Questions from Senator Michael S. Lee
Responses Submitted by Amanda P. Reeves

May 2016

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?

Under the rule of reason framework as currently applied by the U.S. courts and agencies, the fact-finder examines the restraint (i.e., conduct) at issue and determines whether the restraint's harm to competition outweighs the restraint's procompetitive effects. The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (*en banc*); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.2 (2000) (proffered alternative must be a "practical, significantly less restrictive means" of achieving the procompetitive aim).

A Section 5 framework that draws on a framework "similar to the rule of reason" should draw on the same first principles and should focus on: (1) proof of actual—or very likely—anticompetitive effects; (2) whether there is a legitimate business justification for the alleged conduct; and (3) whether the actual (or very likely) anticompetitive effects outweigh the need to protect the legitimate business justification.

A significant way in which the FTC's Section 5 analysis will differ from a traditional rule of reason approach is in cases that involve conduct that is very likely to have—but has not yet caused—anticompetitive effects. The targeting of such "incipient" conduct is a key difference between Section 5 of the FTC Act and Sections 1 and 2 of the Sherman Act. Indeed, the use of Section 5 to go after incipient conduct is a central feature of invitation-to-collude cases, which are widely considered the most accepted use of the Commission's Section 5 authority.

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 FTC's use of Section 5 does not raise the concerns regarding divergence between the DOJ and FTC that are driving interest in the SMARTER Act for at least three reasons.

First, the sweeping day-to-day application of the Hart Scott Rodino Act ("HSR Act") and Section 7 of the Clayton Act—which, together, govern the agencies' review of mergers—is not comparable to the FTC's limited use of Section 5. In Fiscal Year 2014, there were 1,663 transactions notified to the FTC and DOJ under the HSR Act. Of those 1,663 transactions, 274 were cleared to either the FTC or DOJ to investigate and 51 ultimately proceeded to a Second Request (i.e., a full investigation). This is in addition to the handful of non-reportable transactions that were also cleared to one of the agencies for further review. In contrast, the FTC averages just one Section 5 enforcement action a year and that statistic includes the invitation-to-collude cases, which generally are not considered to be controversial.

Second, the suggestion that the FTC's expansive use of Section 5 would disproportionately (and inequitably) impact certain businesses is based in part on the assumption that because certain businesses are more likely to be subject to the FTC's reach, they are chilled from engaging in procompetitive conduct. The problem with this assumption is that the FTC's very limited use of Section 5 and anecdotal evidence does not create a sufficient basis to conclude that procompetitive conduct is, in fact, being chilled.

Third, if the concern is that the FTC is challenging conduct under Section 5 that some businesses engage in, but not others (because in some cases an investigation is cleared to the DOJ), it is also not clear that this is actually happening. This is again because of a stark contrast with the SMARTER Act debate: In the case of the merger review framework which provides that the FTC and DOJ *share and split authority* over mergers, the FTC has *exclusive authority* to pursue cases under Section 5. This means that even if the DOJ wanted to pursue a case that falls outside the bounds of the Sherman Act, it lacks the authority to do so. As such, if the DOJ determined that it could not challenge conduct under the Sherman Act but that there was nevertheless conduct that may have anticompetitive effects, it could refer the matter to the FTC. Indeed, while I was at the FTC, I was aware of at least one such instance when this happened.

b. What can the agencies do to avoid this?

As noted, I generally do not believe that the concerns related to disparate treatment in the merger context exist in the Section 5 context. Nevertheless, to the extent that the DOJ believes that the Sherman Act does not provide a basis to challenge certain conduct which it has investigated, but that it is nevertheless having anticompetitive effects, it could refer such matters to the FTC for consideration under *a free-standing Section 5 theory only* (i.e., not for revaluation under the Sherman Act) in order to make sure that no one is getting a free pass due to clearance.

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 FTC should apply the same standard to determine if anticompetitive effects exist under Section 5 that the courts (and the FTC) have applied in analyzing whether there are anticompetitive effects in cases brought under Sections 1 and 2 of the Sherman Act. There is an extensive body of law and economic thinking on this topic and the FTC should embrace that, as it has done in the past. It should not, however, set out to define a new heightened standard since doing so would likely cause further confusion.

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. Because Section 5 is used to challenge "one off" or novel forms of conduct that are beyond the reach of the other antitrust laws, it makes sense for the FTC to only seek injunctive and associated non-monetary relief in Section 5 cases. In this regard, the Commission has clearly stated that it will *not* pursue disgorgement in Section 5 cases. *See* Statement of the Commission, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases n.6 (July 31, 2016) ("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-looking remedies. *We do not intend to use monetary equitable remedies in stand-alone Section 5 matters*.") (emphasis added); *see also* Debbie Feinstein, Director of the Bureau of Competition, "A Few Words About Section 5" (March 13, 2015), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/few-words-about-section-5 (underscoring that "the Commission's policy is not to seek disgorgement in stand-alone Section 5 cases, a point it made clearly in its 2012

withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases").

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

The Commission has a variety of tools at its disposal to provide additional clarity and it should use all of them so long as doing so does not create more uncertainty.

The FTC and DOJ's approach to updating the Horizontal Merger Guidelines provides a good starting point. In the most recent revisions to those Guidelines (2010), the agencies held workshops around the country involving over 100 panelists including practitioners, academics, economists, members of the business community, and consumer advocates on a wide variety of specific topics to obtain feedback. They also solicited written submissions from the public. This process culminated in the 2010 Guidelines, which does not have the force of law, but does provide the public with a good measure of predictability. The agencies' other Guidelines, including in particular the various IP Guidelines and the Competitor Collaboration Guidelines, are also widely relied upon and provide predictability through their use of examples and illustrations. Looking ahead, given the far more limited application and use of Section 5, the Commission should consider adopting a slimmed down version of the approach that it has applied in these other contexts: an announcement, workshops, opportunities for public comment, debate, and a revised set of guidelines that, where possible, includes examples.

Apart from following the approach used to update the Horizontal Merger Guidelines, there are two additional more modest steps that the FTC can continue to take. First, as it has generally done in the past, the FTC should be as transparent and clear as possible when it pursues a Section 5 case about (1) why it believes the conduct violates Section 5, with reference to the Statement and its Section 5 doctrinal framework, and (2) how the Commission's enforcement action fits within the context of its prior Section 5 enforcement actions. Since much of the Section 5 law has been made through consent orders, it is all the more important that the Analysis to Aid Public Comment that accompanies a consent order and other related Commission statements provide as much clarity on the law as possible. Second, where there is an investigation that has been confirmed to be public and where the FTC ultimately chooses not to pursue a free-standing Section 5 claim, it should issue a Statement that explains why—with reference to the Section 5 Statement and Section 5 precedent—it chose not to proceed.

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?

There is always an inherent risk that foreign authorities that want to adopt a more aggressive approach to their own laws will use ambiguities in the U.S. approach as a justification for doing so. The flexible common law approach taken to developing US antitrust law combined with the inherent questions that arise from the "two agency" approach make those possibilities inevitable. The issue is how to manage that risk. The FTC's Section 5 Statement is an important step forward in this regard because it limits the inferences about Section 5's expansive reach and the more concrete guidance that can be provided on this subject (such as the Commission's statement that it will not pursue monetary remedies in Section 5 cases), the better. These efforts combined with the steps that the agencies and the antitrust bar take to educate foreign authorities through other channels can limit any risks that arise from Section 5's broad language.