FTC Articulates Enforcement Policy Against "Unfair Methods of Competition," Fine-Tunes Merger Review Process

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The Federal Trade Commission commits to weighing costs and benefits of conduct at issue before bringing actions against "unfair methods of competition" under Section 5 of the FTC Act, and updates merger review procedural guidance to reflect current best practices.

Summary

The Federal Trade Commission ("FTC") issued a statement on Thursday that sets forth its basic approach to challenging business conduct as an "unfair method of competition" under Section 5 of the FTC Act—its first formal articulation of Section 5 policy in the agency's history. The Commission will evaluate whether business conduct is anticompetitive, consider any countervailing benefits of the conduct at issue, and seek to rely on Section 5 only if the antitrust laws do not sufficiently address anticompetitive harm. On the whole, the FTC's policy statement echoes rationales for the agency's recent enforcement involving industry standard-setting, invitation-to-collude, and monopolistic conduct cases. The Commission's vote was 4-1, with Commissioner Josh Wright,[1] who had pushed for such guidance, joining the majority, and Commissioner Maureen Ohlhausen dissenting.

Separately, the Commission staff updated its "best practices" guidelines for merger investigations to reflect steps commonly taken by parties to reduce the costs and burdens of the merger review process.

Both developments are discussed below.

FTC's Section 5 Policy and Enforcement

Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce" (typically under the FTC's competition mandate) as well as "unfair or deceptive acts or practices" (typically under the FTC's consumer protection mandate). Section 5 has generally been understood to prohibit at least conduct violating the antitrust laws (the Sherman Act and the Clayton Act). The FTC's Section 5 enforcement against conduct *beyond* the scope of the antitrust laws has expanded and contracted through the decades, with the expansion occasionally meeting resistance from the courts. Nevertheless, Section 5 enforcement has been interpreted to cover anticompetitive conduct that is still in its "incipiency" as well as conduct that violates the policies animating the antitrust laws, even if outside the bounds of the antitrust laws themselves. Critics of Section 5, however, have questioned its use beyond antitrust as well as an absence of guidance from the Commission.

Policy Statement: With its one-page policy **statement** released on August 13th, the FTC stated unequivocally that Section 5 "encompasses not only those acts and practices that violate the Sherman or

[1] Commissioner Wright announced on August 17th that he will step down this month.

Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act." The Commission then outlined three principles that it would follow in deciding whether to launch a case against conduct as an "unfair method of competition":

- promotion of consumer welfare;
- application of a rule-of-reason-type analysis that requires challenged conduct to cause, or be likely to cause, harm to competition or to the competitive process and that must take into account "cognizable efficiencies and business justifications" of such conduct; and
- disinclination to issue a "standalone" Section 5 challenge where antitrust enforcement "is sufficient to address the competitive harm."

The Commission also stated that Congress, in enacting the FTC Act, recognized that application of Section 5 "would need to evolve with changing markets and business practices."

In **dissent**, Commissioner Ohlhausen stated the "vagueness" of the FTC's policy statement "raises many more questions than it answers" and may "encourage more frequent exploration" of the agency's Section 5 authority.

Enforcement Cases: In recent years, the FTC has used Section 5 to address companies' reneging on licensing commitments made to standard-setting organizations that incorporated such companies' technologies into an industry standard (*e.g.,* the FTC's 2013 case against Google/Motorola Mobility and 2008 case against Negotiated Data Solutions ("N-Data")). Also, the FTC has brought "standalone" Section 5 actions in "invitation to collude" cases, in which a party unilaterally solicited another party to fix prices but the parties did not reach an "agreement" as required by Section 1 of the Sherman Act. Further, the FTC has targeted a company's range of practices that, in its view, violate Section 5 when taken as a whole (*e.g.*, the FTC's 2009 case against Intel Corp.). In the *Intel* case, such practices included loyalty discounts and payments to customers that did not deal with Intel competitors, allegedly leading to foreclosure of competition.

But as former FTC Chairman Bill Kovacic observed, all these recent cases have been settlements. He went on to note, "the last time the FTC litigated and prevailed on a case with this competition authority was in the late 1960s."[2] In fact, the FTC lost the last three standalone Section 5 cases that reached the courts—*Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); and *E.I. du Pont de Nemours & Co. v. FTC* ("*Ethyl*"), 729 F.2d 128 (2d Cir. 1984).

The FTC typically brings administrative proceedings against standalone Section 5 violations; that is, it does not bring these cases in federal court. It commonly seeks cease-and-desist orders, though it has also previously imposed injunctive measures (*e.g.*, requiring Google/Motorola to offer arbitration before seeking injunctions for alleged infringement of standard essential patents which Google/Motorola had earlier committed to license on fair, reasonable, and non-discriminatory terms). Section 5 does not provide for a private right of action so, unlike government actions under the Sherman Act or Clayton Act, Section 5 enforcement proceedings will not trigger private treble damages actions under federal law. Having said that, Section 5 enforcement by the FTC may trigger private treble damages actions under state antitrust laws, and many such state laws contain analogues to Section 5 of the FTC Act. If the FTC's Section 5 enforcement action is settled, however, plaintiffs in any such follow-on actions will not

[2] Andrea Peterson, "The FTC is Finally Telling Businesses What 'Competition' Should Mean," *Washington Post* (Aug. 13, 2015).

have a lowered burden of proof by virtue of the Commission's action, although it remains to be seen what individual judges will do in giving weight to the Commission's actions or evidence. Relatedly, the FTC has been active in filing amicus briefs in private litigations which touch on the agency's enforcement priorities and could conceivably do so here to give guidance to courts. Finally, the Commission has stated in **previous guidance** that it would not ask for disgorgement of profits when it brings a Section 5 case beyond the scope of the antitrust laws.

Key Takeaway: In reaffirming that Section 5 can reach conduct not covered by the Sherman and Clayton Acts, the FTC's policy statement echoes the central holding of a line of Supreme Court cases in this area. *See FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953) (the FTC Act "was designed to 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"); *FTC v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966) (FTC's Section 5 power "is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws"). But the Commission also declined to extend Section 5's reach as broadly as some Supreme Court cases might have permitted. *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (FTC, under Section 5, may "consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws"). Thus, the policy statement reflects the agency's interest in continuing to utilize Section 5 to stop conduct which falls short of a Sherman Act or Clayton Act violation but raises the same competition-related concerns about harm to consumers. Put differently, the policy statement should be seen as a both modernized and modestly interventionist approach to Section 5 in which the Commission commits itself to apply economically oriented considerations that have evolved in recent decades since *Sperry & Hutchinson* was decided.

The unprecedented release of an official statement on Section 5 enforcement policy, however, also reflects the political pressures—particularly from Republican lawmakers—under which the agency now operates. While the Commission statement does not place strict limitations on the use of Section 5, we believe that its issuance reflects a likelihood that the agency will proceed cautiously before bringing any new or novel Section 5 actions rather than a sense that the "floodgates" will now be opened for more activity in this area.

FTC's Updated Merger Review Best Practices

Earlier this month, the FTC staff issued an **update** on its "best practices" guidelines for merger investigations and fine-tuned its model second request. The revised guidelines and model represent the first procedural update since merger review reforms in 2006. (These "best practices" do not obligate the DOJ in its own merger investigations but the two agencies generally follow the same approaches.)

The changes, wrote Debbie Feinstein, Director of the FTC's Bureau of Competition, aimed to balance the effort required by both FTC staff and the merging parties "to investigate potentially problematic mergers with the need for adequate information for those investigations," and primarily involve modifications to data requests, information about pricing, and instructions regarding search terms.

The effort resulted in guidance to parties on steps they can take to work cooperatively with the agency "to minimize burden on all involved."

The FTC's guidelines focused on three areas: (1) voluntary early submission of materials during the initial Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") waiting period; (2) when and how to effectively "pull and refile" HSR filings; and (3) negotiation of the scope of a "second request."

Voluntary early submission: Parties can produce information in addition to material required in their HSR submissions during the initial waiting period or even before the HSR filing is made. Providing such information can resolve questions at the outset of an investigation and may even avoid a "second request," which itself can take many months to satisfy.

The following is a list of material that the FTC stated would be helpful to collect and submit in transactions where the parties may anticipate some inquiry:

- Strategic and marketing plans for the previous two years.
- A list of all currently manufactured, marketed, or sold products and products in development.
- A list of top 10 customers (and suppliers if relevant) with contact information for customers of overlapping products.
- A list of top competitors with contact information for competitors that provide overlapping products.
- Market share information for overlapping products.
- A list of the types of reports the company prepares on a regular basis.
- An organizational chart.
- A "data map" to help identify the types of data a party creates and retains in the ordinary course of business. (For example, a "data map" might take the form of a diagram showing where and how the company stores information, thus potentially limiting the number of personnel to search and/or geographic reach of a data request.)
- Any other information the parties believe will be helpful to a staff attorney in understanding competition in the relevant market.

Pulling and refiling: Parties may agree to withdraw and refile HSR submissions to allow the agency additional time to review a transaction without issuing a second request. Pulling and refiling effectively restarts the 30-calendar day waiting period (15-day period for an all-cash tender offer), providing the staff with an additional 30 days (or 15 days) to determine whether the transaction may proceed without a second request. **In the words of the FTC**:

> Sometimes as we near the end of the initial review period, there are still open issues that might be resolved relatively quickly with a bit more information or investigation—if we had more time. But since the HSR statute requires a "thumbs-up-or-or-thumbs-down" determination by the end of the initial waiting period, the only way we are able get that additional time is to issue a Second Request. The alternative—letting the waiting period run and the transaction close—may deprive the Commission of the opportunity to obtain the most effective relief if it turns out that the open issues are not resolved.

Deciding whether to pull and refile is a case-specific determination and is best undertaken with clear feedback from the agency staff about what open issues remain and how they might reasonably be resolved within a second waiting period.

Negotiating the Second Request: The FTC stated in its August 4th release that "[o]ur review of previous investigations suggests that an early, substantive discussion on issues, custodians, data, and documents leads to less costly, more focused second requests, which in turn leads to faster compliance and review."

To that end, the agency encourages parties to engage with the staff early to identify the key areas of concern. Ideally, these discussions could focus the staff's anticompetitive theory on a particular issue and undertake a "quick look" on that issue. In a quick look, the parties agree to produce a limited set of documents and information identified by the staff, and the staff agrees to expedite review of those materials within a stated period.

The FTC further encourages parties to "explain[] the organizational and decision-making structure of the parties' businesses as well as where, how, and by whom relevant information is kept" and be "prepared to discuss the duties and responsibilities of the individuals with relevant documents or information."

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Ultimately, the best way of reducing the burden of a second request is for parties to negotiate with the FTC's staff to modify search terms. In Director Feinstein's words, the FTC "found that this continues to be the most effective way to tailor the second request."

Key Takeaway: Overall, early and continuous engagement with government staff when antitrust issues are present maximizes the parties' chances for an efficient and less time-consuming merger review process. The Commission last tried in **2006** to address the concern that the HSR review process had become overly burdensome and time-consuming. It remains to be seen whether this well-intentioned new effort will be more effective in achieving that objective.

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