CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
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September 30, 2015

Chairwoman Edith Ramirez
Commissioner Julie Brill
Commissioner Terrell McSweeny
Commissioner Maureen Ohlhausen
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20590

Dear Chairwoman Ramirez, Commissioner Brill, Commissioner McSweeny, and Commissioner Ohlhausen:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing the interests of over three million businesses and organizations of every size, sector, and region, I write to share our views on last month's decision by the Federal Trade Commission (FTC) to issue Section 5 guidance. The Chamber and its members have repeatedly called for Section 5 guidance as a top antitrust policy priority in order to bring much needed clarity to the FTC's ambiguous statutory authority.

The Chamber recognizes that Congress chose to leave undefined the meaning of "unfair methods of competition." We also support the use of Section 5 beyond the scope of traditional antitrust laws to address concrete competitive harms. However, agency enforcement efforts against invitations to collude are to date the only concrete example of where Section 5 should clearly be used as an extension of traditional antitrust laws. Additional cases seem to be based on a "know it when we see it" approach, which is not helpful to U.S. businesses.

The Chamber appreciates the August 13th release of guidance as a first attempt to address this problem in the FTC's 101-year history. Given the contentious nature of the issue and the historic inability of the FTC to issue any form of Section 5 guidance, there is no doubt that any guidance would be agreed only through compromise. But as was indicated in the Chamber's responsive statement at the time of the release, we were disappointed in the FTC's guidance because it offered so little in terms of meaningful guidance to U.S. businesses and their counselors.

The Chamber has the following concerns:

The first prong of the guidance—that the Commission's use of Section 5 will be guided by the promotion of consumer welfare—is important, but today it is also widely accepted and understood and thus adds nothing to current understanding. Only small corners of antitrust

academia might seek to return to the 1970s, when FTC enforcement was in search of enforcement aligned with non-competition goals. Following strong rebuke by the Congress and the courts, the FTC made an appropriate course correction decades ago.

Since there is little present danger to returning to those days, this prong does little to further illuminate the future use of Section 5 and does nothing to further limit novel theories of harm. In recent years, FTC actions under Section 5 have all employed consumer welfare as a guiding principle, even as the action taken in those cases raised serious questions. Therefore, while tying Section 5 to consumer welfare recognizes a flawed era, this prong offers nothing reliable to interpretation of Section 5 application today.

The Chamber takes stronger issue with the second prong, that actions "will be evaluated under a framework similar to the rule of reason." The Chamber questions the choice of wording and would advocate clarification as to why the guidance indicates that Section 5 cases will be viewed in a framework "similar to the rule of reason." Why wasn't the FTC prepared to adopt a straightforward rule of reason standard? It is helpful that at a minimum this prong goes on to discuss efficiencies consistent with a rule of reason analysis, but in doing so, that additional context adds some degree of confusion as to what about Section 5 analysis is inconsistent with the rule of reason. What other analytical framework might be used and what are the critical elements of it?

Beyond the confusing qualifier that was clearly an internally negotiated compromise, the Chamber's larger concern with prong two is that the rule of reason for Section 5 cases is not an appropriate standard for cases that may fall outside traditional antitrust law and its long history of recognized boundaries. It is too lax, ripe for abuse, and raises serious procedural fairness issues because of its highly subjective nature. Where Section 5 is being used to enforce the antitrust laws, the rule of reason should be the standard. However, if Section 5 is being used beyond the antitrust laws, the standard should be more than a simple balancing test.

Pure Section 5 cases should be guided by an analysis where the harm to consumer welfare substantially outweighs any pro-competitive justifications. Some degree of proportionality should be required. Had the FTC recognized this proportionality, the Chamber would have viewed the guidance as a significant step forward. In doing so the FTC would have been consistent with the widely accepted view that challenging an invitation to collude, as an example, is consistent with the spirit of the antitrust laws, and the standard of harm under a rule of reason analysis results in significant damage to consumer welfare, meaningfully outweighing any pro-competitive justifications.

The third prong of the guidance does not appear to be a real limitation on the use of Section 5, nor does it qualify as guidance at all. In its attempt to remove a hybrid categorizing of cases, the FTC has indicated it is "less likely" to bring a case under Section 5 if the case can be brought within the traditional antitrust laws. What does this mean? If a case could be brought under the antitrust laws, why was there a need for the "less likely" qualifier? Does the FTC think that it may still need to bring a case under Section 5 that can be brought under antitrust laws, if it believes its case is too weak to win as an antitrust case?

Complicating matters, Chairwoman Ramirez and other commissioners have, prior to the issuance of this statement, repeatedly pointed to cases where the parties chose to settle as guidance in and of itself. Most of those cases arguably could have been brought under the antitrust laws, instead of as standalone Section 5 case or as a hybrid. However, the FTC issued its Section 5 guidance without referencing any of the cases it has previously brought, leaving one to speculate openly which, if any, of the these past cases would have been brought differently by the FTC under its newly pronounced "less likely" standard.

Perhaps the most telling indicator of how flawed the FTC's own attempt at offering meaningful guidance comes from Chairwoman Ramirez and the speech she gave the day the guidance was released. Throughout those remarks, she downplayed the value of the guidance, emphasizing the "flexibility" the FTC has under its Section 5 authority and repeatedly stated that this guidance does little more than "reaffirm" what is already evident. In short, her message was business as usual, stating "the policy statement marks no change in course; it merely makes explicit what has been evident to close observers of FTC enforcement actions over the past few decades."

The Chamber considers itself a very close observer, as are the practitioners that counsel companies which find themselves under investigation by the FTC. The Chamber agrees with Chairwoman Ramirez that the August 13 guidance offers nothing new to aid in understanding the FTC's approach to Section 5 and understands that the FTC recognizes no new limits on its authority. Close observers within the business community are no better off than they were before this guidance was issued. Indeed, no business counselor could now either advise a client that (a) particular conduct is now likely problematic under Section 5, or (b) particular conduct is now likely not problematic under Section 5. In this respect, the guidance is valueless.

The Chamber also actively supports the proper use of antitrust to advance consumer welfare in foreign jurisdictions. However, there have been and continue to be longstanding concerns about the use of antitrust laws to advance non-competition goals. Virtually all antitrust enforcement actions taken today claim to do so for the benefit of consumers, even when the actions are arguably focused on producer welfare or, even worse, based on government-designed industrial policies. The FTC guidance sends the wrong message abroad as it failed to offer meaningful limitations on its own authority or even sufficiently address through examples how the FTC has abandoned pursuing enforcement actions based on non-competition goals. Given the FTC's century of experience to share with less mature jurisdictions around the world, its Section 5 guidance is a missed opportunity to establish a clearer example that would influence international norms.

In closing, the Chamber is appreciative of the efforts made by former Commissioner Wright to bring forward meaningful guidance. However, for all of these reasons, the business community's longstanding request for meaningful and practicable Section 5 guidance remains unfulfilled. The Chamber and its members continue to view the need for Section 5 guidance as a top antitrust policy priority and will continue to underscore the importance of close

Congressional oversight wherever Section 5 cases are advanced beyond the scope of traditional antitrust laws.

Sincerely,

R. Bruce Josten

cc:

Former Commissioner Joshua Wright
Chairman Charles Grassley
Ranking Member Patrick Leahy
Chairman Michael Lee
Ranking Member Amy Klobuchar
Chairman Robert Goodlatte
Ranking Member John Conyers, Jr.
Chairman Thomas Marino
Ranking Member Hank Johnson
Chairman John Thune
Ranking Member Bill Nelson
Chairman Jerry Moran
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Chairman Fred Upton
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Chairman Michael Burgess
Ranking Member Jan Schakowsky