



Antitrust ADVISORY ■

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FTC Issues Statement of Principles on Section 5 Enforcement

On August 13, 2015, the Federal Trade Commission approved its first official guidelines on the breadth of its powers to prosecute “unfair methods of competition” that are not violations of federal antitrust law.¹ The Commission’s broad interpretation of its unfair competition enforcement powers has come under criticism in recent years, and this brief, one-page statement is not likely to end that debate.

Section 5 of the FTC Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices,” which include but are not limited to violations of federal antitrust laws. But, unlike the FTC’s extensive published guidance concerning antitrust (and consumer protection) law, the agency has not published guidelines about how and why it would apply its unfair competition powers, which can lead to decade-long consent decrees and follow-on private class actions. Rather, the FTC has encouraged observers to study its precedents, which include sporadic use of “pure” Section 5 authority to condemn practices such as invitations to collude, loyalty discounts, exchanges of competitively sensitive non-price information by rivals, and standard-essential patent licensing abuses.

FTC Commissioners, the business community, and members of Congress have increasingly questioned both how use of Section 5’s unfair competition authority without “limiting principles” protects consumers or competition as Congress intended when it passed the law over 100 years ago, and how the business and legal community can promote legal compliance without more specifics from the FTC. Current and former FTC Commissioners – including Maureen Ohlhausen, Josh Wright, and Tom Rosch – have advocated for more guidance.

The Statement of Principles, which was approved by a vote of 4-1, provides three guidelines the FTC will adhere to when deciding to use its authority under Section 5:

1. the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;

¹ See Fed’l Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (2015), available at <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>.

2. the act or practice will be evaluated under a framework similar to the rule of reason, developed under antitrust case law, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
3. the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

In announcing the principles, FTC Chair Edith Ramirez said they are consistent with past application of Section 5 and will allow for continued case-by-case and flexible application of the FTC's Section 5 authority. However, the principles offer little new insight or firm limiting principles in an area devoid of many litigated decisions (even when taking into account decisions under similarly worded state statutes). And, as Commissioner Ohlhausen pointed out in her dissent, it still is not clear how "similar" the analysis under Section 5 is to the traditional rule of reason, when lawful conduct by a dominant firm may become unlawful, or how much broader Section 5 is than the antitrust laws enforced by both the FTC and the Department of Justice. But they do confirm that the majority of the FTC recognizes that there are instances in which non-antitrust theories may form the basis for an enforcement action under Section 5.

The legal and business community will continue to watch how the Section 5 statement on unfair competition is applied, or amended, in the future to gain additional understanding of the FTC's powers and processes. And we can expect former Commissioner Wright – who was very vocal in advocating for a set of enforcement principles and proposed his own version in 2013 – to continue to push for sound economic and legal reasoning in its use, albeit in an unofficial capacity. Commissioner Wright resigned from the FTC on August 24 to return to teach law at George Mason University School of Law.

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