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As this is published, the United States has just elected a new President. No matter who won, it is likely that the federal antitrust enforcement agencies—the Department of Justice’s Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”)—will become more aggressive in their enforcement agendas. With the DOJ, that is most likely to manifest itself in somewhat more aggressive merger enforcement. Absent something crazy, that is a path we have been down before without systemic damage to the economy. Of course, those parties whose mergers are attacked are not happy, but it seems pretty unlikely that the change here will be more than marginal from a broad economic perspective.

On the FTC front, however, there is the risk of something more dangerous. Even today, the FTC is noticeably more aggressive than the DOJ, and in fact recently went so far as to publicly criticize the DOJ for releasing a report on Section 2 enforcement that the Commission did not agree with—an odd step but one that reflects the pretty wide gulf between the two agencies at the moment. But tomorrow, probably regardless of who becomes President but certainly if the Democratic candidate has been victorious, the FTC could become a much more serious risk to the U.S. economy, which already has all the problems it needs. There is currently a majority of the four sitting FTC Commissioners

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(there is one vacancy) that actively supports the reinvigoration of Section 5 of the FTC Act—the part of the Act that prohibits “unfair methods of competition.” This language, which has been part of the Act since it was enacted nearly a century ago, is the nuclear bomb of U.S. antitrust enforcement—or perhaps the neutron bomb is a more accurate analogy, since structures would be left standing even while businesses were seriously injured.

When the FTC Act was passed in 1914—the result, in part, of a view held by some that the U.S.’s first antitrust statute, the Sherman Act, was not being enforced and interpreted vigorously enough—it included and was accompanied by lots of interesting ideas. One of those, which of course has not come to pass, was that the five FTC Commissioners should be “experts learned in the ways of business,” so as better to make decisions that made business sense. Today, those FTC Commissioners with any relevant background tend to be academics, practicing lawyers, or Congressional staffers, most with no business experience at all. Under these circumstances, probably best that they focus on enforcing legal regimes that are relatively well-understood, rather than seek to inject their views as to how business should be conducted into the American economy. Unfortunately, that modest view of their capacity does not appear to have much traction with the current Commission, which has made it clear that it intends to increasingly look to Section 5—another one of those interesting ideas—as a weapon with which to attack conduct that does not, or could not, violate the Sherman or Clayton Acts.

To borrow a famous phrase, this is *déjà vu* all over again. During the 1960’s and

1970's, the FTC vigorously attacked a variety of industries and practices using Section 5, in virtually every case eventually failing to accomplish anything but collateral damage—enormous costs of responding to ill-conceived investigations and litigation, a chilling effect on business decision-making, and a steadily growing perspective of the FTC as an agency out of control, culminating in the *Washington Post's* devastating description of the FTC as the “National Nanny.” To be fair, the DOJ's Antitrust Division, for a while, also fell into the trap of looking for “shared monopolies” and other economic phantoms; I know, because I was there and share some of the blame. But since the DOJ did not have the elastic language of Section 5 to rest on, it was required to find actual evidence of anticompetitive conduct and effect. When it became clear it could not, it stopped this effort. One good illustration was the shared monopoly cases filed against Goodyear and Firestone in 1973; once it became clear that the evidence did not support the allegations in the complaint, the DOJ dismissed those cases and went so far as to release to the public the memorandum that Tom Kauper, the head of the Antitrust Division, had prepared for the Attorney General explaining his decision. The FTC, by contrast, continued to rely on the open-ended language of Section 5 until it was told by the Ninth Circuit (in *Boise Cascade*) and the Second Circuit (in *Official Airline Guide* and *Ethyl*) that just making it up as you go was not an acceptable standard for government law enforcement.

Given this history, anyone proposing that we go back to these bad old days should have a very heavy burden of persuasion. Indeed, if we are going to try yet again to use these 100-year old completely meaningless words as a basis for regulating the 21st

Century economy, at a minimum there should have to be two predicate showings: (1) that there are some real, not imaginary or hypothetical, competitive problems that are currently causing meaningful competitive harm and that cannot adequately be dealt with by the application of the Sherman and Clayton Acts, with their depth of judicial interpretation and gloss accumulated over more than a century of extensive private and public litigation; and (2) that it is possible to set real boundaries that effectively cabin in the unconstrained language of Section 5, and that can be counted on to prevent the abuse of this power by a political majority of FTC Commissioners who (no doubt well-intentioned) seek to turn the FTC into the Federal Industrial Planning Commission. I have serious doubts that either of these preconditions can be met.

The most common justification for unearthing Section 5 from the crypt where it has rested in appropriate repose for 25 years is that the Congress that passed the statute in 1914, confirmed by the Supreme Court's *S&H* decision of almost 40 years ago, intended the language "unfair methods of competition" to reach broader categories of conduct than would violate the Sherman Act. So what? Of course, the language "unfair methods of competition" is essentially boundless, and whatever was intended by Congress 94 years ago (assuming it, unlike most Congresses, actually knew what it intended) is pretty irrelevant to the issue of whether creating an enforcement program based on those words makes sense today. No one argues about the breadth of the language, just the wisdom of actually trying to use it. And while the current Supreme Court could potentially have a different view of the reach of Section 5, and if forced to might well articulate it, that is

pretty irrelevant to the main issue as well. What is really driving this new emphasis is the fact that FTC Commissioners, like all regulators, really don't like courts telling them what they can and cannot do, and in some areas of the law that certain Commissioners think are important, they cannot get the courts to accept their view of how the Sherman Act should be interpreted. We can all understand why the proponents of the use of Section 5 find appealing the notion of being able to impose their personal views of what is "unfair" or not on conduct that cannot be shown to violate the Sherman Act. But we should also be able to agree that the common desire of many—probably most—government regulators to have a statute to enforce that is not constrained by nagging little impediments like evidence and burdens of proof is hardly news, and certainly no justification for renewed use of Section 5.

So what is the evidence that there is some systematic failing in the coverage of the Sherman and Clayton Acts that would justify reviving a very dangerous statute like Section 5? Some have argued that it would be good to have broader authority over oligopolies, referring favorably to the "dominance" standard contained in Article 82 of the Treaty of Rome. They apparently think it would be a good idea to tell U.S. companies, as sometimes happens in the EC, that if you have managed to obtain a large market position, you need to stop competing vigorously and allow your weaker competitors to survive and prosper, or you may face antitrust attack by the antitrust authorities. This argument may resonate with some in uncertain times like these, when silly antitrust arguments always seem to have more legs, but it makes no sense if we are

worried about consumers rather than competitors. The EC has long taken the view that the best way to protect consumers is to protect competitors from overly vigorous competition; this is perhaps understandable given the European history of state-owned monopolies in many industries, but it is still wrong-headed. The last thing we need in the United States is European-style antitrust.

Another argument is that there are various areas where court decisions have made the kind of enforcement some want more difficult, and Section 5 would present another, less constrained, vehicle for dealing with those “problems.” This is, of course, just another way of saying that, because we can’t win under the Sherman Act, let’s use Section 5, which imposes either no legal burden at all or a much lighter one. Indeed, one Commissioner recently analogized the state of antitrust law today with that of the early 20th Century, asserting that recent Supreme Court decisions make it clear that “the Sherman Act is no longer the broad mandate protecting consumers that it once was.” This rather astoundingly arrogant description of cases that many (I would argue most) antitrust experts would find pro-consumer in their impact over time, encouraging innovation and individual initiative and requiring antitrust plaintiffs to allege “plausible” antitrust violations to survive a motion to dismiss, is pretty revealing of the mindset that is encouraging more Section 5 enforcement: “I don’t like the way the way courts are deciding antitrust cases these days, so let’s turn away from the standard antitrust laws as developed over a century or more of litigation, academic give and take, and enforcement, and rely instead on a statute that means what we say it means.” Alice would understand

this approach, which was common in Wonderland.

You hear this line of reasoning frequently in the area of hot current debate around settlements of patent disputes between branded and generic companies. Some at the FTC (and a few others) are bound and determined to try to make various kinds of conduct that they believe is undesirable as close to *per se* illegal as they can get, without the unpleasantness of having to actually establish that the patent at issue causing the competitive restraint was invalid or not infringed. Unless and until held invalid, of course, a patent bars competition from infringing products; as a result, it is hard to make the case that a settlement of patent litigation had or was likely to have an adverse effect on competition unless you can show that the patent was either invalid or not infringed, or at a minimum that the attempted defense of the patent was objectively baseless. But that is hard work, requiring essentially a full patent trial. Suppose instead all you had to show was that a patent holder had reached an agreement with a generic producer to end or eliminate patent litigation, and that the settlement with the alleged infringer kept the generic product off the market in return for a payment of money. According to one FTC Commissioner, this conduct might be illegal monopolization, but “given the courts’ ever-narrowing of the antitrust laws, it would be no surprise if courts reject that approach – even if the practice is unfair and causes tremendous harm to consumers.” Let’s unpack that sentence: The conduct at question might be illegal, he says, but if the courts should conclude it is not, we want to be able to stop it anyway, because the practice is “unfair.” And exactly how does it get determined that such an agreement is, in fact, an “unfair

method of competition,” and thus can be stopped? Why, this Commissioner and two others just say it is so. You can see why this approach would be appealing to a regulator, since it is a lot easier than having to produce evidence and prove something to an independent decision-maker, like a federal judge or appellate court, but it is hard to see why anyone else should like it.

It is very hard to see why a renewed interest in Section 5 enforcement would not, eventually, produce the same embarrassing results for the FTC that the last effort did. But it will have other adverse effects along the way. Since the FTC shares enforcement jurisdiction with the DOJ, with the two agencies basically deciding jointly who will look at any particular matter, the FTC covers only about half the American economy. So long as both agencies are enforcing the same statutes in roughly the same way, the differences that inevitably arise are manageable (although very frustrating to the companies or industries that happen to be on the short end of any particular stick where the other agency would likely not have taken that position). But Section 5 is only enforced by the FTC. A Section 5 enforcement program would mean that those companies and industries relegated to the FTC would face a completely different legal regime than those facing the DOJ. The inevitable result of this would be an even further breakdown in the already strained relationship between the two agencies, and raise yet again the question of why we have two competing federal antitrust agencies. The notion that it is a good idea to have two federal enforcement agencies is not intuitively obvious to start with; but two federal enforcement agencies enforcing two completely different standards of antitrust

law is simply not sustainable. The historical cries to take away the FTC's antitrust jurisdiction were loudest and strongest when it was raging out of control 40 years ago. A new Section 5 initiative will inevitably start that debate up all over again, and for good reason.

The point here is not to argue about the application of Section 5 to any particular fact situation, but to make clear that what we are talking about here is the "I know it when I see it" approach to competition law enforcement. As one FTC Commissioner puts it, "just because the Sherman Act no longer stops some kinds of bad conduct does not always mean that the conduct is no longer bad." George Orwell would be proud of that line. In the United States, we have a jurisprudential system where plaintiffs allege, defendants defend, and independent arbiters decide. What is being proposed is that, if they decide against you, you don't concede, but just move to another field, where you get to both allege and decide. Lots easier to get your way, but an almost surreal vision of law enforcement.

This kind of thinking, completely untethered to reality, is exactly the way that the FTC got wrapped up in its underwear the last time it went down the Section 5 road. We have already seen this movie, and it was pretty awful the first time. We do not need a sequel.