



CPI Antitrust Chronicle

September 2013

**A Response To Commissioner
Wright's Proposed Policy
Statement Regarding Unfair
Methods Of Competition**

Maurice E. Stucke
University of Tennessee College of Law

A Response To Commissioner Wright's Proposed Policy Statement Regarding Unfair Methods Of Competition

Maurice E. Stucke¹

I. INTRODUCTION

Federal Trade Commissioner Joshua Wright recently proposed a new legal standard to evaluate “unfair methods of competition” under Section 5 of the Federal Trade Commission (“FTC”) Act, 15 U.S.C. § 45(a) (2012).² The FTC must prove that the act or practice (1) harms or is likely to harm competition, significantly and (2) lacks cognizable efficiencies.³ The FTC currently prosecutes both traditional antitrust offenses and other conduct under Section 5’s unfair methods of competition clause. Under Wright’s proposal, the FTC would still apply the well-forged antitrust case law to orthodox Sherman and Clayton Act violations, but use his proposed standard for any remaining standalone violations of Section 5. Wright proposes that his standard be applied only to unfair methods of conduct, for which no “well-forged case law under the traditional federal antitrust laws exists.”⁴ Where that boundary lies, as this Essay discusses, is a far more difficult question.

First, I agree with Wright that it is often difficult for courts and agencies to ramble through the wilds of economic theory to identify the conduct’s net competitive consequences.⁵ The Supreme Court once recognized its shortcomings in making such trade-offs.⁶ More recently the dissent in *Leegin* and *Actavis* criticized the rule of reason.⁷ Indeed, Congress’s dissatisfaction with the Court’s rule of reason motivated Section 5.⁸

¹ Associate Professor, University of Tennessee College of Law; Of Counsel, GeyerGorey LLP; Senior Fellow, American Antitrust Institute. I wish to thank for their helpful comments Neil Averitt, Kenneth Davidson, Bert Foer, John Kirkwood, Spencer Weber Waller, and Joshua Wright.

² Statement of Commissioner Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013).

³ *Id.* at 2-3.

⁴ *Id.* at 6 (“At the same time, the Commission will not challenge conduct as an unfair method of competition where there is well-forged case law under the traditional federal antitrust laws because the Commission does not have an institutional advantage in discerning competitive effects under such circumstances and prosecuting conduct under disparate standards may blur the line between lawful and unlawful behavior.”); Joshua D. Wright, Commissioner, Fed. Trade Comm’n, Section 5 Recast: Defining the Federal Trade Commission’s Unfair Methods of Competition Authority 17 (June 19, 2013).

⁵ Wright, *supra* note 2, at 11.

⁶ *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-10 (1972) (noting the courts’ “limited utility in examining difficult economic problems” and “inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules”); *United States v. Philadelphia National Bank*, 374 U.S. 321, 370-71 (1963) (rejecting the invitation to make two trade-offs, which would require courts to offset anticompetitive effects in one market for pro-competitive benefits in another).

⁷ *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238, 2245, 186 L. Ed. 2d 343 (2013) (Roberts, C.J., dissenting) (calling the rule of reason “unruly” and “amorphous”); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877,

Second, I welcome Wright's efforts to bring competition law closer to the rule of law. The Court of late has "repeatedly emphasized the importance of clear rules in antitrust law."⁹ A key component of the rule of law is that the courts and enforcement authorities should apply clear objective legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly.

Consequently, we can agree that any legal standard of "unfair methods of competition" under Section 5 should promote (i) accuracy¹⁰; (ii) administrability—the standard should be easy to apply; (iii) consistency—the standard should yield predictable results; (iv) objectivity—the standard should leave little, if any, subjective input from the decision makers; (v) applicability—the standard should reach as wide a scope of conduct as possible; and (vi) transparency—the standard and its objectives should be understandable.

Although Wright's proposal seeks to bring Section 5 closer to these rule-of-law principles, it is wide of the mark. Wright relies on the Second Circuit's analysis in *Ethyl*.¹¹ Whatever one's qualms about this dated decision, it is a good starting point. Ideally any proposed legal standard for "unfair methods of competition" under Section 5 would have broad applicability. The standard would prohibit the current orthodox violations under the Sherman and Clayton Acts, and would reach further, as Congress intended, to condemn other unfair methods of competition beyond these Acts' reach.¹²

So, at a minimum, whatever is currently illegal under the Sherman and Clayton Acts would remain illegal under the Section 5 legal standard; but not everything illegal under the Section 5 standard would necessarily violate the Sherman and Clayton Acts. The legal standard, pursuant to Section 5's design, should "supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts."¹³

917, 924 (2007) (Breyer, J., dissenting) (mentioning "many complexities of litigating a case under the 'rule of reason' regime," including the "existence of 'market power,'" which "invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets").

⁸ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984) (explaining how the "statute's legislative history reveals that, in reaction to the relatively narrow terms of the Sherman Act as limited by the Supreme Court's adoption of the Rule of Reason in *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), Congress sought to provide broad and flexible authority to the Commission as an administrative body of presumably practical men with broad business and economic expertise in order that they might preserve business' freedom to compete from restraint").

⁹ *Actavis*, 133 S. Ct. at 2245 (Roberts, C.J., dissenting) (quoting *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 452 (2009)).

¹⁰ Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORD. L. REV. 2543, 2570-72 (2013) (discussing the importance in antitrust analysis of discussing both "accuracy benefits," the predicted benefits of getting it right measured against "error costs," the predicted costs of getting it wrong).

¹¹ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); Wright, *supra* note 2, at 6 (hailing this 1984 case as "recent judicial guidance regarding the Commission's use of Section 5") & 9 n.32.

¹² *du Pont*, 729 F.2d at 136-37 (internal citations omitted) ("[a]lthough the Commission may under § 5 enforce the antitrust laws, including the Sherman and Clayton Acts, it is not confined to their letter").

¹³ *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1293 (4th Cir. 1987) (quoting *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953)).

One concern, which Part II addresses, is that Wright's proposed legal standard does not go as far as Congress intended. Part III addresses a second concern, namely the risk that the proposed legal standard goes the other direction and permits conduct that is otherwise illegal under the Sherman and Clayton Acts. As Wright recognizes, "prosecuting conduct under disparate standards may blur the line between lawful and unlawful behavior."¹⁴ Here, I believe, the proposed standard can cause much mischief.

II. CONFLATING UNFAIR METHODS OF COMPETITION WITH ACTS AND PRACTICES THAT SIGNIFICANTLY HARM CONSUMER WELFARE

Wright argues that an unfair method of competition must harm, or is likely to harm significantly, competition and, in turn, consumers. Two questions arise. First, why must an incipency statute that is meant to reach beyond the Sherman and Clayton Acts be limited to acts and practices that already (or likely will) significantly harm competition? Second, why must the FTC prove an adverse impact on consumers under an incipency statute, when it need not do so under the orthodox antitrust standards?

First it is not altogether clear why an unfair method of competition "in or affecting commerce" must also substantially lessen competition. Unfair methods of competition may very well reflect aggressive acts of competition that society deems off limits, regardless of the act's impact on prices and output. As Justice Brandeis said:

What section 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were 'unfair methods of competition'; that is, the method or means by which an unfair end might be accomplished.¹⁵

With the exception of cartel behavior deemed *per se* illegal, courts already require for Sherman Act violations evidence of the restraint's likely or actual anticompetitive effects. The Clayton Act requires that the conduct may substantially lessen competition or tend to create a monopoly. In contrast, "[o]ne of the objects of the Act creating the Federal Trade Commission was to prevent potential injury by stopping unfair methods of competition in their incipency."¹⁶ So, currently, when the FTC finds that a company has lied about the quality of its competitor's merchandise, it can prevent this socially undesirable method of competition, and prevent the defendant from unfairly gaining a competitive advantage, regardless of the deception's effect on competition.

One can defend the proposed standard's first element when Section 5 is applied to otherwise lawful and legitimate business behavior.¹⁷ The requirement of proving significant competitive harm can check the FTC's discretion in attacking otherwise innocuous behavior. But the proposed standard makes no sense when applied to otherwise illegal, deceitful, coercive, predatory, or tortious methods of competition.

¹⁴ Wright, *supra* note 2, at 6.

¹⁵ *FTC v. Gratz*, 253 U.S. 421, 441 (1920) (Brandeis, J., dissenting).

¹⁶ *FTC v. Raladam Co.*, 316 U.S. 149, 152 (1942).

¹⁷ *du Pont*, 729 F.2d at 137 (as "the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by enjoining *otherwise legitimate* practices, the closer must be our scrutiny upon judicial review").

Take commercial bribery as an example. Bribery affects commerce, and has long been recognized as an unfair method of competition.¹⁸ But does bribery substantially harm competition and consumers? On the one hand, bribery may reflect vigorous competition. Firms, to secure contracts at their rivals' expense, compete by bribing officials. On the other hand, corruption is arguably "anti-competitive, leading to distorted prices."¹⁹

Of course the Foreign Corrupt Practices Act prohibits bribery of foreign government officials and imposes stiff civil and criminal penalties. Viewing bribery as an unfair method of competition, Congress wanted to prevent a race to the bottom and promote a level playing field for honest businesses.²⁰ Consistent with Section 5's design, the FTC also challenged corporate bribes without having to prove the magnitude and probability of competitive harm from the bribe.²¹ But under the proposed standard, the FTC must prove how a specific bribe caused (or is likely to cause) higher prices, less output, diminished quality, or less innovation.

This burden significantly limits the FTC's ability to prosecute bribery as a standalone Section 5 violation. Why make it harder to challenge illegitimate conduct that destroys a competitive market system, disadvantages "honest businesses that do not pay bribes," increases "the cost of doing business globally," inflates "the cost of government contracts in developing countries," introduces "significant uncertainty into business transactions, undermines "employee confidence in a company's management," and fosters "a permissive atmosphere for other kinds of corporate misconduct, such as employee self-dealing, embezzlement, financial fraud, and anti-competitive behavior"?²² Wright does not say.

Besides commercial bribery, other widely acknowledged unfair methods of competition include deception, corporate espionage, stealing trade secrets, passing off goods, and tampering with a competitor's products. Indeed, "[a]s a general matter, if the means of competition are otherwise tortious with respect to the injured party, they will also ordinarily constitute an unfair method of competition."²³ That is clearly not the case under the proposed standard.

The proposed standard also conflates lessening of competition with consumer welfare. Granted the U.S. courts at times describe the antitrust laws as a consumer welfare prescription. But the Clayton and Sherman Acts reach beyond consumer harm. Otherwise why prosecute monopsonies that harm only upstream suppliers and bid-rigging, where the conspirators are the ultimate purchasers? Shortly after the Sherman Act's enactment, the courts recognized harm to

¹⁸ Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1918, 1918 WL 18083 (F.T.C.), at *4 (describing FTC's efforts to combat commercial bribery, a "wide-spread and insidious unfair method of competition"); *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, CIV A 04-332 EGS, 2006 WL 2711527, at *21 (D.D.C. Sept. 21, 2006); Neil Averitt, *Commissioner Wright's Section 5 Policy Leaves Much To Be Desired*, FTC: WATCH, Issue No. 832, July 2, 2013.

¹⁹ U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION & U.S. SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012).

²⁰ *Id.*

²¹ *Giant Food, Inc. v. FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962) (finding that injury to competition is not an essential element of a § 5 violation).

²² FCPA Resource Guide, *supra* note 19, at 3.

²³ REST. OF UNFAIR COMPETITION § 1 cmt. g (1995).

sellers, independent of any harm to downstream consumers.²⁴ Likewise, in 1948 the Court held that the Sherman Act applies to buyer cartels that only injure sellers, not customers or consumers:

[The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.²⁵

Similarly, the FTC and Department of Justice (“DOJ”) do not always use consumer harm to screen mergers. To dispel any uncertainty, their 2010 Guidelines cite as example of an illegal merger one that harms only upstream farmers, and not consumers.²⁶

Consequently, it is hard to see then how the proposed standard’s first element supplements and bolsters the Sherman and Clayton Acts, when it significantly limits the FTC’s ability to prosecute (and prevent) socially undesirable methods of competition.

III. AN EFFICIENCIES TRUMP CARD

To reach the proposed standard’s second element, let us suppose, as we must, that the defendant’s conduct harms, or is likely to harm, competition and consumers significantly. Let us suppose defendant’s conduct causes \$100 million in consumer harm, while yielding cognizable productive efficiencies of only \$1 million. That conduct, if it fell within the well-forged antitrust case law, would likely be illegal. But that conduct, if it fell outside the well-forged antitrust case law, would be allowed under the proposed standard. The Second Circuit in *Ethyl* never said that a defendant could avoid liability under Section 5 by showing some countervailing efficiency.²⁷ The proposed standard, however, goes to that extreme.

To be clear, Wright does not endorse any efficiency claim. Under his proposed standard, the defendant’s efficiencies, to be cognizable, must be conduct-specific, be verified, not arise from anticompetitive reductions in output or service, be accomplished with the conduct, and unlikely be accomplished in the absence of either the conduct in question or another means having comparable anticompetitive effects.²⁸

Indeed, Wright attributes his proposed standard to the agencies’ analytical framework in the Merger Guidelines.²⁹ The Supreme Court has never recognized an efficiencies defense for Section 7 of the Clayton Act (or for Section 5 for that matter). The FTC and DOJ over the past

²⁴ *United States v. Swift & Co.*, 122 F. 529 (C.C.N.D. Ill. 1903), *modified*, 196 U.S. 375 (1905).

²⁵ *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948).

²⁶ DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 12 (2010).

²⁷ *du Pont*, 729 F.2d at 139 (“before business conduct in an oligopolistic industry may be labelled ‘unfair’ within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct”). The court never said that any cognizable efficiency, however small, would suffice to avoid § 5 liability: “To suggest, as does the Commission in its opinion, that the defendant can escape violating § 5 only by showing that there are ‘countervailing pro-competitive justifications’ for the challenged business practices goes too far.” *Id.* at 140.

²⁸ Wright, *supra* note 2, at 12.

²⁹ Wright Speech, *supra* note 4, at 23.

few decades have recognized a narrow efficiencies defense—namely the cognizable efficiencies, besides being merger-specific, must be “of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.”³⁰

Both the Merger Guidelines and proposed standard reject any balancing of the magnitude of the cognizable efficiencies with the magnitude of the likely competitive harm.³¹ But the Merger Guidelines and lower courts go one way: If a merger will likely harm consumers or upstream suppliers (regardless of the likely efficiencies), then the merger violates Section 7 of the Clayton Act.³² Wright’s proposed standard goes the other way: If the conduct yields any cognizable efficiencies, then it is permissible regardless of the magnitude of the competitive harm.

Why the shift? In part, Wright argues that “[t]hrough years of learning and regular application, the Commission has developed a core institutional competency in identifying the presence of cognizable efficiencies.”³³ This is suspect. First, as the International Competition Network noted:

Efficiency is a broad economic term that may refer to allocative efficiency (allocation of resources to their most efficient use), productive efficiency (production in the least costly way), or dynamic efficiency (rate of introduction of new products or improvements of products and production techniques).³⁴

Dynamic efficiencies play a far greater role in promoting societal welfare than productive efficiencies. The problem is that the agencies, like the rest of us, do not know very much about dynamic efficiencies, and generally how to identify mergers or restraints that promote or hinder innovation. But under the proposed standard, the defendant, after identifying a cognizable efficiency, can significantly harm suppliers and consumers, hamper innovation, increase systemic risk, and cause greater inefficiency in the marketplace.

Second, even for productive efficiencies, the agencies’ knowledge is incomplete. They do not know how often the merging parties’ projected efficiencies are actually realized. Rarely do the FTC and DOJ engage in in-depth post-merger reviews.³⁵ One theme in the academic literature, however, is how many mega-mergers are duds.³⁶ Consequently, the agencies (with good reason,

³⁰ Merger Guidelines § 10.

³¹ Compare Merger Guidelines § 10 with Wright, *supra* note 2, at 11-12.

³² Merger Guidelines § 10 (“To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm customers in the relevant market, e.g., by preventing price increases in that market.”).

³³ Wright, *supra* note 2, at 10.

³⁴ Int’l Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 12 (2007).

³⁵ John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 629 (2013) (identifying 53 mergers subject to academic and agency retrospectives).

³⁶ KENNETH M. DAVIDSON, REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY 64 (2011); Ulrike Malmendier et al., *Winning by Losing: Evidence on the Long-Run Effects of Mergers*, NBER Working Paper 18024 (Apr. 2012), <http://www.nber.org/papers/w18024> (collecting data on all U.S. mergers with concurrent bids of at least two public potential acquirers from 1985 to 2009, comparing winners’ and losers’ performance prior and several years after the merger contest, and finding that post-merger, losing bidders significantly outperform winning bidders); George Alexandridis et al., *How Have M&As Changed? Evidence from the Sixth Merger Wave*, 18 EUROPEAN J. FIN. 663

based on the business literature) recognize that “efficiencies projected reasonably and in good faith by the merging firms may not be realized.”³⁷

Finally, even for claimed productive efficiencies, the agencies recognize that “[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms.”³⁸ Thus, the Guidelines place the burden on defendants to establish the efficiencies.³⁹ But under the proposed standard, after the firm initially offers evidence to substantiate its efficiency claim, the burden rests upon to the FTC to prove, by a preponderance of evidence, that the act or practice lacks *any* cognizable efficiencies.

So if defendant’s anticompetitive conduct causes \$100 million in consumer harm, while yielding cognizable productive efficiencies of only \$1 million, consumers must bear the harm. Why? Wright argues that his efficiencies screen helps yield “clear and predictable results,” prevents “arbitrary enforcement” of Section 5, focuses the FTC’s “scarce resources on conduct most likely to harm consumers,” and avoids “detering consumer-welfare enhancing business practices.”⁴⁰ Even here his proposed standard does not deliver.

Today price-fixing and other hard-core cartels are *per se* illegal. Courts and agencies generally do not undertake any elaborate analysis of the industry, the cartel members’ market power, or efficiency claims. The DOJ actively and successfully prosecutes cartels, even in industries that would not appear susceptible to collusion under neo-classical economic theory. Few today would dispute the virtue of prosecuting hard-core cartels as *per se* illegal. Nor would the DOJ likely tolerate the weakening of antitrust’s *per se* illegal standard to entertain a

(2012); Klaus Gugler et al., *Market Optimism and Merger Waves*, 33 *MANAGE. DECIS. ECON.* 159, 171-72 (2012); Clayton M. Christensen et al., *The Big Idea: The New M&A Playbook*, *HARV. BUS. REV.*, Mar. 2011, at 49, 49 (reporting that “study after study puts the failure rate of mergers and acquisitions somewhere between 70 percent and 90 percent”); Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 *GEO. MASON L. REV.* 833, 873-79 (2011) (examining evidence from corporate finance that suggests that entire categories of mergers are “more likely to destroy, rather than enhance, shareholder value”); Vicki Bogan & David Just, *What Drives Merger Decision Making Behavior? Don’t Seek, Don’t Find, and Don’t Change Your Mind*, 72 *J. ECON. BEHAVIOR & ORG.* 930, 930-31 (2009) (collecting some of the academic research that many mergers add no value or reduce shareholder value for the acquiring firm); Sara B. Moeller et al., *Do Shareholders of Acquiring Firms Gain from Acquisitions?*, NBER Working Paper 9523 (Feb. 2003), <http://www.nber.org/papers/w9523> (in examining whether shareholders of acquiring firms gain when firms announce acquisitions of public firms, private firms, and subsidiaries, the study examined over 12,000 purchases between 1980 to 2001 for more than \$1 million by public firms and found roughly “shareholders from small firms earn \$8 billion from the acquisitions they made from 1980 to 2001, whereas the shareholders from large firms lose \$226 billion”); James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 *BUFF. L. REV.* 249, 280 (2001) (“The systematic empirical evidence on past mergers and the available data on the mega-mergers, however, now supports the conclusion that a large majority of these transactions destroy shareholder value.”); Walter Adams & James W. Brock, *Antitrust and Efficiency: A Comment*, 62 *N.Y.U. L. REV.* 1116, 1117 n.8 (1987) (highlighting earlier studies).

³⁷ Merger Guidelines § 10.

³⁸ *Id.*

³⁹ *Id.* (“it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific”).

⁴⁰ Wright Speech, *supra* note 4, at 21.

cognizable efficiencies claim. Since price-fixing falls within antitrust's well-forged case law, Wright's proposed standard does not apply.

But what about invitations to collude? Arguably, some invitations to collude can be prosecuted as attempts to monopolize.⁴¹ But not every offer to collude, if accepted, leads to monopoly power. So, as Wright notes, Section 5 can reach such conduct.⁴² Currently, antitrust counsel impress on their clients to avoid private communications that the FTC likely would construe as invitations to collude.⁴³ Although public communications are more problematic, it is "reasonably well-accepted" within the antitrust community that the FTC treats private solicitations to collude as *per se* illegal under Section 5.⁴⁴

Although not without some controversy, the FTC's *per se* rule for private solicitations has the "virtue of being a comparatively clear-cut rule for counseling purposes."⁴⁵ After all, if hard-core cartels are *per se* illegal, without regard of their economic impact or efficiencies, then private solicitations to enter into hard-core cartels should also be *per se* illegal.

Wright's proposed standard muddies the legal waters. In his one example involving invitations to fix prices, Wright strikes down the solicitation, without mentioning the two firms' market power or efficiency claims.⁴⁶ It seems to suffice that the invitation "creates a substantial risk of competitive harm."⁴⁷ But his proposed standard would consume far more agency resources. The FTC first must prove both the magnitude and probability of harm to competition from the invitation.⁴⁸ Moreover, the aspiring cartel, under the proposed standard, could raise a cognizable efficiency for its behavior—something courts and the agencies seek to avoid altogether for cartel behavior. Further, the proposed standard requires the FTC to not only consider, but to ultimately disprove, any cognizable efficiency claim by an aspiring cartel.

Thus, under Wright's proposed legal standard, one small bidder could privately invite another small bidder to collude.⁴⁹ A major competitor could also invite several rivals to collude, if the proposed cartel offers any cognizable efficiency, however small. But if one competitor agrees, they face imprisonment, regardless of the cartel's impact on competition or efficiencies. Whatever the justification, this is hardly a coherent framework.

Besides invitations to collude, Wright identifies unilateral conduct by a firm "to acquire market power that does not yet rise to the level of monopoly power necessary for a violation of

⁴¹ *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1118 (5th Cir. 1984) (finding that if the other party accepted the offer to collude, then both parties would have acquired monopoly power).

⁴² Wright, *supra* note 2, at 8.

⁴³ Larry Fullerton, *FTC Challenges to "Invitations to Collude,"* 25 ANTITRUST 30 (Spring 2011).

⁴⁴ *Id.* at 31, 33.

⁴⁵ *Id.* at 31.

⁴⁶ Wright, *supra* note 2, at 9 (Ex. 2).

⁴⁷ *Id.*

⁴⁸ Wright Speech, *supra* note 4, at 20.

⁴⁹ Under the proposed standard, the FTC's finding "must be rooted in sound economic analysis that calculates—or at a minimum provides the intuition for understanding—the magnitude and probability of the purported harm to competition." Wright Speech, *supra* note 4, at 20. This would be very difficult if the two bidders had low market shares and entry was easy.

the Sherman Act.”⁵⁰ But it is unclear when exactly his proposed standard bumps into an attempt to monopolize claim under Section 2 of the Sherman Act, which can, albeit infrequently, involve unilateral conduct by firms with low market shares.⁵¹

More importantly, several of Wright’s examples entail unilateral conduct that Section 2 does reach.⁵² Courts and agencies typically rely on the rule of reason to evaluate novel competitive restraints with potential pro-competitive effects. Wright’s proposed standard would also apply to novel conduct for which there isn’t well-forged antitrust case law. So if a novel practice arises, it is unclear whether the FTC would apply the rule of reason, the proposed standard, or some other legal standard. The problem is compounded given that Wright’s proposed standard is far more deferential to anticompetitive conduct than antitrust’s rule of reason, which covers a vast swath of unilateral conduct.⁵³ The risk of arbitrary and inconsistent results therefore increases.

Consider one of Wright’s examples:

Firm A joins a standard-setting organization and intentionally and deceptively fails to disclose a patent covering a critical technology that ultimately is adopted as part of a standard. Firm A acquires monopoly power as a result of the non-disclosure because the standard-setting organization’s members become locked into Firm A’s technology. The Commission can challenge Firm A’s non-disclosure of its intellectual property right as an unfair method of competition because the conduct harms competition and lacks cognizable efficiencies.⁵⁴

Firm A’s non-disclosure of its intellectual property right falls squarely within the Sherman Act.⁵⁵ Wright, however, assumes that this conduct would be subject to his proposed standard and, absent any cognizable efficiencies, be illegal.⁵⁶

Even if this conduct were novel, the outcome could vary depending on whether the rule of reason or the proposed standard were applied. Both the rule of reason and the proposed standard require the FTC and courts to “look to the particular facts of the case to determine whether a challenged restraint is likely to enhance or harm competition.”⁵⁷ Consequently, under both standards, the FTC must expend the time and expense to prove actual or likely anticompetitive harm. But under the proposed standard’s second element, the outcomes can

⁵⁰ Wright, *supra* note 2, at 8.

⁵¹ L&W/Lindco Products, Inc. v. Pure Asphalt Co., 979 F. Supp. 632, 637 (N.D. Ill. 1997) (noting that defendant’s market share grew from 5-10 percent to already capturing, or is well on the way of capturing, 40 percent of the relevant market and that market performance, while relevant to monopoly power, is by no means dispositive).

⁵² See Wright, *supra* note 2, at 9 (Example 3 involving firm’s use of deception in an attempt to monopolize); 13 (Example 5 involving firm’s use of deception to attain a monopoly); 14 (Examples 7 and 8 involving patent holder’s maintaining its monopoly).

⁵³ Averitt, *supra* note 18 (“Wright’s proposed efficiency screen comes very close to a rule of per se legality.”).

⁵⁴ Wright, *supra* note 2, at 13.

⁵⁵ Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) (holding that “(1) in a consensus-oriented private standard-setting environment, (2) a patent holder’s intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with [a standard setting organization’s] reliance on that promise when including the technology in a standard, and (4) the patent holder’s subsequent breach of that promise, is actionable anticompetitive conduct” under Section 2 of the Sherman Act).

⁵⁶ Wright, *supra* note 2, at 13.

⁵⁷ Freeman v. San Diego Ass’n of Realtors, 322 F.3d 1133, 1150 (9th Cir. 2003).

conflict. Under Wright's proposed standard, if the defendant raises a tiny (relative to the anticompetitive harm), but cognizable, efficiency, the FTC loses. Under the rule of reason, the FTC prevails. It is hard to see how consumers benefit from this incongruous result, especially when deception is hardly a "consumer-welfare enhancing business practice."

It gets worse. Preparing a rule of reason case is already daunting for the agencies, leading to very few successful challenges. But the FTC would have relatively better odds striking down a novel restraint under the rule of reason than it would under Wright's standard. Under the rule of reason, the FTC need not disprove the novel conduct's cognizable efficiencies. Even when defendant's conduct yields some cognizable efficiency, the FTC still could prevail by showing greater anticompetitive harm.

Thus, for novel restraints and any other conduct for which no well-forged case law exists, the FTC would be less willing to challenge the conduct under the proposed standard than it would under the rule of reason. With fewer FTC challenges come even fewer cases. With fewer cases, the case law is likelier to remain undeveloped, perpetuating the proposed standard's reach. Consequently, for all conduct for which no well-forged antitrust case-law exists, the defendant, under the proposed standard, could egregiously harm suppliers and consumers, causing millions, or even billions of dollars in competitive harm. All the defendant needs is evidence of some cognizable efficiency, conceivably as little as one dollar.⁵⁸

IV. SEVERAL SIGNIFICANT RISKS ARISE IF THE FTC ADOPTS THIS STANDARD

First, the proposed standard reduces accuracy. The standard's bias against false positives makes sense for the rare case, where society generally desires this method of competition, no societal harm arises if other competitors adopt the practice, and—absent prosecution under Section 5—this method of competing would be otherwise legal. But the proposed standard extends far beyond this narrow pocket of innocuous conduct to otherwise tortious and unethical practices that society seeks to stamp out.

For any new or evolving business practices that happen to fall outside the well-forged antitrust case law, the standard enables unscrupulous firms to significantly harm competition and consumers for a cognizable efficiency trinket. Why should our citizens suffer this harm? Although the Policy Statement claims to rely on "modern economics," it is hard to see what current empirical economic work demands this standard. The modern economic and legal scholarship has moved away from the dated and discredited neo-classical economic beliefs in self-correcting markets. Greed is no longer praised as a virtue. Fairness and the importance of trust are today's economic hot topics.

Second, the proposed standard, while easy to apply in isolation, is hard to administer in connection with the traditional antitrust standards. Ideally the Section 5 legal standard would reach as wide a scope of conduct as possible in simultaneously striking down conduct beyond the

⁵⁸ If the one-dollar efficiency is rejected as too low, then the issue becomes how large must the efficiencies be to counter the anticompetitive harm. Now the court and agency are balancing, which the proposed legal standard seeks to avoid. Moreover, the standard becomes more subjective, as the efficiency can be anywhere above an amount deemed trivial relative to the magnitude of the anticompetitive harm.

Sherman and Clayton Acts and conduct currently illegal under those Acts.⁵⁹ That is clearly not the case here. Perhaps it is difficult to craft one legal standard that promotes both consistency and broad applicability. Antitrust already has several legal standards: the *per se* illegal standard, quick-look, rule of reason, and the incipency standard. Consequently one cannot demand from Wright one legal standard that consistently and accurately does the job of the current standards.

But the problem here is that the proposed legal standard, rather than supplementing and bolstering the Sherman and Clayton Acts, undermines them. The proposed standard, even when it does not apply, becomes the mecca for antitrust violators.

Suppose you represent a monopsony. You could reasonably argue that the case law on monopsony behavior is not well-forged, and that your client's conduct should be evaluated under the proposed standard rather than the rule of reason. As antitrust violators rush to this weak standard, the FTC would have to define and then guard the border. Unless the FTC wants to become a museum or mausoleum, it would need to quarantine the proposed legal standard to conduct well beyond the Sherman and Clayton Acts' reach.

Given that (i) several of Wright's examples entail conduct that the Sherman Act reaches, and (ii) the Sherman Act reaches any agreement to restrain trade and unilateral conduct by some firms with market shares below 40 percent, marking this boundary will be difficult. Antitrust plaintiffs have had limited success in determining where and when the rule of reason becomes quick look. Now the FTC would have to defend its rule of reason from being encroached by an even weaker standard.

Third, the proposed standard increases the risk of inconsistent outcomes for behavior outside the well-forged antitrust case law, but within the Sherman and Clayton Acts' reach. Liability can depend on the luck of the draw—whether the DOJ or FTC investigates the anticompetitive behavior, and whether the FTC seeks to apply the proposed standard or the rule of reason.

Even if the FTC could somehow quarantine the proposed standard to conduct well beyond the Sherman or Clayton Acts' reach, how will the state agencies and courts respond to the FTC's retrenchment? Several state courts currently turn to the FTC to construe their state law on unfair methods of competition and deceptive acts and practices.⁶⁰ Whether they will continue to do so is questionable.

V. CONCLUSION

It is hard to see how the proposed legal standard fulfills Congress's intent to reach beyond the Sherman and Clayton Acts and prohibit "incipient violations of those statutes, and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit."⁶¹ For any novel competitive practice, the FTC would have better luck

⁵⁹ *In re McWane, Inc. & Star Pipe Products, Ltd.*, 2013 WL 2100132 (F.T.C. May 9, 2013) ("Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Sections 1 or 2 of the Sherman Act.").

⁶⁰ *See, e.g., Ciardi v. F. Hoffmann-La Roche, Ltd.*, 762 N.E.2d 303, 309 (Mass. 2002).

⁶¹ *du Pont*, 729 F.2d at 136-37 (internal citations omitted).

under the rule of reason than this standard. The proposed standard would kill what little vitality remains within the “unfair methods of competition” statute.

Both the liberal and conservative Supreme Court Justices seem dissatisfied, of late, with the unwieldiness of antitrust litigation under the Court’s rule of reason. They support antitrust legal standards that lawyers can readily and simply explain to their clients. Thus, the FTC should take this opportunity to provide greater clarity on what businesses can and cannot do, without the risks of private treble damages and attorney’s fees.

The Commissioners should work together to design a better legal standard to supplement and bolster the Sherman and Clayton Acts. The FTC can propose legal presumptions, based on the empirical evidence, regarding specific practices, with the aim to stop in their incipency acts which, when full blown, would violate the Sherman and Clayton Acts.

To promote consistency and to prevent the new legal standard from usurping the existing standards, one safeguard is to design the new legal standard to be as stringent as the bordering traditional standards. This way the FTC (or the defendants) need not guard the border to prevent the other side from slipping to the more deferential standard. And, over time, the new legal standard could be refined by allowing specific defenses for specific types of restraints.

If we want to avoid future economic crises involving firms too-big-to-fail, we need a better incipency standard. Although his proposed legal standard falls short, Wright admirably has sparked the debate.