CLIENT ALERT

Federal Trade Commission Issues Policy Statement on Unfair Methods of Competition

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On August 13, 2015, the Federal Trade Commission issued a short policy statement describing how it will apply its authority to challenge unfair methods of competition under Section 5 of the FTC Act. 15 U.S.C. § 45(a)(1). The very brief policy statement is the first time the Commission has provided formal guidance on its "standalone" Section 5 authority. However, the statement merely reflects broad principles already apparent from Commission enforcement actions over the past decade, and according to FTC Chairwoman Edith Ramirez, "does not signal any change of course in our enforcement practices and priorities."

WHAT IS A "STANDALONE" SECTION 5 CASE?

Section 5 gives the Commission authority to challenge "unfair methods of competition in or affecting commerce…." 15 U.S.C. § 45(a)(1). As a matter of enforcement policy, the Commission typically pursues its Section 5 cases under the same standards that courts apply to claims brought under the Sherman Act. 15 U.S.C. §§ 1-7. However, it is not required to do so. The Commission has the broader authority to challenge unfair methods of competition that fall outside the scope of the Sherman Act or other federal antitrust laws. *See e.g. FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). The statutory power to pursue unfair methods of competition that do not necessarily fall within the scope of the other antitrust laws is often called the FTC's "standalone" Section 5 authority.

In recent years, the agency has exercised its standalone Section 5 authority in limited circumstances, most often to challenge invitations to collude (*e.g.*, one competitor invites another to fix prices but no agreement is established). For example, in 2014, the Commission settled cases brought under Section 5 against two online sellers of barcodes (used to track retail sales) who had each invited a third competitor to raise prices.

While the Commission's invitation-to-collude cases have raised few eyebrows, other standalone Section 5 matters have been more controversial. In 2010, the Commission settled an action against Intel for, among other things, using allegedly anticompetitive market share discounts to exclude rivals. The Commission claimed that Intel's conduct constituted both monopolization under Sherman Act standards and a standalone unfair method of competition.

Perhaps most controversially, in recent years the Commission has used its standalone Section 5 authority against firms that allegedly breached patent licensing commitments made to a standards-development organizations ("SDOs"). In 2008, the Commission settled an action against Negotiated Data Solutions. The Commission alleged that the prior owner of the N-Data patents had made a commitment to license technology essential to implementing an ethernet standard for a one-time flat fee of $1000, but that after acquiring the patents, N-Data breached that commitment. Then, in 2012 and 2013, the Commission settled actions against Bosch and Google. The Commission alleged that the companies had reneged on commitments made to SDOs to license standard-essential patents on fair, reasonable, and nondiscriminatory terms by filing patent infringement actions and seeking injunctive relief against willing licensees.

RECENT COMMISSION PERSPECTIVES ON SECTION 5

Calls for the Commission to issue guidance on how it will exercise its standalone Section 5 authority are nothing new. But those calls grew louder when Republican Commissioner Joshua Wright joined the agency in January 2013. Less than six months after he arrived, he released his own proposed Section 5 policy statement. He claimed that a policy statement would provide crucial certainty to the business community and help the agency focus its own research and enforcement agenda. According to Wright, a standalone Section 5 claim should satisfy two elements: the conduct "harms or is likely to harm competition significantly" and "lacks cognizable efficiencies."

A little over a month later, Republican Commissioner Maureen Ohlhausen offered her own thoughts on Section 5. Commissioner Ohlhausen proposed that the agency should exercise its standalone Section 5 authority only "in cases of substantial harm to competition" and where "there is no procompetitive justification for the challenged conduct or where such conduct results in harm to competition that is disproportionate to its benefits."

Early in 2014, Chairwoman Edith Ramirez weighed in. The Chairwoman agreed with Commissioners Wright and Ohlhausen that Section 5 enforcement should focus on protecting consumer welfare and the competitive process. And like Commissioners Wright and Ohlhausen, she called for considering both the competitive costs and benefits of the challenged conduct, but with equal weight to both sides of the equation. With regard to process, the Chairwoman supported a common law approach to the development of Section 5 principles that will allow the agency to respond flexibly to commercial practices as they evolve. However, while she promoted the benefits of case-by-case development of Section 5 principles, she did not object to a policy statement that described the "broad enforcement principles revealed in our recent precedent."

THE COMMISSION'S 2015 POLICY STATEMENT

Consistent with the Chairwoman's view, the new policy statement provides only high-level guidance on how the agency will apply its standalone Section 5 authority. It offers little that the Commission has not stated previously in the context of enforcement actions brought over the past decade. According to the statement, the Commission will use its standalone Section 5 authority to pursue conduct that is inconsistent with the "spirit of the antitrust laws," as well as conduct that "if allowed to mature or complete, could violate the Sherman or Clayton Acts."

In deciding whether to challenge a particular practice as an unfair method of competition, the Commission articulated three broad principles (quoted verbatim below) without providing any additional explanation.

- The Commission will be guided by the public policy underlying the antitrust law, namely the promotion of consumer welfare;
- The act or practice will be evaluated under a framework similar to the rule of reason, 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
- 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.

The vote to adopt the statement was 4-1, with Commission Ohlhausen writing a detailed dissent. She argued that the statement was too abbreviated to provide meaningful guidance and raised more questions than it answered. She warned that "Arming the FTC staff with this sweeping new policy statement is likely to embolden them to explore the limits of [unfair methods of competition] in conduct and merger investigations."

IMPLICATIONS

Whether the policy statement will encourage more aggressive development of standalone Section 5 cases remains to be seen. However, the emphasis on incipient violations of the other antitrust laws suggests continued caution with respect to invitations to collude, as well as unilateral conduct such as bundled pricing and exclusive dealing arrangements by firms with a significant market position that may fall short of monopoly power as defined under the Sherman Act. Finally, though the statement makes no express mention of any of the Commission's prior actions, the Chairwoman's associated remarks indicate that, at least in the minds of the Democratic majority, a breach of a patent licensing commitment made to an SDO continues to raise the risk of standalone Section 5 liability.

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