Editor's Note

August Surprise: The FTC's Section 5 Statement

BY JAMES J. O'CONNELL

WASHINGTON IN MID-AUGUST is usually a very quiet place. In the days before air conditioning, the usually swampy summer city emptied of anyone who could get themselves to cooler climes. Those who remained behind spent their nights on sleeping porches or spread out across the city's parks, in hopes of catching a breeze.

Although air conditioning has made staying in Washington during the summer less of a challenge, August in Washington in the early 21st century is still fairly quiet. Not much happens in the weeks leading up to Labor Day and the official end of the summer.

So it came as something of a surprise to the antitrust bar when, on August 13, the Federal Trade Commission released its Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (the Statement), in which four of the FTC's five commissioners—Chairwoman Ramirez and Commissioners Brill, Wright, and McSweeny—sought to "provide a framework for the Commission's exercise of its 'standalone' Section 5 authority to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act."[1]

The Statement is brief, and while laden with terms of art that will be familiar to any antitrust practitioner, it also includes some curious phrasing that makes it difficult to parse. That, and the deafening silence of what it does *not* say, significantly reduce the Statement's effectiveness as guidance regarding where the commissioners think the limits of their standalone Section 5 enforcement authority are—which may have been the point.

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Guidance, Please

The Supreme Court has confirmed that conduct that is not unlawful under the Sherman Act or other antitrust statutes can nevertheless be prohibited under Section 5 of the FTC Act.[2] But regardless of whether the FTC *can* prohibit conduct that is either not unlawful or that otherwise can't be reached under the Sherman Act, whether it *should* do so—and when—have been open questions for decades. As the Sherman Act came to be interpreted more broadly and enforced more rigorously in the years following the enactment of the FTC Act in 1914, it became less clear that there was any real need for "standalone" Section 5 authority at all.[3] Thus, until a few years ago and with only a few exceptions, such as cases involving "invitations to collude," the enforcement boundaries of Section 5 and those of other antitrust statutes like the Sherman and Clayton Acts were, as a practical matter, coterminous.

This understanding started to shift about ten years ago. Faced with what they saw as a "cramped reading" of the Sherman Act by the courts and searching for ways to push the enforcement pendulum in a direction that would make it easier for the federal government to bring and win competition cases,[4] some—like FTC Commissioners Jon Leibowitz and Thomas Rosch—found the perfect tool in the FTC's standalone Section 5 authority. It is, after all, a vaguely worded statute, whose reach isn't necessarily determined by the many decades of evolving jurisprudence, economic thinking, and enforcement standards that lend meaning to the Sherman Act, itself not exactly a model of specificity. Instead, the reach of the FTC's Section 5 authority is left to a simple majority of three commissioners to determine, at least unless or until a defendant in a specific case takes that majority to federal court.

Faced with such a blank enforcement check, advocates of more active standalone Section 5 enforcement have suggested all sorts of conduct that the FTC could prevent with Section 5. These have included, but are by no means limited to:

- New business practices that courts may be unwilling to condemn under the Sherman Act but which the FTC may nevertheless believes harm consumers, such as "strategic" Orange Book listings, conduct arising out of disputes between pioneer and generic drug manufacturers, and the conduct of companies that participate in standard-setting bodies, such as breaches of FRAND and other commitments.[5]
- Conduct that does not satisfy the elements of a prima facie Sherman Act case, such as: "invitations to collude," where an agreement and thus a violation of Section 1 cannot be established;[6] "above cost" predatory pricing; monopolization cases in which the defendant's market share does not rise to the levels generally required by the federal courts to establish monopoly power; European-style "abuse of dominance" cases involving conduct that is "exploitative" rather than exclusionary, such as "unilat-

eral withholding" or the creation of artificial shortages by firms that do not possess monopoly power; cases of "countervailing buyer power," in which the buyer's share of purchases is not sufficient to establish a case of monopsony power.[7]

- Conduct that would be condemned "strictly on the *antitrust* merits and law" but regarding which "courts . . . pull back from recognizing a Sherman Act claim" because of "legal concerns extrinsic to the Sherman [Act]."[8] Such cases might include those in which the defendant's conduct may be protected from Sherman Act liability by the *Noerr-Pennington* doctrine or some other immunity.[9]
- Cases alleging coordinated action in which plaintiffs, post-*Twombly*, may face challenges alleging more than mere conscious parallelism, but where the FTC could use its authority under Section 5 to conduct the sort of discovery that the pleading standards of *Twombly* might place out of the reach of private plaintiffs.[10]
- Loyalty or bundled discounts that have the effect of excluding less-efficient firms that nevertheless exercised a constraint on prices.[11]
- Conduct that might not satisfy the requirements of a Sherman Act violation but might nevertheless result in a diminution of consumer choice. These might include cases of "incipient exclusive dealing or tying," in which the defendant may be "able to disadvantage smaller competitors or would-be entrants because their market share is larger, even if it is not large enough for a traditional [Section 2] violation."[12]
- Conduct such as price discrimination or the charging of monopoly prices that is "targeted at less advantaged consumers . . . even if the market power was legitimately obtained,"[13] or conduct that involves business torts and other violations of laws that fall outside the antitrust context.[14]
- Conduct that results in the "social and environmental harms produced as byproducts of the marketplace; resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of producer-stimulated demands."[15]

To be fair, that final suggestion comes from the age of disco, bell bottoms, and mood rings and thus pre-dates the FTC's recent efforts to apply its standalone Section 5 authority more broadly. And I am not aware that anyone at the FTC supports using the FTC Act to combat "the psychological and social consequences of producer-stimulated demands," Senator and presidential candidate Bernie Sanders's lamentations about the crowded deodorant aisles of our nation's drug stores and supermarkets notwithstanding.[16]

But the rest of the ideas summarized above are worth more serious consideration—not, in my view, because of the merits of those ideas, but because as a practical matter only the votes of three FTC commissioners stand between your clients and the threat of liability under such theories. And while it is true that the FTC has tended to use its Section 5 authority only sparingly, it was once also true that it did not use Section 5 in the context of a merger review to go after conduct that was not specific to the merger, but which a majority of commissioners nevertheless thought was an unfair method of competition. But the FTC did precisely that in the *Bosch* case three years ago.[17]

Given that so many have been encouraging the FTC to say something about the reach of its Section 5 powers—myself included—why then when it did so this past August was it such a surprise? I think the Statement was surprising in a few different respects.

If the FTC will not acknowledge that there are limits to its Section 5 authority and articulate what it thinks those limits are, who will? In the past, the federal courts have checked overly expansive applications of Section 5, and they may do so again. But, as a practical matter, faced with the prospect of a cease-and-desist consent decree most companies will likely prefer to settle their matters and move on, rather than incur the risks and expense of putting the FTC to its proof in federal court. That cost-benefit analysis is why one of your clients may well be only a third commissioner away from finding itself the next N-Data, Intel, or Bosch.[18]

This state of affairs is largely why, even though the FTC has obtained only a few consent decrees using its standalone Section 5 authority and thus won no actual cases using such theories, voices inside and outside the agency have been calling on it to issue guidance on where it thinks the metes and bounds of its authority lie.[19]

The August Surprise

Given that so many have been encouraging the FTC to say something about the reach of its Section 5 powers—myself included—why then when it did so this past August was it such a surprise? I think the Statement was surprising in a few different respects.

First, it was literally a surprise, in that nearly no one (including, as I understand it, many at the FTC itself) knew that such a statement was in the works until a few days before the Statement was approved. They could be forgiven for not seeing it coming, because although Chairwoman Ramirez had said that she was not opposed to issuing general statements of enforcement principles,[20] she had repeatedly expressed her preference for a "common law" evolution of Section 5 enforcement policy through the cases that the FTC chooses to bring over time and did not seem particularly enthusiastic about orchestrating a pronouncement regarding Section 5.[21] Commissioner Julie Brill had questioned the need

for guidance and suggested that the resources necessary to produce it would be better spent elsewhere.[22] As the newest Commissioner, the views of Terrell McSweeny were less known, but she had not joined her colleagues Commissioners Wright and Ohlhausen in calling for Section 5 guidance. So with three of the five commissioners expressly or implicitly leaning against issuing Section 5 guidance, the bar could perhaps be forgiven for not seeing the Statement coming.

The Statement was also surprising because it is only slightly more than half a page long. Although it was accompanied by a slightly longer (if one credits footnotes) statement about the Statement[23] and a speech by Chairwoman Ramirez,[24] it is surprisingly brief when one considers the quantity of ink that has been spilled in discussions about the potential breadth and reach of Section 5.[25]

The Statement is also surprising because it doesn't say much regarding where the limits of Section 5 might be found—at least, not expressly. If the goal was to offer guidance, then, it would seem that the Statement misses the mark—although that would at least explain why it is titled a "statement of enforcement principles" rather than "guidance."

Unpacking the Surprise

The Statement opens with two short sentences on the Commission's Section 5 authority, the second of which states that this authority "encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."[26] If the commissioners have anything specific in mind regarding what may "contravene the spirit of the antitrust laws," they aren't telling.

After some references to Congressional intent, the Statement then lays out the Commission's "framework for [its] exercise of its 'standalone' Section 5 authority to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act." This framework is described in few words with no further explanation, at least not within the Statement itself:

> In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:
>
> - the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
> - the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
> - 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.[27]

What should antitrust practitioners make of the Statement? Although Chairwoman Ramirez has referred to it as "an important milestone in the Commission's application of its founding statute," she has also described it as a reaffirmation of existing principles that "preserve[s] a flexible understanding" of the reach of Section 5.[28] Milestone or not, then, the Chairwoman does not consider the Statement as "signal[ing] any change of course in [the FTC's] enforcement practices and priorities."[29]

If we were to ask the two people who probably deserve most of the credit for getting the Commission to say anything about its standalone Section 5 authority at all—Commissioner Maureen Ohlhausen and now-former Commissioner Josh Wright—we would get conflicting answers regarding whether the Statement advances the ball. Commissioner Ohlhausen, who alone among her colleagues did not vote to approve the issuance of the Statement, said in a strong dissent that it "is too abbreviated in substance and process for me to support," "ultimately provides more questions than answers, undermining its value as guidance," and "includes no examples of either lawful or unlawful conduct to provide practical guidance on how the Commission will implement this open-ended enforcement policy." Ohlhausen also expresses her concern that

> the possibilities for expansive use of Section 5 under this policy statement appear vast. The majority's reading of Section 5 could easily accommodate a host of controversial theories pursued or considered by the Commission over the past four decades, including breach of standard-setting commitments, loyalty discounts, facilitating practices, conscious parallelism, business torts, incipient violations of the antitrust laws, and unfair competition through violation of various laws outside the antitrust context.[30]

Wright, whose departure from the Commission to return to teaching was the second surprise to come out of the FTC this past August, takes a different view. And before getting to his views about the Statement, it should be noted that this is an issue to which Wright has given considerable thought and energy. Only a few months after becoming a commissioner in 2013, in fact, he offered his own views on what a Section 5 policy statement should look like. Among other things, he argued that conduct should not be found to violate Section 5 if it does not harm competition "as understood under the traditional federal antitrust laws"—or, in other words, in an economic sense, such as through "increased prices, reduced output, diminished quality, or weakened incentives to innovate."[31] Wright also said that his preferred guidance would specify that "[t]he Commission will not challenge conduct as an unfair method of competition [under its Section 5 authority] if cognizable efficiencies exist."[32]

The Statement does not follow this approach, but one can find elements of it in its references to "harm to competition or the competitive process," for example, and of the need to take "into account any associated cognizable efficiencies and business justifications." Wright himself certain-

ly seemed to hear enough of his own positions in the Statement to vote in support of it and to later express the view that the Statement's linking of Section 5 to "a framework similar to the rule of reason" will operate as a significant constraint on the FTC's authority and an important aid to those who counsel clients on the reach of Section 5.[33]

With all due respect to former Commissioner Wright, I am not as enthusiastic about what he, Chairwoman Ramirez, and Commissioners Brill and McSweeny have wrought. As I read their Statement, I think it gives up only a very little, leaves open and unsettled far more than it clarifies, and at best only creates further opportunities for argument and disagreement.

"The promotion of consumer welfare." The first element of the FTC's Section 5 framework states that the agency "will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare." This, admittedly, comes close to the sort of guidance for which the critics of the FTC's stand-alone Section 5 authority have been looking, in that it does seem to bar the door against using Section 5 to combat worker alienation and other social ills that have nothing to do with competition. One can't help but marvel, however, at the persistent insistence on building in escape hatches and trap doors. If non-competition policy goals are now off the table, why, one wonders, does the Statement say only that the Commission "will be guided by . . . the promotion of consumer welfare" rather than something more definitive and clear like "The FTC will not use its Section 5 authority to pursue any policy goals other than the promotion of consumer welfare"? Is there some other public policy goal that the FTC has in mind? If it is simply a matter of preserving the options of a future commission, why sacrifice certainty and clarity today when the Statement could easily be withdrawn or modified, should the time ever come when strict adherence by the FTC to the consumer welfare standard somehow still leaves corporations free to wreak havoc through unfair methods of competition that can't be reached under the Sherman Act?

So one does wonder what the FTC is preserving by stating only that it "will be guided" by a consumer welfare standard. That said, if an acknowledgement that it will be guided by the policy of promoting consumer welfare means that the FTC considers non-competition policy goals to be beyond the reach of Section 5, that's progress.

"A framework similar to the rule of reason." But the Statement is less clear regarding competition policy goals that can't be furthered via enforcement of the Sherman Act. We learn from the Statement that conduct that might have an impact on competition—conduct that "contravene[s] the spirit of the antitrust laws" but does not violate the Sherman or Clayton Act—will be evaluated, not under the rule of reason, but rather under "*a framework similar to* the rule of reason." What does that mean?

According to the Statement, it means that in order for the FTC to challenge conduct as an unfair method of competition under Section 5, it "must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications." Left unsaid is how much "harm to competition" will be sufficient, how efficiencies and justifications will be taken into account (particularly in cases involving incipient harm), or how this "framework" is different from a traditional rule of reason assessment under the Sherman Act. For example, does the FTC believe that any amount of harm to competition could be sufficient? In the absence of any modifiers like "substantial" or "significant," one is left to assume so. Must the harm, however measured, be found to outweigh those "cognizable efficiencies and business justifications" before the conduct at issue can be condemned as an unfair method of competition? The Statement doesn't say, exactly. Does the majority at least think that a finding of harm to competition that outweighs, significantly or otherwise, the claimed efficiencies and justifications will be required before it will conclude that the conduct violates Section 5? Again, the majority was not willing to go even that far.

Former Commissioner Wright believes that the reference to "a framework similar to the rule of reason" brings Section 5 fully in line with the substance of the other antitrust laws. He bases that view on the FTC's statement about the Statement, which says that "Section 5 is aligned with the other antitrust laws," refers to "the *modern* 'rule of reason,'" and argues that the 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."[34] The Statement itself does not exactly make that clear, as it happens, but we are told in a footnote that the FTC's statement about its Statement "reflects the views of Chairwoman Ramirez and Commissioners Brill, Wright, and McSweeny,"[35] so it would not seem unreasonable to read the two together.[36] Does the latter's "accumulated knowledge and experience" reference mean that, as Wright has argued, conduct, such as the charging of monopoly prices, is now beyond the reach of Section 5, because "the traditional antitrust laws recognize that conduct as outside their scope"?[37] In her speech about the Statement, Chairwoman Ramirez did not say anything to suggest a view that conduct that the traditional antitrust laws recognize as being outside their scope is now also considered outside the scope of Section 5. Rather, she explained that the Statement's reference to a rule of reason framework means that the FTC acknowledges that it must "at least *ask* whether a challenged practice has some plausible economic justification," and stressed that the Statement uses "the term 'rule of reason' in its broad, modern sense"—meaning, for example, that sometimes a "quick look" analysis may be sufficient.[38] So is the reference more about process and burden-shifting than substantive law?

The FTC Act vs. the Sherman and Clayton Acts. A statement that the FTC will not use Section 5 to condemn

conduct that the courts have deemed permissible under, or beyond the reach of, the Sherman Act, even if the conduct causes some harm to competition and consumer welfare (such as higher prices), would have brought some much-needed clarity to this issue. Unfortunately, neither the Statement nor the FTC's statement about the Statement says any such thing. The third part of the Statement does say that the FTC "is less likely" to challenge conduct "if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from" the conduct, but unless we are to read "address" as meaning "analyze and leave alone," all that means is that the FTC won't use Section 5 when the Sherman or Clayton Act will do just as well. It is thus quite far from being the "anti-circumvention" prong—a "commitment to refraining from use of Section 5 to remedy defects in cases under theories already addressed by the traditional antitrust laws" that Wright has described.[39]

So, far from providing guidance or clarity, this statement of the FTC's current enforcement principles may only provide more fodder for the ongoing argument about whether and when conduct that cannot be reached by the Sherman Act should nevertheless be reached by Section 5.[40] It will give the FTC something to which it can point the next time someone—a member of a Congressional committee, a party under investigation, or just a critic in the antitrust bar—says that the agency needs to do more to articulate its views regarding the reach of its Section 5 authority, and that may have been the point. But, given the practicalities of Section 5 enforcement, the Statement is unlikely meaningfully to limit the ability of the FTC staff to rattle the Section 5 sword, nor the discretion of current and future commissioners to swing it, whenever some harm to competition can be identified. In that regard, at least, the Statement is unfortunately not much of a surprise. ■

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[1] Federal Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 1 (Aug. 13, 2015) [hereinafter Statement], https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[2] *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (dictum); FTC v. Sperry & Hutchinson, 405 U.S. 233, 239 (1972)).

[3] *See* Maureen Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 1 J. Antitrust Enforcement, Vol. 2, at 5–6 (Oct. 2013), http://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf; Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *What's Your Agenda?*, Remarks Delivered at the ABA Spring Meeting (Apr. 11, 2013), http://www.ftc.gov/sites/default/files/documents/public_statements/whats-your-agenda/130411abaspringmtg.pdf.

[4] *See* Jon Leibowitz, Comm'r, Fed. Trade Comm'n, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5, Remarks at the FTC Section 5 Workshop 1 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/jleibowitz.pdf (referring to the "cramped reading of the Sherman Act that we see in federal courts today"); James J. O'Connell, *Section 5, 1914, and the FTC at 100*, Antitrust, Fall 2014, at 5, 8; *see also* William McConnell, *Joshua Wright Claims Victory in Struggle over Section 5*, The Deal (Sept. 10, 2015), http://www.thedeal.com/content/regulatory/joshua-wright-claims-victory-in-struggle-over-section-5.php (discussing recent history of the FTC's exercise of its standalone Section 5 authority).

[5] *See* Susan A. Creighton & Thomas G. Krattenmaker, Some Thoughts About the Scope of Section 5, Remarks at Workshop on Section 5 of the FTC Act as a Competition Statute 3–4 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/screighton.pdf (discussing "frontier" cases).

[6] *See id.* at 4–5 (discussing "gap-filling" cases).

[7] *See* Albert A. Foer, Section 5 as a Bridge Toward Convergence, Submission Prepared for the Workshop on Section 5 of the FTC Act as a Competition Statute 5–9 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/afoer.pdf.

[8] Creighton & Krattenmaker, *supra* note 5, at 5.

[9] *See id.* at 6 (discussing these and other possible "Yes, but" cases). *Compare* Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1, Robert Bosch GmbH, (Nov. 26, 2012) (noting that the seeking of injunctive relief on a patent may be considered protected petitioning of the government under *Noerr*).

[10] *See* William H. Page, The FTC's Procedural Advantage in Discovering Concerted Action, Remarks at Workshop on Section 5 of the FTC Act as a Competition Statute (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/wpage.pdf.

[11] *See* Leibowitz, *supra* note 4, at 6.

[12] Robert H. Lande, How to Have a Distinctive and Useful Antitrust Role for Section 5 of the FTC Act 8–10 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/rlande.pdf.

[13] Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. Online 1, 15 (2015).

[14] *See* Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 Geo. L.J. 225, 281–82 (1981); *see also* Joshua D. Wright & Angela M. Diveley, *Interpreting Section 5 Unfair Methods of Competition After the 2015 Commission Statement*, Antitrust Source 5 (Oct. 2015), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf.

[15] Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks Before the Annual Meeting of the Section on Antitrust and Economic Regulation, Association of American Law Schools (Dec. 27, 1977) (unpublished speech on file with the *Wayne Law Review*).

[16] *See* Jeff Jacoby, *Bernie Sanders' 'Deodorant' Comment Ignores Realities of Economic Growth*, Boston Globe (May 31, 2015) ("You can't just continue growth for the sake of growth in a world in which we are struggling with climate change and all kinds of environmental problems. All right? You don't necessarily need a choice of 23 underarm spray deodorants or of 18 different pairs of sneakers when children are hungry in this country."), https://www.bostonglobe.com/opinion/2015/05/30/bernie-sanders-deodorant-comment-ignores-realities-economic-growth/2OfPVj77EsJlZiPSeH1kQN/story.html.

[17] *See* FTC Complaint 3–5, Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012) (explaining the alleged pre-merger "conduct" violation of the target company).

[18] *See* FTC Press Release, FTC Challenges Patent Holders Refusal to Meet Commitment to License Patents Covering "Ethernet" Standard Used in Virtually All Personal Computers in U.S. (Jan. 23, 2008) (explaining the Commission's consent decree with N-Data), http://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license; FTC Press Release, FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets (Dec. 16, 2009), http://www.ftc.gov/news-events/press-releases/2009/12/ftc-challenges-intels-dominance-worldwide-microprocessor-markets; FTC Press Release, FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems (Nov. 26, 2012) (explaining the Commission's consent decree with Bosch), http://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge.

[19] *See, e.g.*, Ohlhausen, *supra* note 3, at 3; Wright & Diveley, *supra* note 14, at 2; *see also* Melissa Lipman, *GOP Lawmakers Push FTC for Section 5 Guidance*, Law360 (Oct. 23, 2013), http://www.law360.com/articles/482799/gop-lawmakers-push-ftc-for-section-5-guidance; Neil W. Averitt, *The Elements of a Policy Statement on Section 5*, Antitrust Source 1–3 (Oct. 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_averitt_10_29f.authcheckdam.pdf; O'Connell, *supra* note 4.

[20] *See* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, *Unfair Methods and the Competitive Process: Enforcement Principles for the FTC's Next Century*, Keynote Address at George Mason Univ. School of Law (Feb. 13, 2014).

[21] *See, e.g.*, Averitt, *supra* note 19, at 3–4 (discussing Chairwoman Ramirez's testimony before the Antitrust Subcommittee of the Senate Committee on the Judiciary, at which she said that "[c]ase-specific guidance, grounded in detailed facts and sound economic theory, is likely the most useful form of guidance for the business community and lawyers advising the business community"); *see also* Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Address at the George Washington University Law School Competition Law Center (Aug. 13, 2015) [hereinafter Ramirez Address], https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf ("I . . . favor a common-law approach to the development of Section 5 doctrine rather than a prescriptive codification of precisely what conduct is prohibited.").

[22] *See* Pallavi Guniganti, *Brill Questions Need for and Feasibility of Section 5 Statement*, Global Competition Rev. (Aug. 21, 2013), http://globalcompetitionreview.com/news/article/34038/brill-questions-need-feasibility-section-5-statement/.

[23] Statement of the Federal Trade Commission on the Issuance 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/735381/150813commissionstatementsection5.pdf.

[24] Ramirez Address, *supra* note 21.

[25] *See* Leah Nylen, *FTC's Section 5 Guidance—'Historic Step' or Much Ado About Not Very Much?*, Mlex Mkt. Insight (Aug. 14, 2015), http://mlexmarketinsight.com/landing-pages/ftcs-section-5-guidance-historic-step-much-ado-not-much/ (noting that the Statement "clocks in at exactly 331 words, 347 if you include the title—roughly three-quarters of a page, or about a dozen or so long Tweets").

[26] Statement, *supra* note 1.

[27] *Id.*

[28] Ramirez Address, *supra* note 21, at 1, 3.

[29] *Id.* at 6.

[30] Dissenting Statement of Commissioner Maureen K. Ohlhausen, FTC Act Section 5 Policy Statement 1–3 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.

[31] Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 5–7 (June 19, 2013), http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf.

[32] *Id.* at 9.

[33] *See* Melissa Lipman, *Wright Sees No Risk of Section 5 Tsunami After Guidance*, Law360 (Aug. 13, 2015) ("But Wright heralded the commission's decision to embrace a rule of reason type of test for Section 5 as a 'significant constraining force' that, to his eye, some of the FTC's more controversial cases in recent years against Intel Corp. and Negotiated Data Solutions LLC would not have survived."); Melissa Lipman, *Wright Says Criticisms of FTC Section 5 Guidance Overblown*, Law360 (Sept. 22, 2015) ("Antitrust lawyers who know how to counsel rule-of-reason can counsel Section 5 cases," Wright said. "That wasn't true a month ago.").

[34] Statement of the Federal Trade Commission, *supra* note 23, at 1 (emphasis added). *See also* Wright & Diveley, *supra* note 14, at 6–7.

[35] Statement of the Federal Trade Commission, *supra* note 23, at n.1.

[36] *But see* Neill Averitt, *Commentary: Pots of Gold, Hidden Land Mines in Section 5 Policy Statement*, FTC:Watch No. 880 (Sept. 18, 2015) (discussing FTC cover statements and noting that "[p]oints made in that location tend not to get the same attention as those in a primary statement").

[37] Wright & Diveley, *supra* note 14, at 8.

[38] Ramirez Address, *supra* note 21, at 7–8. *See also* Averitt, *supra* note 36.

[39] Wright & Diveley, *supra* note 14, at 12.

[40] *See* Averitt, *supra* note 36 ("Dueling commissioners have sprinkled the statement with buried code words and magic phrases, which they clearly hope will provide a starting point for their successors to argue for their favored interpretations.").