



Five Questions About Section 5

William E. Kovacic
U.S. Federal Trade Commission
Washington, D.C.
October 17, 2008



Do the Sherman and Clayton Acts Cover the Field?

- Areeda's Hypothesis from the 1960s and 1970s
- The Supreme Court and the Modern Treatment of Private Rights



What Are the FTC's Chief Section 5 Accomplishments?

- Test: Name Ten Distinctive FTC Contributions to Competition Policy Jurisprudence Through Section 5
 - Consents (e.g., Xerox) or Litigated Cases
 - How many of your top ten are regarded today as distinctive and useful?
- Why Will Outcomes Improve in the Future?



In Litigation, Is Section 5's Elasticity a Mirage?

- Last Litigated FTC Section 5 Victories in Competition Cases: 1960s
- Section 5 in Theory
- Section 5 in Practice
 - OAG
 - Ethyl



What Are the Political Constraints?

- From Congress or the White House
- Examples of Backlash
 - Cement Institute
 - Kellogg and Exxon



What Is the Content of Section 5?

- Extensions of Sherman and Clayton Act Concepts?
- Extensions Based on Demonstrable Effects?
- Incorporation of Extrinsic Norms?
 - Which?



Concluding Thoughts

- Crucial Rationale for FTC's Creation
- Conceptual Attractions
- Problems in Implementation