QUESTIONS

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 Section 5 framework is precisely the modern rule of reason that is the touchstone of antitrust analysis. As a textual matter, the Section 5 Statement itself makes clear what the Commission must demonstrate in order to prevail on a Section 5 unfair methods of competition claim—that is, an 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."[1]

The Statement of the Commission accompanying the Section 5 Statement should end any doubt about whether there are significant analytical gaps between the Section 5 rule of reason framework and that applied by antitrust lawyers under the Sherman Act and Clayton Act for the past 125 years. There are not. The Statement is explicit that the rule of reason applied in the analysis of standalone Section 5 claims is identical to the modern rule of reason familiar to antitrust practitioners, courts, and agencies:

> 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.[2]

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[1] Fed. Trade Comm'n, Statement 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/735201/150813section5enforcement.pdf.

[2] 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.

The combination of the Section 5 Statement and the accompanying Statement of the Commission should put such questions to rest. However, skeptical readers might also take a close look at footnote 3 of the Statement of the Commission, which goes so far as to cite the paradigmatic treatise definition of the rule of reason as an example of the analysis endorsed by the Commission's Section 5 Statement.

This leaves only the question of why the Commission used the term "similar" in modifying its reference to the rule of reason. Some have raised this concern in reference to the context of claims that the Section 5 Statement is too short and too vague to be useful to businesses and the bar. I disagree on both fronts.

The first concern is easily addressed. As my co-author, Angela Diveley, and I have explained, "The Statement's 'similar to' is intended to preserve the Commission's ability to reach invitations to collude and, importantly, to provide an analytical framework that includes consideration of this type of expected harm to competition."[3] There was, at the time of the Section 5 Statement, some debate over whether invitations to collude could be properly reached under the rule of reason framework, but little debate that they either do or should constitute an unfair method of competition. The "similar to" language in the Section 5 Statement ensures that the Commission the ability to condemn invitations to collude. No more. And, as the explicit references to the traditional rule of reason make clear, no less.

The second concern, that the Section 5 Statement is too short, also falls flat. Once one recognizes that the brief statement incorporates by reference the 125 years' worth of case law that underlie the rule of reason, the shortcomings of this critique become clear. Indeed, the rule of reason is such a well-known and well-recognized concept in antitrust practice that it forms the basis of every introductory antitrust course in every law school. I understand that some find the "rule of reason" too broad a concept as well. But to antitrust practitioners, courts, and agencies, this is standard practice. Complaints that the Section 5

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[3] Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, ANTITRUST SOURCE, Oct. 2015, at 7, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf.

Statement incorporates by reference the rule of reason have less to do with any ambiguity in the Statement and more to do with general grievances with the concepts underlying the traditional antitrust laws.

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?*

In short, the concerns are real and significant if the Commission were to adopt an expansive interpretation of Section 5. The greatest concern for divergence between the agencies of the type motivating the SMARTER Act would arise in cases involving intellectual property.[4] For example, if the Commission were to use its standalone unfair methods of competition authority to declare actions of patent holders unlawful that would not be unlawful under Section 2 of the Sherman Act, serious and problematic divergence could arise. For reasons explained elsewhere, I do not believe such an outcome is likely because the Section 5 Statement restrains the discretion of the Commission to do so.[5]

I am skeptical the FTC could or would use its standalone Section 5 authority to create rifts between the agencies in merger policy.

It should also be noted that, by adopting explicitly a rule of reason framework for analyzing conduct cases, the Section 5 Statement closes any divergence between the FTC and DOJ in that area.

    b. *What can the agencies do to avoid this?*

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[4] *See* Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 COMPETITION POL'Y INT'L 2, Autumn 2013, at 13, http://www.masonlec.org/site/rte_uploads/files/GAI/Readings/Economics%20Institute/Wright%20and%20Ginsburg_Whither%20Symmetry%20%20CPI%20Reprint.pdf.

[5] Wright & Diveley, *supra* note 3, at 10–12.

The agencies must set clear boundaries regarding the exercise of their authority. They must cooperate on the guidance they offer in areas of potential overlap and faithfully apply that guidance.

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 Section 5 Statement would certainly benefit from an explicit statement that substantial harm is required to establish a violation of the statute. Currently, the FTC is experiencing resource constraints that require it to exercise prosecutorial discretion and to not pursue cases where the harm is de minimis; however, this may not always be the case.

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?*

The general principle that limited remedies are appropriate when the Commission applies its standalone Section 5 authority is a sound one. The objective, in theory, of coupling a broad statutory authority offering the FTC significant discretion with limited remedies is to enable the Commission to use its broad authority to take a key role in shaping antitrust doctrine without fear of chilling procompetitive behavior through harsh remedies.

It bears notice that the 2015 Section 5 Statement significantly constrains the Commission's ability to adopt interpretations of its standalone authority beyond the confines of the traditional antitrust laws. In other words, the broad reach of the Commission's standalone authority has been narrowed by the Statement, rendering less immediate the need to "balance Section 5's broader reach" by curtailing available remedies.

Your question raises an important question about the Commission's disgorgement authority generally. As Commissioner Ohlhausen and I pointed out in our joint concurring statement in *Cephalon,* the Commission's decision to abandon its guidelines setting forth when it will seek monetary remedies such as disgorgement was a mistake.[6]

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[6] FTC v. Cephalon, Inc., Separate Statement of Commissioners Maureen K. Ohlhausen & Joshua D. Wright (May 28, 2015) [hereinafter Ohlhausen & Wright, Separate Statement

I continue to have significant concerns about the Commission's use of disgorgement as a competition remedy in the absence of meaningful guidance setting forth the conditions when it will seek such a remedy.[7] As I highlighted in my dissenting statement in *Cardinal Health*, the lack of clear guidance from the Commission could very well cause risk-averse companies concerned about their financial and reputational effects to avoid engaging in behavior beneficial to consumers.[8] This inherent uncertainty caused by the FTC's current approach towards disgorgement is concerning and worth addressing.[9]

This problem could be resolved by reinstating the 2003 disgorgement policy statement or issuing a new one clearly articulating the current FTC position.

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

The Commission should be transparent as to its applications of its standalone Section 5 theory wherever possible. For instance, the FTC should issue statements detailing the theories of harm and evidence supporting those theories that led it to conclude an act or practice harmed competition. The logic underlying this recommendation is identical to the logic underlying my recommendation that the FTC be required to issue detailed closing statements, or at least to issue closing statements on a much more frequent basis, when it concludes a practice does not violate the antitrust laws. Transparency of this variety would be a significant step toward providing certainty to businesses in understanding the contours of the Commission's Section 5 authority.

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?*

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in *Cephalon*],
https://www.ftc.gov/system/files/documents/public_statements/645501/150528cephalonohlhausenwright1.pdf.

[7] *Id.* at 2.

[8] Dissenting Statement of Commissioner Joshua D. Wright, *In re* Cardinal Health, Inc., FTC File No. 101- 0006, at 4 (Apr. 17, 2015),
https://www.ftc.gov/system/files/documents/public_statements/637771/150420cardinalhealthwright.pdf.

[9] Ohlhausen & Wright, Separate Statement in *Cephalon*, *supra* note 6, at 3.

Yes, and this is why it is so important for the Commission to make efforts to be as transparent as possible when bringing Section 5 cases. It is also a significant benefit of the Section 5 Statement because it has reduced those ambiguities considerably as compared to the enforcement regime prior to the Statement. In addition to issuing public statements in cases, the FTC can, through its public advocacy function, explain the contours of the Statement. In particular, it can use the Statement to extol the virtues of competition policies that focus solely on competition to the exclusion of protectionist policies or policies that are better suited to regulation by other agencies.

There is also a risk that other domestic agencies and state enforcers may use the FTC's approach to Section 5 to justify a broad application of their statutes. For instance, the Department of Transportation enforces 49 USC § 41712, which is modeled after Section 5, and the agency looks to the FTC when applying the standard under its enforcement statute. State consumer protection acts also often require states to harmonize the interpretation of their state statute with the FTC interpretation of Section 5.[10] It is thus critical that the FTC provide clarity under the Statement wherever possible.

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[10] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 173 (2011).

Senator Orrin G. Hatch
Questions for the Record
Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing: "Section 5 and 'Unfair Methods of Competition'"
April 5, 2016

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?***

   No, I do not. The Section 5 Statement is a significant and positive tool for the FTC in efforts to demonstrate to international competition regimes, including China, how to limit problematic application of unfair methods of competition authority that injure competition. I do agree that China and other international antitrust regimes look to the FTC and DOJ Antitrust Division, as well as other jurisdictions, when implementing their own competition laws. It is critical that the FTC and DOJ are careful not only to adopt sensible competition policies but also to be mindful of how they discuss their enforcement and policy decisions.

   However, it is important to understand that the FTC Section 5 Policy Statement reduces rather than increases ambiguities in interpreting its unfair methods of competition authority.[1] China or other competition regimes from around the world looking to the United States experience with unfair methods of competition thus should draw the lesson that a broad and unbounded unfairness authority was widely viewed as problematic. This unbounded unfairness authority was ultimately replaced with a bounded authority tethered to the consumer welfare standard and economic principles that are the foundation of modern antitrust analysis. The FTC experience with unfair methods of competition therefore, cannot logically and should not serve as a justification for implementing standards that are in tension with the underlying purpose of the law. Having issued guidelines, the FTC is now in a much better position to engage internationally when it attempts to persuade international regimes that non-competition

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[1] *See* Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, ANTITRUST SOURCE, Oct. 2015, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_full_source.pdf; *Legislative Hearing on 17 FTC Bills Before H. Subcomm. on Commerce, Manufacturing, And Trade Comm. on Energy And Commerce*, 114th Cong. 1 (2016) (statement of Joshua Wright, Professor, Antonin Scalia Law School George Mason University), http://docs.house.gov/meetings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-WrightJ-20160524.pdf.

factors are not appropriate for antitrust analysis, and that economic analysis and an effects-based approach should be the lodestar of unfair competition enforcement.

In my current role as the Executive Director of the Global Antitrust Institute at George Mason University School of Law, I frequently train foreign competition enforcers and judges, including judges from China and many other international jurisdictions. The FTC Section 5 Policy Statement provides an example of actions a competition agency can take to limit broad interpretations of vague and unbounded "unfair competition" provisions that appear in many competition laws around the world. This is one way the FTC signals to foreign jurisdictions that it is important to protect against an overbroad application of unfair methods of competition enforcement with the potential to chill procompetitive behavior or otherwise distort the competitive process.

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?***

The traditional antitrust laws have, for over 125 years, addressed most conduct that harms competition. The Statement is broad enough to address new competitive threats but narrow enough to put the business community on ample notice as to the types of conduct that would run afoul of Section 5. Prior to issuance of the Statement, the FTC had unbounded authority to enforce Section 5 in ways that were contrary to competition.[2] The FTC's commitment to the limiting principles of the Statement – and in particular its commitment to exclude non-economic aims from the scope of its Section 5 authority – aims its focus squarely upon promoting competition. The Statement thus empowers the FTC to use its resources and expertise to contribute to competition policy in ways that it had not prior to the issuance of the Statement.[3] Congressional oversight is necessary to ensure that the FTC continues to interpret its Section 5 unfair methods of competition authority in a manner consistent with the Statement.

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[2] *See* Wright & Diveley, *supra* note 1 at 5-6 (citing previous interpretations like environmental harm and "otherwise oppressive" conduct).

[3] Wright & Diveley, *supra* note 1.