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Recalibrating Section 5: A Response to the CPI Symposium

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I. INTRODUCTION

I want to thank the participants in Competition Policy International's Symposium on the Federal Trade Commission's ("FTC" or the "Commission") unfair methods of competition ("UMC") authority under Section 5 of the FTC Act and, in particular, my Proposed Policy Statement² suggesting one approach to defining what constitutes an UMC.³ The Symposium elicited many thoughtful contributions and identified some misunderstandings about the rationale for my proposal. I will take this opportunity to share my view of the current state of play with respect to FTC guidance for Section 5, suggest the intellectual distance between the various UMC definitions offered for public scrutiny is relatively small, address a few criticisms of my Proposed Policy Statement, and demonstrate why I believe there is significant reason to be optimistic that this Commission can finally produce much needed guidance in this important area.

As the FTC enters its second century, it is an especially appropriate time to reflect upon whether the agency's various enforcement and policy tools are being put to the best possible use to help the agency fulfill its competition mission. Now is the time to sharpen tools that have long been deployed effectively and to evaluate whether tools that have not proven up to the task should be salvaged or scrapped. One of these tools—the Commission's UMC authority under Section 5 of the FTC Act—is a particularly suitable candidate for evaluation.

I have made no secret of the fact that I think the Commission's record with respect to Section 5 is bleak. The historical record reveals a remarkable and unfortunate gap between the theoretical promise of Section 5 as articulated by Congress and its application in practice by the Commission. This gap has grown in large part due to the absence of any guidance articulating what constitutes a UMC. Both the existence and cause of the Section 5 performance gap are well understood. Indeed, for at least the past twenty years, commissioners from both parties have acknowledged that a principled standard for application of Section 5 would be a welcome improvement and have called for formal UMC guidance.

¹ Commissioner, U.S. Federal Trade Commission. The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I thank my attorney advisor, Jan Rybnicek, for his many thoughtful contributions and valuable insights on this topic. I have also benefited from discussions with Doug Melamed, Tim Muris, Joe Sims, and Steve Salop.

² Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013), *available at* <http://ftc.gov/speeches/wright/130619umcpolicystatement.pdf>.

³ Published as Guidelines, 9(1) CPI ANTITRUST CHRON. (Sept. 2013), *available at* <https://www.competitionpolicyinternational.com/sep-13/>.

In the absence of guidelines, the Commission's UMC authority cannot possibly contribute effectively to the agency's competition mission. At best, without UMC guidelines, the gap will remain. At worst, the absence of UMC guidelines can be counterproductive to the FTC's competition mission, raising issues of fundamental fairness and potentially deterring consumer welfare-enhancing conduct.

II. IDENTIFYING THE PROBLEMS: SECTION 5 PROCESS AND SUBSTANCE

The fundamental problem with the Commission's UMC enforcement is one that combines administrative process and substance. The agency's competition mission and its beneficiaries—consumers—are put at risk by the obvious and problematic interaction between the agency's administrative process advantages and the vague and ambiguous nature of the FTC's UMC authority. These two issues combine to pose a unique barrier to the application of Section 5 in a manner that consistently benefits rather than harms consumers.

The vague nature of Section 5 is well known, and it is not necessary to recount the systematic sources of its volatility here.⁴ Proposed UMC definitions and approaches to UMC enforcement have varied substantially over time. Beliefs that the modern FTC has *now* somehow moved beyond this product of its institutional design are no more than wishful thinking. Indeed, there are still a few voices among the commentariat who lament the vague and boundless UMC authority as too limiting upon FTC enforcement. These commentators today hold out hope for an unbridled Section 5 the Commission can use expansively to capture all manner of conduct that a majority of the Commission happens to perceive as bad for consumers.⁵

For instance, one former commissioner has recently called upon the Commission to challenge Patent Assertion Entities ("PAEs")—often referred to as "patent trolls"—because "we

⁴ The sources of the significant variation and instability of the UMC definition include, but are not limited to: (1) the lack of any requirement that the agency interpret Section 5 consistently while membership of the Commission remains constant and (2) changing membership of the Commission over time. Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority (June 19, 2013), at 8-12, Remarks at the Antitrust Section of the New York State Bar Association's Executive Committee Meeting, *available at* <http://ftc.gov/speeches/wright/130619section5recast.pdf>. Take for instance the position offered by one commissioner who several years ago stated that conduct can constitute an UMC when it includes "actions that are collusive, coercive, predatory, restrictive, or deceitful, or other-wise oppressive, and does so without a justification that is grounded in legitimate, independent self-interest." *Id.* at 9 (citing Concurring Opinion of Commissioner Jon Leibowitz at 15, *In re Rambus, Inc.*, FTC Docket No. 9302, *available at* <http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf>).

⁵ See, e.g., Neil W. Averitt, *The Elements of a Policy Statement on Section 5*, ANTITRUST SOURCE, Oct. 2013, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_averitt_10_29f.pdf; Maurice Stucke, *A Response to Commissioner Wright's Proposed Policy Statement Regarding Unfair Methods of Competition*, 9(1), CPI ANTITRUST CHRON. (Sept. 2013), *available at* <https://www.competitionpolicyinternational.com/a-response-to-commissioner-wright-s-proposed-policy-statement-regarding-unfair-methods-of-competition/>; Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using "Consumer Choice" Analysis*, ANTITRUST SOURCE, Feb. 2009, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Lande2_26f.authcheckdam.pdf; Albert A. Foer, *Section 5 as a Bridge Toward Convergence*, ANTITRUST SOURCE, Feb. 2009, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Foer2_26f.authcheckdam.pdf.

have a gut feeling” that the conduct violates Section 5.⁶ Such statements illustrate precisely the type of enforcement regime we should be concerned about when the Commission has failed to commit itself to a set of principles captured in a formal policy statement articulating how the agency intends to apply its UMC authority under Section 5.

However, the key to understanding the threat of Section 5 is the interaction between its lack of boundaries and the FTC’s administrative process advantages. What do I mean by administrative process advantages? Consider the following empirical observation that demonstrates at the very least that the institutional framework that has evolved around the application of Section 5 cases in administrative adjudication is quite different than that faced by Article III judges in federal court in the United States. The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges (“ALJs”) in the past nearly twenty years. In each of those cases, after the administrative decision was appealed to the Commission, the Commission ruled in favor of FTC staff. In other words, in 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed.⁷ By way of contrast, when the antitrust decisions of federal district court judges are appealed to the federal courts of appeal, plaintiffs do not come anywhere close to a 100 percent success rate. Indeed, the win rate is much closer to 50 percent.

There are a number of hypotheses one might suggest to explain this disparity, but the leading two possibilities are (1) Commission expertise over private plaintiffs in picking winning cases and/or (2) institutional and procedural advantages for the Commission in administrative adjudication that are fundamentally different than what private plaintiffs face in federal court. The relatively harsh treatment Commission decisions have endured in federal courts of appeal over the same time period relative to the treatment federal district courts have received gives at least some pause to the expertise hypothesis.⁸ At a very minimum, however, these figures suggest that how we conceive of the appropriate time and place to use the Commission’s UMC authority to further its competition mission ought to take into account these institutional features.

Further, these figures should call into question the idea that concepts like the rule of reason and other substantive doctrine that evolved in the federal courts, a different institutional setting with a different balancing of the costs and benefits of error and administration, are appropriate for wholesale incorporation into Section 5 adjudication. Professor Salop, for instance, proposes that the rule of reason would be an appropriate tool for assessing UMC claims

⁶ Former Commissioner J. Thomas Rosch, Remarks at the Federalist Society 2013 National Lawyer Convention, available at <http://youtu.be/rZk9SYs6UZU>.

⁷ See David Balto, *Can the FTC be a Fair Umpire?*, THE HILL, Aug. 14, 2013, available at <http://thehill.com/blogs/congress-blog/economy-a-budget/316889-can-the-ftc-be-a-fair-umpire>.

⁸ See Joshua D. Wright & Angela Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, J. OF ANTITRUST ENFORCEMENT at 16 (Dec. 2012) (showing the Commission is reversed at four times the rate of federal district court judges).

but entirely ignores the administrative process advantages available to the Commission in enforcing Section 5 claims that are not available in federal court.⁹

The intuitive appeal of a rule of reason analysis that might make sense in federal court is undermined by the differences in administrative institutions and Article III courts—a difference starkly highlighted by the Commission’s “perfect” record over almost two decades. A fundamental feature of my Proposed Policy Statement is to harness these administrative advantages and use them where they are appropriate—not in cases involving balancing and the risk of over-enforcement, but rather to use them to attack the worst possible conduct lacking redeeming competitive virtues.

The combination of institutional and procedural advantages with the vague nature of the Commission’s Section 5 authority gives the agency the ability, in some cases, to elicit a settlement even though the conduct in question very likely may not be anticompetitive. This is because firms typically prefer to settle a Section 5 claim rather than going through lengthy and costly administrative litigation in which they are both shooting at a moving target and have the chips stacked against them. Significantly, such settlements also perpetuate the uncertainty that exists as a result of the ambiguity associated with the Commission’s UMC authority by encouraging a process by which the contours of Section 5 are drawn without any meaningful adversarial proceeding or substantive analysis of the Commission’s authority.

The second impediment to effective contribution of Section 5 to the Commission’s competition mission is the absence of even a minimal level of certainty for businesses. UMC guidelines would provide businesses with important guidance about what conduct is lawful and what conduct is unlawful under Section 5. The benefit of added business certainty is less important than ensuring Section 5 enforcement actions—including consents—actually reach and deter anticompetitive conduct rather than chill pro-competitive conduct. However, guidance to the business community surely is important. Indeed, the FTC has issued nearly fifty sets of guidelines on a variety of topics, many of them much less important than Section 5, to help businesses understand how the Commission applies the law and to allow practitioners to better advise their clients on how to comply with their legal obligations.

Without a policy statement that clearly articulates how the Commission will apply Section 5, businesses must make difficult decisions about whether the conduct they wish to engage in will trigger a Commission investigation or worse. Such uncertainty inevitably results in the chilling of some legitimate business conduct that would otherwise have enhanced consumer welfare but for the firm’s fear that the Commission might intervene, as well as the attendant consequences of that intervention. Those fears would be of little consequence if the Commission’s Section 5 authority was clearly defined and businesses could plan their affairs to steer clear of its boundaries. In practice, however, the scope of Section 5 today is as broad or as narrow as a majority of the commissioners believes it is.

⁹ See Steve C. Salop, *Guiding Section 5: Comments on the Commissioners*, 9(1), CPI ANTITRUST CHRON. (Sept. 2013), available at <https://www.competitionpolicyinternational.com/guiding-section-5-comments-on-the-commissioners/>.

III. STATE OF PLAY IN THE SECTION 5 DEBATE

In an effort to start a discussion about the appropriate contours of the Commission's UMC authority, and ultimately to remedy the problems outlined above that have prevented Section 5 from being a productive member of the antitrust community, earlier this year I offered a concrete Proposed Policy Statement explaining my views of how the agency should apply its signature competition statute. My Proposed Policy Statement provides that an unfair method of competition should be defined as an act or practice that (1) harms or is likely to harm competition significantly and that (2) lacks cognizable efficiencies.¹⁰

There are several benefits to this definition of an UMC. First, the definition allows the Commission to reach beyond the scope of the Sherman and Clayton Acts, as Congress intended. Second, it does so while explicitly tethering the agency's enforcement actions to the modern economic concept of harm to competition. Third, this definition allows the Commission to leverage its expertise and administrative process advantages to target conduct that is most likely to harm consumers. Fourth, this definition reduces the risk of potentially deterring welfare-enhancing conduct and provides the business community with clear guidance as to what conduct will be considered unlawful under Section 5.

My proposed definition in no way immunizes, as some have suggested, conduct that has efficiency benefits from the antitrust laws. Any conduct falling outside my proposed UMC definition because it generates cognizable efficiencies still can be prosecuted under the traditional antitrust laws. The FTC is more than capable of challenging conduct where the anticompetitive effects outweigh any procompetitive benefits. The agency does so successfully today, and should continue to do so where appropriate.

Nor will just any efficiency justification save a party from scrutiny under Section 5 under my proposed definition. As practitioners who appear regularly before the agency on merger matters know all too well, the Commission does not credit efficiency benefits easily and requires significant evidence before deeming an efficiency to be cognizable.

Over the past nearly six months, through symposiums such as this one, conferences, roundtables, and other forums, there has been considerable debate and commentary from the antitrust bar, consumer groups, the business community, my colleagues on the Commission, and even members of Congress¹¹ about the need for Section 5 guidelines and what those guidelines should ultimately say about the Commission's UMC authority. These discussions lead me to be very optimistic that this Commission can reach agreement on a policy statement that benefits consumers and the business community by strengthening the agency's ability to target anticompetitive conduct and providing clear guidance about the boundaries of the Commission's

¹⁰ Wright, *supra* note 2, at 2-3.

¹¹ Members of the Senate and House Judiciary Committees have engaged in the debate about the need for Section 5 guidance by sending a letter to Chairwoman Ramirez urging the Commission to issue a UMC policy statement. See Letter from Chairman Bob Goodlatte and Members of Congress to the Chairwoman Edith Ramirez (Oct. 23, 2013), available at <http://judiciary.house.gov/news/2013/Signed%20Letter%20to%20FTC.pdf>. Congressional interest in Section 5 raises the real possibility that if the Commission fails to address the absence of UMC guidance, Congress may take the issue into its own hands by either defining the scope of Section 5 for the Commission, or worse, stripping the agency of its unique Section 5 authority altogether.

Section 5 authority. Indeed, there already appears to be broad consensus on a majority of the core questions that comprise the Section 5 debate.

First, there is broad consensus that guidelines would be helpful, if not required, if the FTC uses Section 5 to reach conduct beyond the traditional antitrust laws.¹² Indeed, a majority of the current Commission has stated that Section 5 guidelines would be helpful.¹³ This is in many ways unsurprising as it has been the position of a majority of the FTC Chairmen, irrespective of political affiliation, over the past two decades that a Section 5 policy statement would be beneficial.¹⁴ Indeed, the Commission has long taken transparency seriously. For instance, the Commission's decision to issue policy statements defining its authority to prosecute "unfair and deceptive acts or practices" as part of the agency's consumer protection mission has widely been regarded as a major success.¹⁵

Those who oppose guidelines claim the case law already provides sufficient guidance to the business community and antitrust bar while giving the Commission much needed flexibility to challenge conduct believed to be anticompetitive.¹⁶ Opponents of guidance further claim that guidelines are unnecessary because the FTC uses Section 5 judiciously and only in limited cases.

With respect to the first objection, Joe Sims has already pointed out in his contribution to this Symposium that it is impossible for even the most skilled antitrust practitioner to glean from the existing case law what is lawful and what is unlawful under Section 5.¹⁷ Moreover, the litigated cases are largely unhelpful because they pre-date the incorporation of modern economics into antitrust. As a result, although the cases have not been overturned and thus still represent good law, they should be as helpful in predicting the agency's Section 5 enforcement

¹² See, e.g., Salop, *supra* note 9, at 1 ("Agency Guidelines can provide a useful role in defining the scope of agency enforcement intentions and providing guidance to the business community, outside counsel, and agency staff. They also can lead to more refined legal standards.").

¹³ See Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Section 5: Principles of Navigation (July 25, 2013), Remarks at the U.S. Chamber of Commerce, *available at* <http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf>; Julie Brill, Commissioner, Fed. Trade Comm'n, Remarks at Aspen Forum 2013: A Conversation with the Commissioners (Aug. 20, 2013), *available at* http://www.youtube.com/watch?v=9V_YEu1FIAE (stating that a unanimous policy statement could provide helpful guidance).

¹⁴ It is not often that I have been accused of carrying forward the Leibowitz competition agenda, but I am quite happy here to benefit from the former Chairman's efforts (as well as calls by former Chairmen Kovacic, Majoras, and Pitofsky) in urging the Commission to issue a formal policy statement on the application of its UMC authority under Section 5.

¹⁵ See FTC Policy Statement on Unfairness (1980), appended to Final Order, Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* <http://ftc.gov/bcp/policystmt/ad-unfair.htm>; FTC Policy Statement on Deception (1983), appended to Final Order, Cliffdale Assocs., Inc. 103 F.T.C. 110, 174 (1984), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

¹⁶ Sharis A. Pozen & Anne K. Six, *Section 5 Guidelines: Fixing a Problem that Doesn't Exist?* 9(1), CPI ANTITRUST CHRON. (Sept. 2013), *available at* <https://www.competitionpolicyinternational.com/section-5-guidelines-fixing-a-problem-that-doesn-t-exist/>.

¹⁷ Joe Sims, *Section 5 Guidelines: Josh Wright as the New King of Corinth*, 9(1), CPI ANTITRUST CHRON. (Sept. 2013), *available at* <https://www.competitionpolicyinternational.com/section-5-guidelines-josh-wright-as-the-new-king-of-corinth/> ("Excuse me, but if you can take the existing cases and from those tell me what Section 5 covers and what it does not, you are a lot smarter than I am.").

agenda as *Von's Grocery*¹⁸ is for predicting which mergers the agency will challenge—which is to say not at all.

The Commission's consents also do not provide any meaningful guidance about how the Commission will apply its Section 5 authority. Although the consents clearly suggest that a practitioner today would be wise to advise a client that holds a standard essential patent ("SEP") that the agency might use Section 5 to challenge how the client has enforced its SEP rights, what guidance did the first SEP holder that became subject to a Section 5 challenge have? Put another way, how do businesses know which conduct that has not yet been subject to a Section 5 claim will become subject to Section 5 scrutiny in the future?¹⁹ For instance, as mentioned above, some are calling on the FTC to use Section 5 to prosecute PAEs. Are PAEs sufficiently on notice that their conduct could violate Section 5? What consent can PAEs look to for guidance about whether their conduct violates Section 5?

With respect to the notion that the Commission uses its Section 5 authority judiciously and only in limited instances, the data simply does not support the assertion that Section 5 represents an insignificant part of the agency's enforcement agenda. For instance, in the past year alone the Commission has brought four non-merger enforcement actions of which precisely one-half were Section 5 UMC cases.²⁰ More dramatically, the agency claimed credit for consumer savings of roughly \$1 billion in fiscal year 2012 from merger and non-merger enforcement victories, of which over 33 percent is attributable to standalone Section 5 UMC enforcement actions.²¹ When viewed as a portion of consumer savings solely from the Commission's non-merger enforcement agenda, the percentage attributable to Section 5 standalone claims balloons to over 75 percent.

Both in terms of the number of standalone Section 5 cases as a percentage of the Commission's non-merger enforcement agenda and as a percentage of consumers' purported overall return on investment, the Commission's use of Section 5 appears to be anything but minimal and certainly these data are more than sufficient to rebut the claims of those who would argue that Section 5 guidelines are a solution in search of a problem. Given the significant role Section 5 plays in the agency's enforcement agenda, the Commission would do well to provide transparency and guidance for how it applies its Section 5 UMC authority as it has done in other areas of enforcement.

Second, there is broad consensus that one of the requirements of the FTC's signature *competition* statute should be a showing of "harm (or likely harm) to competition" as the phrase

¹⁸ *United States v. Von's Grocery Co.*, 385 U.S. 270 (1966).

¹⁹ See Sims, *supra* note 17, at 2 ("The one thing we know for certain is that there will always be something new that catches attention but looks hard to attack under the Sherman Act.")

²⁰ A complete list of non-merger competition enforcement actions for fiscal year 2013 is available at <http://ftc.gov/bc/caselist/nonmerger/consents/2013.pdf>.

²¹ Fed. Trade Comm'n, Performance & Accountability Report Fiscal Year 2012, *available at* www.ftc.gov/opp/gpra/2012parreport.pdf. The fiscal year 2012 consumer savings are calculated using the average consumer savings of fiscal year 2012 and the previous four fiscal years. As the Performance & Accountability Report notes, an overwhelming majority of the consumer savings from non-merger enforcements actions is attributable to one standalone Section 5 case: Intel.

has been developed under the traditional antitrust laws.²² This phrase has a specific meaning that is known to the antitrust bar and that is tethered to modern economics. Indeed, a majority of the Commission has publicly stated that the Commission should only invoke Section 5 on a standalone basis where there is harm to competition as understood under the traditional laws.²³ Most significantly, in a letter to Chairman Bob Goodlatte of the House Judiciary Committee, Chairwoman Ramirez expressed her view that the Commission should only use Section 5 where there is likely harm to competition and only after taking into account any efficiency justifications.²⁴

Third, there is a growing (albeit incomplete with the notable exception of Joe Sims and others who contend Section 5 ought to be interpreted to extend only to the boundaries of the Sherman and Clayton Acts and no further) consensus that Section 5 is broader than the traditional antitrust laws and is a unique institutional tool in the FTC's toolkit. For instance, I have explained in my Proposed Policy Statement that Section 5 should be able to reach practices that have not yet resulted in harm to competition but are likely to result in anticompetitive effects if allowed to continue.²⁵

These three areas of consensus cover much of the Section 5 debate, while leaving room on the margins with respect to how we deal with efficiencies to best allow the FTC to use its UMC authority to complement its mission of protecting competition. Simply documenting and memorializing the consensus on the issues above would be an improvement upon the current state of affairs, but in my view, there is a real opportunity to do more.

IV. WHAT REMAINS TO BE SETTLED: HOW TO ANALYZE EFFICIENCIES UNDER SECTION 5

What remains is to identify the precise definition of a UMC claim within these broad areas of agreement that will maximize the rate of return the Commission's Section 5 UMC enforcement efforts earn for consumers. There is no shortage of potential definitions that would bring Section 5 UMC jurisprudence and agency practice within the confines of "harm to competition" as understood in modern antitrust practice and improve the incorporation of economic analysis in standalone Section 5 cases. There appear to be at least four major possibilities consistent with a modern economic approach to antitrust. All have in common that efficiencies will be incorporated into the UMC analysis but each applies different weights.

First, one could define a standalone UMC violation to require evidence of a violation of the traditional federal antitrust laws; in other words, Section 5 UMC authority is co-extensive with the Sherman and Clayton Acts. Former Chairman Muris has favored this approach. Joe

²² See Salop, *supra* note 9, at 4 ("Our major agreement is that the basic standard should be geared to the condemnation of unilateral conduct that allows a firm to achieve, maintain, or enhance market power to the detriment of consumers, even if it does not lead to monopoly").

²³ See Ohlhausen, *supra* note 13; Letter to Chairman Bob Goodlatte from Chairwoman Edith Ramirez Responding to a Letter from Chairman Goodlatte and Members of Congress Dated Oct. 23, 2013 (Nov. 8, 2013).

²⁴ Letter to Chairman Bob Goodlatte from Chairwoman Edith Ramirez Responding to a Letter from Chairman Goodlatte and Members of Congress Dated Oct. 23, 2013 (Nov. 8, 2013).

²⁵ See Wright, *supra* note 2, at 8 (stating "when the act or practice has not yet harmed competition, the Commission's assessment must include both the magnitude and probability of competitive harm").

Sims articulates the benefits of this approach in his contribution to this symposium.²⁶ This approach requires UMC analysis to incorporate by reference the framework for analyzing competitive harms and efficiencies under the traditional antitrust laws. This approach would eliminate the now conventional application of UMC to conduct outside the traditional antitrust laws, such as invitations to collude. It would also eliminate more adventurous recent applications outside the scope of the traditional antitrust laws, including assertion of patent rights and the mere breach of FRAND commitments.

A second possibility is to define a standalone UMC violation to require evidence of harm to competition *and* that the underlying conduct has no cognizable efficiencies; that is, a standard that acknowledges Section 5 is broader than the traditional antitrust laws but targets violations comprising nakedly anticompetitive conduct. This is the standard I prefer and have articulated in my Proposed Policy Statement.²⁷ The fundamental premise of this approach is a conscious decision to recalibrate the Commission's Section 5 authority to harness its institutional process advantages and leverage them toward addressing the most nakedly anticompetitive conduct. Efficiencies, if deemed cognizable and verifiable under an approach similar to that applied under the Horizontal Merger Guidelines, would preclude a finding that an act or practice constituted an UMC. By my count, well over half of the Section 5 UMC cases the FTC has successfully brought in the last 20 years also could be brought under this standard. Of course, the FTC would remain free, like the U.S. Department of Justice ("DOJ"), to prosecute in federal court and under the traditional antitrust laws cases involving conduct that generated harms greater than efficiencies.

A third approach is that a standalone UMC violation requires evidence of harm to competition and that the harms are disproportionate to any benefits arising from the conduct in question. This test would apply greater weight to efficiencies than to competitive harms in determining whether a UMC violation occurs. Commissioner Ohlhausen has adopted this test at the core of her proposed approach to Section 5.²⁸

Finally, a standalone UMC violation could require evidence of harm to competition and that the harms outweigh the benefits; in other words, what is often described as a traditional rule of reason analysis or consumer-welfare test. Professor Salop endorses this "rule of reason" approach in this contribution to this Symposium.²⁹ The approach purports to credit harms and

²⁶ See Sims, *supra* note 17.

²⁷ See Wright, *supra* note 2, at 9-14.

²⁸ See Ohlhausen, *supra* note 13, at 10.

²⁹ Note that the "rule of reason" label is misplaced to the extent it is meant to communicate that anticompetitive effects and efficiencies will be treated symmetrically and without presumptions or asymmetrical weights. The traditional rule of reason is not without its presumptions and weights. Compare, for example, the analysis of efficiencies under the rule of reason in Section 2 cases to that applied in horizontal restraint cases under Section 1. Professor Salop explicitly favors the application of the so-called Section 1 rule of reason to Section 5 UMC cases involving unilateral conduct. Salop, *supra* note 9, at 5. Salop endorses the rule of reason standard over my efficiencies screen or Commissioner Ohlhausen's disproportionality test because, he argues, the rule of reason already balances the costs of false positives and negatives and the need for business certainty. But what about where, such as in Section 2 cases, courts have determined that the balance of those same considerations requires that greater weights be assigned to efficiencies? There Professor Salop confusingly rejects the outcome of that balancing. In other words, Professor Salop without explanation rejects court's balancing of these considerations when they determine safe harbors or presumptions are appropriate and endorses it when they do not. The more important error, whatever

efficiencies equally in a balancing test. Chairwoman Ramirez also appears to endorse an approach to Section 5 that balances anticompetitive harms and efficiencies benefits.³⁰

I will not fully address the various costs and benefits of each of these proposals, but I will note that all would require evidence of harm to competition and all focus upon efficiencies. It is only the treatment of efficiencies within the analysis that would differ. Each treats a UMC as an antitrust violation—focusing upon and applying differing weights to harms and efficiencies.

But how should we select among these options?

To choose among the standards outlined above, I think it is important to recall why the Commission's use of its Section 5 UMC authority has failed to date. In my view, this failure is principally because the Commission has sought to do too much with Section 5, and in so doing, has called into serious question whether it has any limits whatsoever. This failure also is primarily a function of the combination of the absence of these limits and the procedural and administrative advantages conferred to the Commission in enforcing Section 5.

Consider once again those advantages and their impact on Section 5 UMC outcomes. Over the last twenty years the Commission has affirmed 100 percent of ALJ decisions in favor of FTC staff while reversing 100 percent of the ALJ decisions ruling against FTC staff. Those statistics alone ought to give significant pause to those like Professor Salop and others who favor an approach that contemplates the sort of balancing that occurs in antitrust claims in federal court.

One response would be to rely upon Commission expertise to explain the disparity of these outcomes with the reversal rate of federal district court judges. However, federal courts of appeals reverse federal district court judges four times less often than the Commission.³¹ Another approach is to ignore the statistics—which amounts to ignoring critical institutional differences between the Commission and courts—by merely hoping that the Commission will do better in its UMC enforcement efforts if we try harder in the future. That is an entirely unsatisfactory explanation when we have a track record of 100 years to go on that gives little reason for such optimism. Ignoring institutional detail and its impact on substantive outcomes and agency performance is a recipe for repeating old mistakes and discovering new ones.

Thus, in order to save Section 5, and to fulfill the vision Congress had for this important statute, the Commission must recalibrate its UMC authority with an eye toward regulatory humility in order to effectively target plainly anticompetitive conduct. My proposal does so in a simple manner: targeting the Commission's Section 5 enforcement efforts at the most

one thinks about court's balancing of these considerations in the federal courts, is that different institutions require different analysis. To describe the Section 5 UMC debate, as Professor Salop does, as a replay of "the very same standards and arguments [that] have been raised with respect to Section 2 enforcement" is to miss the point that these tradeoffs cannot be analyzed in an analytical vacuum or on the blackboard and simply presumes that there is no difference between agencies and federal courts. Rather, we must take into account the different features of these real and complex institutions.

³⁰ Letter to Chairman Bob Goodlatte from Chairwoman Edith Ramirez Responding to a Letter from Chairman Goodlatte and Members of Congress Dated Oct. 23, 2013 (Nov. 8, 2013).

³¹ See Wright & Diveley, *supra* note 8.

anticompetitive conduct—those without redeeming efficiency virtues—and allowing the Commission to pursue all other cases in federal court where it can and does litigate with success.

V. CONCLUSION

Congress intended Section 5 to play a key role in the Commission's competition mission by allowing the agency to leverage its institutional advantages to develop evidence-based competition policy. In order for the Commission to fulfill that promise, it must first provide a framework for how it intends to use its authority to prosecute Section 5 UMC cases. My Proposed Policy Statement offers a framework that is tethered to modern economics and antitrust jurisprudence and that avoids deterring consumer welfare-enhancing competition while targeting conduct most harmful to consumers. I believe the framework would strengthen the Commission's ability to target anticompetitive conduct and provide clear guidance about the contours of its Section 5 authority.