathetic to those that say they would like to see more.
16 But it is a start, and it is a very good start. As the
17 title of this hearing notes, if the question is whether the
18 FTC's recent actions protect competition or increase
19 uncertainty, I am very comfortable that the FTC has done the
20 former.

21 Thank you for your time today, and I look forward to
22 answering your questions.

23 [The prepared statement of Ms. Reeves follows:]

1 Chairman Lee. Thank you very much.

2 Ms. Reeves, why don't we start with you? I'd like to
3 know from you if you can distill it down in, I do not know,
4 two or three sentences what in your mind is an "unfair
5 method of competition" as that term is used in Section 5.

6 Ms. Reeves. So I was a little glib in my remarks. So
7 if I had previously been asked this prior to the statement,
8 I would have defaulted to the rule-of-reason framework, in
9 part because that is what governs Section 1, but also
10 following the D.C. Circuit's en banc decision in Microsoft
11 that provides a framework for Section 2 as well. And I
12 think in general, when practitioners do not have a clear
13 framework from which to operate on, they tend to retreat to
14 the rule-of-reason framework. ^{to distill the test, I would say} So a showing of
15 anticompetitive effects, ^(or, in the case of an invitation to collude, likely anticompetitive effect) the burden then shifting to the
16 defendant or the target of the investigation to show that
17 ^{its} ~~their~~ conduct is justified by a legitimate purpose and then
18 a weighing of those two factors.

19 Chairman Lee. Is it surplus then? Is it statutory
20 surplus if we are going to use the same framework there that
21 we use elsewhere?

22 Ms. Reeves. ~~Understood~~. No, I do not think so
23 because, again, I do think that there is conduct that will
24 not fit perfectly within Section 1 or Section 2. So if the
25 common law does not reach conduct that has an

1 Ms. Reeves. I will begin on that one and to follow up
2 a bit on what Professor Wright just said. I agree, by the
3 way, with everything he said about the process in terms of
4 acknowledging the need for a formal process, but also the
5 fact that there was an exhaustive dialogue, I would say at
6 least from my perspective on the outside, up to that point.

7 There is also a little bit of sort of "Let us get the
8 show on the road mentality," which is sort of getting to
9 your question, which is to say the benefit of what has now
10 begun is there is now something to shoot at. There is a
11 statement that provides a standard, and we can sit here and
12 debate whether it is right or wrong, but the sort of formal
13 discussion is officially commenced around one piece of paper
14 as opposed to however many trillions of pages have been
15 spilled on this topic to date.

16 And so in terms of what the Commission can do going
17 forward, I think one thing that would certainly be
18 beneficial is, just as it has done with other guidelines,
19 including the horizontal merger guidelines, which I think
20 are overwhelmingly viewed as a success, is think about
21 updating the guidelines from time to time, and in
22 conjunction with that process, engage in a similar process
23 as it does with the horizontal merger guidelines in terms of
24 holding workshops and hearings and the sort of formal yet
25 still informal dialogue that it does to produce a guideline

1 or a policy statement.

2 Senator Tillis. Do you have any reason to believe that
3 they feel like that is necessary?

4 Ms. Reeves. I think they have heard the message loud
5 and clear. Having worked both at the FTC and been now on
6 the other side as someone who has always, you know, got
7 something to complain about to the FTC, I think that they
8 appreciate that there is a desire for transparency. And I
9 think the challenge, which is why it took so long getting to
10 this point--Bill Kovacic held a workshop in 2008 which is
11 where I think you could say it was sort of the genesis of

(Chyphen) 12 ~~this~~ ^X ~~I think the challenge is figuring out the right~~
13 ~~forum, and, look,~~ I think a lot of people hoped that the
14 guidelines would be a lot longer. But I am not actually
15 sure that there would have been benefit in that. You can
16 imagine a form of guidelines that starts to describe conduct
17 with more specificity as being potential violations of
18 Section 5 that certainly ^{folks} on the business community side
19 ~~folks~~ may not like.

20 So you have ~~sort of got~~ to be careful what you wish for
21 if you want a lot more guidance, and that is why I think
22 ~~sort of~~ resorting to ~~the~~ first principles, as the Commission
23 did, is a very responsible way to start, ~~and look over time.~~
24 If more examples can be distilled, that is helpful. If more
25 principles can be discerned, that is a good thing. But I

1 let us know your Twitter handle, Professor Melamed? No, it
2 is all right.

3 Mr. Melamed. I actually signed up for Twitter, but I
4 do not remember what my handle is.

5 [Laughter.]

6 Senator Schumer. One of my favorites, my friend
7 Sherrod Brown, who is from Ohio, his is "DamnYankees." He
8 hates the New York Yankees.

9 Ms. Reeves. I have one that I believe I signed up for
10 but have never used, and it was "AntitrustGirl." So there
11 you go.

12 [Laughter.]

13 Senator Schumer. Oh, excellent.

14 Ms. Reeves. That one is taken. ~~Sort of two~~
15 observations I would add on merger enforcement and then
16 bringing it back to the topic today.

17 The first is that I think the agencies are in an
18 extremely aggressive posture. They are working very hard.
19 It may be that they do not have enough people to do
20 everything they want to do. I know every time I interact
21 with an agency staffer, they are pulled three or four
22 different ways and are working on multiple litigations. The
23 DOJ has been litigating right and left. The FTC right now
24 is litigating Staples-Office Depot down the street. They
25 are preparing to challenge the Advocate-NorthShore Hospital

1 merger in the north suburbs of Chicago.

2 So to bring it back to today, sometimes in Section 5
3 the discussion tends to come up, ^uWhy do we need both
4 agencies?" And one of the refrains that I think is
5 particularly relevant here is sort of an odd benefit of two
6 agencies, which is competition among them. So if aggressive
7 antitrust enforcement is a priority, there is a benefit to
8 two agencies; ~~and so far,~~ if the FTC sees the DOJ is
9 bringing a lot of cases, you ^{can}~~better~~ bet that they are
10 looking for cases, too.

11 Senator Schumer. But according to Professor Wu and
12 Professor Melamed, even with the two agencies, we have not
13 had enough enforcement, particularly in the merger area. Do
14 you agree?

15 Ms. Reeves. My sense is there are probably more cases
16 that the staff would like to bring, but, again, they lack
17 the resources.

18 Mr. Wright. If I can make a small point about the FTC.

19 Senator Schumer. Professor Wright.

20 Mr. Wright. And I do not know my Twitter handle. It
21 has "Professor Wright" somewhere in it.

22 Chairman Lee. Just for the record, it is
23 @profwrightgmu.

24 Senator Klobuchar. That is because Professor Wu was
25 sort of trash-talking you--

1 Chairman Lee. Anything to add, Professor Wright?

2 Mr. Wright. I think I agree with both of them, so my
3 answer will be boring. So I will stop.

4 Chairman Lee. Okay. Ms. Reeves?

5 Ms. Reeves. I would just add, as the ~~sort of~~ debate
6 back and forth here suggests, when I saw that language and
7 having not been at the Commission, part of my interpretation
8 of "less likely" is that there is a very practical issue,
9 which is to say it is unclear in many cases if you could
10 bring a case under Section 1 ^{or} ~~of~~ Section 2. And it is not
11 simply is there a question of whether or not ^{the FTC} ~~we~~ could
12 prevail. It is a question of whether or not the facts and
13 circumstances are something that Section 1 or Section 2
14 contemplated.

15 And so I think if you have a standard that says the
16 Commission is not going to ~~bring an act or practice unless~~
17 challenge an act or practice unless it could not be brought ^{under Section}
18 you generate a huge internal discussion as to whether or not ^{1, 1 or 2}
19 you could. ^{is that the FTC is} ~~And my sense, if you are~~ having that debate
20 anyway. So my interpretation of that language was that it
21 was to address this practical problem of not knowing whether
22 or not Section 1 or Section 2 would support a cause of
23 action.

24 And just in response to a point Professor Melamed made,
25 so to the extent Section 5 is used ^{in the context of} ~~in these contexts of~~

1 high-tech companies to go after novel conduct, I actually
2 think there is a benefit to the fact that you are not
3 subjecting those companies to the follow-on class actions,
4 but also creating a body of law well beyond Section 5,
5 because people are not on notice yet. So I think Section 5
6 does potentially serve ^{as} a more conservative vehicle for
7 challenging novel conduct.

8 Chairman Lee. Thank you.

9 Senator Klobuchar?

10 Senator Klobuchar. I am fine. I really appreciate all
11 of your answers, and it has been a lively and interesting
12 hearing. Thank you.

13 Chairman Lee. Senator Tillis?

14 [No response.]

15 Chairman Lee. I want to thank all of you for coming.

16 This has been very enlightening, and we have had great
17 lively and civil discourse. I appreciate it very much.

18 The Subcommittee will stand adjourned.

19 [Whereupon, at 4:06 p.m., the Subcommittee was
20 adjourned.]