

Congress of the United States

Washington, DC 20515

October 23, 2013

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Ramirez:

Following the recent statements of Commissioners Wright and Ohlhausen, we are writing to express our concerns with the lack of guidance by the Federal Trade Commission (the “FTC”) regarding its authority under Section 5 of the Federal Trade Commission Act.¹ As you know, Section 5 provides that “unfair methods of competition in or affecting commerce . . . are hereby declared unlawful.”² The statute does not provide a specified list of proscribed conduct but, rather, Congress originally deferred to the FTC to establish guiding principles for what would constitute unfair methods of competition.³ Despite calls for the FTC to publish this guidance, the FTC has yet to provide a clear standard to which the public and business community can refer.

As you know, antitrust enforcement actions pursued under the Clayton and Sherman Acts are subject to rigorous economic tests to ensure that the subject activity results in actual economic harm. In contrast, stand-alone Section 5 claims do not receive similar scrutiny. The absence of clear parameters for the FTC’s Section 5 authority based on empirical and economic justifications engenders uncertainty in the business community. This uncertainty acts as a deterrent to innovation and creativity, which are critical drivers of the American economy and are vitally important in today’s challenging economic environment. Accordingly, articulating a standard by which the FTC intends to utilize its Section 5 unfair method of competition authority should be a high priority.

Providing guidance is particularly important in light of the FTC’s prosecution of conduct as a standalone violation of the unfair methods of competition provision of Section 5 beyond the confines of traditional antitrust law.⁴ While the Clayton and Sherman Acts have the benefit of decades of developed and refined jurisprudence, Section 5 unfair methods of competition enforcement remains a largely unformed area of the law. As former Commissioner Kovacic highlights, since 1968, no federal Court of Appeals has endorsed an FTC competition decision that relied solely on a Section 5 violation.⁵ Notwithstanding this record, prior and existing

¹ 15 U.S.C. § 45(a) (2012).

² *Id.*

³ See Joshua D. Wright, Commissioner, Federal Trade Comm’n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013) [hereinafter the “Commissioner Wright Policy Statement”].

⁴ See e.g., *In re Bosley Inc.*, FTC File No. 121-0184 (2013); *In re Robert Bosch GmbH*, FTC File No. 121-0081 (Nov. 21, 2012).

⁵ William E. Kovacic, Former Commissioner, Federal Trade Comm’n, Remarks at Global Competition Review’s Dominance and Unilateral Conduct Conference (Feb. 9, 2010); see also William E. Kovacic & Marc Winerman,

Commissioners remain steadfast in their view that Section 5 can, and should, be used to proscribe behavior beyond conduct prohibited by the Clayton and Sherman Acts.⁶ This provides the opportunity for Section 5 standalone prosecutions to operate untethered to the economic justifications grounded in Clayton and Sherman Act jurisprudence, with boundaries that may be defined only by the existing composition of the FTC.

In addition to the absence of an economic foundation, the FTC has developed certain Section 5 jurisprudence through entry into private, administrative settlements that lack the benefit of judicial review.⁷ This is particularly troublesome when the settlement is reached in the context of a merger review, which creates a significant risk that the settling party acquiesces because of economic pressure rather than substantive agreement.⁸

While we can agree with your statements before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights that agencies should provide clear enforcement criteria, we take issue with your views that it is difficult to articulate the outer bounds of Section 5 authority or that existing decisions provide sufficient guidance.⁹ In fact, two of your fellow Commissioners have issued separate, but largely consistent, policy statements on the parameters of Section 5.¹⁰ Further, obtaining clear principles from a body of decisions that are largely formed through private settlement agreements and tailored to case-specific facts would be difficult enough, but when coupled with a lack of judicial review by courts who have

Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 ANTITRUST L.J. 929, 940 (2010) (“one needs to go back to the 1960s to find cases in which the Commission succeeded on appeal in a case applying a Section 5 theory.”).

⁶ See e.g., J. Thomas Rosch, Former Commissioner, Federal Trade Comm’n, Remarks Before the New York State Bar Association Annual Antitrust Conference (“First, I believe a major virtue of Section 5 is that it enables the Commission to hold firms liable for anticompetitive conduct where the Sherman Act does not.”) (Jan. 27, 2011); see also Edith Ramirez, Chairwoman, Federal Trade Comm’n, Remarks at the Federal Trade Comm’n Workshop on Intellectual Property Rights in Standard Setting (“And, as the Commission concluded in *N-Data*, conduct that permits patent hold-up can violate Section 5 of the FTC Act even if it does not necessarily violate Section 2 of the Sherman Act.”) (June 21, 2011).

⁷ See Maureen K. Ohlhausen, Commissioner, Federal Trade Comm’n, Remarks Before the U.S. Chamber of Commerce (July 25, 2013) [hereinafter the “Commissioner Ohlhausen Policy Statement”] (“ . . . the Commission has brought some [unfair methods of competition] cases but only in settlements, where the defendant basically agrees for purposes of the settlement that its conduct [violates Section 5].”).

⁸ See Commissioner Ohlhausen Policy Statement, *supra* note 7, at 4 (“Setting Section 5 policy via consent is particularly problematic when we do so in the context of a Hart-Scott-Rodino merger review (as we did in the *Bosch* matter), where there is likely to be less resistance from parties who are primarily interested in seeking clearance of a merger by the FTC.”).

⁹ *Oversight of the Enforcement of the Antitrust Laws Hearing Before the Subcomm. On Antitrust, Competition Policy and Consumer Rights of the S. Comm. On the Judiciary*, 113th Cong. (Apr. 16, 2013) (statement of Chairwoman Ramirez) (“Senator, I do agree that it is beneficial for the agencies to provide clear enforcement criteria where they can. I do take a different view with regard to Section 5. I do believe that this is an area that is difficult to specify precisely what the outer bounds are However, I will say again that I do believe that there is guidance that’s provided. If you look back at the recent cases in which the agency has taken action, using Section 5 on a standalone basis, it would include cases such as the invitation to collude cases in the context of the exchange of information, that can then be used to facilitate collusion or other unlawful practices and also in the standard-setting arena.”).

¹⁰ See Commissioner Wright Policy Statement, *supra* note 3; see also Commissioner Ohlhausen Policy Statement, *supra* note 7.

not upheld a standalone Section 5 case since the 1960s,¹¹ it is virtually impossible.¹² The FTC has a record of providing the business community with guidance on its enforcement authority,¹³ and we urge you to extend its record to include guidance on the “unfair methods of competition” component of Section 5.

Antitrust laws and their enforcement should be transparent, fair, predictable, and reasonably stable over time. When exercised appropriately, the application of antitrust law allows for a functioning market and negates the need for further government regulation. Providing guidance with respect to the FTC’s Section 5 unfair methods of competition authority will allow businesses to develop lawful competition policies and encourage critical innovation. We look forward to your response.

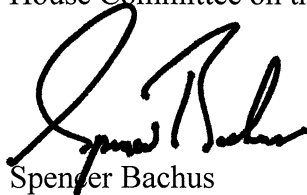
Sincerely,



Bob Goodlatte
Chairman
House Committee on the Judiciary



Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary



Spender Bachus
Chairman
House Committee on the Judiciary
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law



Mike Lee
Ranking Member
Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition
Policy and Consumer Rights

¹¹ See William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 942 (2010) (“The FTC’s record of appellate litigation involving applications of Section 5 that go beyond prevailing interpretations of the other antitrust laws is uninspiring one needs to go back to the 1960s to find cases in which the Commission succeeded on appeal in a case applying a Section 5 theory These results have not been for lack of trying.”).

¹² See also Kovacic and Winerman, *supra* note 11, at 939 (“one can have confidence in a theory’s power and durability only when it has been tested in adversarial proceedings and endorsed by reviewing courts.”).

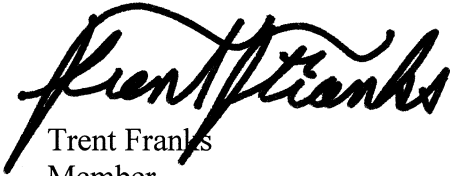
¹³ Fed. Trade Comm’n, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, 104 F.T.C. 1070, 1071 (1984) (appended to *In re Int’l Harvester Co.*, 104 F.T.C. 949 (1984)), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>; see also Commissioner Ohlhausen Policy Statement, *supra* note 7, at 2, citing policy statements issued in connection with enforcing its “deceptive acts or practices” authority under Section 5 in addition to several guidelines that the FTC has issued related to its competition enforcement.



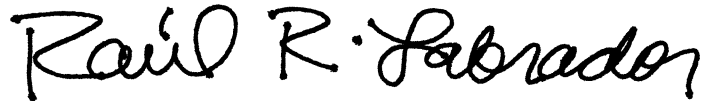
Lamar Smith
Member
House Committee on the Judiciary



Blake Farenthold
Vice-Chairman
House Committee on the Judiciary
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law



Trent Franks
Member
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Raúl Labrador
Member
House Committee on the Judiciary

cc: Commissioner Julie Brill
Commissioner Maureen K. Ohlhausen
Commissioner Joshua D. Wright