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Policy, but what now: The GCR Section 5 Roundtable

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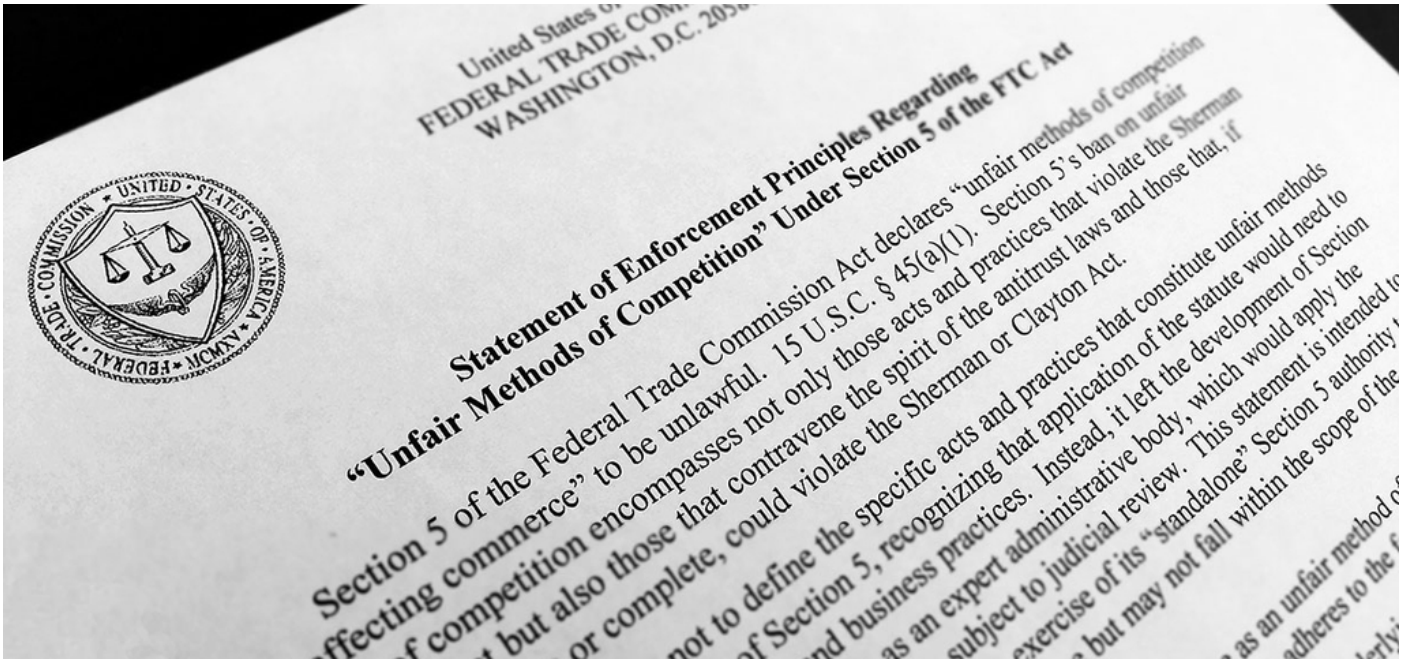

Now that the Federal Trade Commission has published its long-awaited guidance on when and how it will challenge anti-competitive conduct that falls outside of the traditional antitrust laws, the question remains: What does this mean for the agency's enforcement agenda, and what light does the guidance shed on when the agency will choose to bring a section 5 case. To help answer that, **Ron Knox** gathered five top antitrust specialists – including a former FTC chairman and other ex-agency officials – to hash out what the new policy statement means to them and their clients.

In September 2013, GCR brought together then-FTC Commissioner Joshua Wright and a group of top antitrust practitioners and observers to discuss the proposed guidance on the commission's use of section 5 he had published that summer. Wright's proposal was intended to, and in fact did, start a discussion among his fellow commissioners about what a section 5 policy statement would look like.

After two years of discussions, Chairwoman Edith Ramirez earlier this month unveiled that guidance, approved by a 4-1 vote among the commissioners. The guidance came in at a scant 331 words, and spells out the general principles the FTC will follow when using the FTC Act to bring competition cases – including adhering to a consumer welfare standard, relying on a "framework similar to the rule of reason," and so on.

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Left to right: Jon Leibowitz, Lisa Kimmel, Will Tom, Bill Blumenthal, and Joel Chefitz

Now, five antitrust practitioners with an intimate familiarity with the years-long Section 5 debate join us to discuss what the guidance means, both to the agency, and to practitioners and their clients. Our panel includes Davis Polk partner Jon Leibowitz, a former FTC Chairman and a participant in our first section 5 roundtable in 2013; Lisa Kimmel, a senior counsel at Crowell & Moring and a former attorney advisor to Chairwoman Ramirez; Will Tom, who served as FTC general counsel before joining Morgan Lewis; Sidley Austin partner Bill Blumenthal, who also served as general counsel at the commission; and Joel Chefitz, the co-chair of the Chicago antitrust group and McDermott Will & Emery.

Ron Knox: Lisa, if you can, why don't you get us started, and share how you think this new policy statement will affect enforcement, and decision-making, inside the agency.

Kimmel: Ron, thanks for including me in the chat. Happy to get things started. As we all know, the question of whether the agency should issue a statement describing its section 5 authority has been on the table for a long time. Perhaps it has gotten more attention than it deserved, depending on your point of view. So I think it was an achievement for the commission as an institution to issue this statement on a bipartisan basis. However, I think the statement is very much in line with what the chairwoman said she would support. It describes how the agency has used its standalone section 5 authority in recent history in very broad terms.

In my view, by tying section 5 enforcement to likely competitive harm, it doesn't go beyond what the commission has stated in other documents, including (if anyone was looking in the most unlikely of places) the recently updated Fred Meyer Guides. So I don't expect any practical change in how the agency approaches enforcement.

Blumenthal: Picking up on Lisa's formulation, I'm in the camp that says: The question of the need for a statement on section 5 authority has gotten more attention than it deserved. I've been in that camp for a long time.

We've done fine for a century without a detailed statement unpacking the scope of section 5. The combination of the broad reading in Sperry & Hutchinson, the limiting principles found in Official Airline Guides, Ethyl, and Boise Cascade, and the many forms of guidance provided by the agency in speeches, complaints, analyses to aid public comment, and other megaphones have been adequate over the course of my professional lifetime to enable practitioners as a practical matter to provide adequate guidance to clients, given the inherent ambiguities not only in section 5, but also in the Sherman and Clayton Acts. The section 5 statement doesn't materially reduce ambiguity or enhance clarity, but I don't know that it's realistic to assume that those outcomes could have been achieved. They certainly couldn't have been assured – one needs only look to the large number of guidelines and policy statements that aren't particularly helpful in assisting the public.

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From my perspective, the main benefit of the section 5 statement and its accompanying day-of-release materials may be in the careful phrasing to help the public (including many practitioners) understand that everything the FTC does is under section 5, that the FTC's powers as to the Sherman and Clayton Acts are via the incorporation of those acts into the scope of section 5 by virtue of judicial interpretation, and that the real dispute is the breadth of the margin under section 5 beyond the Sherman and Clayton Acts. The popularisation of the term "standalone authority" to describe that margin is one of the statement's main accomplishments. I'll let the next round of commentators offer views on whether that accomplishment was worth all the shouting.

Tom: I agree with Bill that popularisation is one of the statement's main accomplishments, but I wouldn't focus on popularisation of the term "standalone authority." Much of the shouting has come from the fact that the general public seems to have had no idea that the FTC was already focusing on economic effect as the touchstone of section 5. For those who feared that the FTC would challenge as "unfair" any conduct that violated three commissioners' subjective sense of ethics or morals, the statement came as reassurance.

For those who actually practised in the antitrust area and were familiar with the commission's thinking, there may have been a bit of surprise and puzzlement that what was in the commission statement even needed to be said. Certainly there seems to be widespread agreement that it signals no change in enforcement policy or practice.

Leibowitz: Did the commission need to make a statement about "standalone" section 5 authority? Probably not. Is it planning to bring a case any time soon challenging a business practice as unethical or unscrupulous along the lines of Keppel & Brothers in the 1930s (prohibiting cash prizes in children's candy)? Unlikely. But there is certainly something admirable in the notion that an agency would place limits on the metes and bounds of its own authority – and in a largely bipartisan way.

Plus, for those who believe that "unfair methods of competition" is a licence for regulatory wilding – an accusation with which I very much disagree – there is a clear additional benefit: Every time the commission meets to consider bringing a standalone section 5 "unfair methods of competition" challenge, it will have to justify the case under the principles in the statement. The commission takes this kind of precedent very seriously and at every level – staff, front office and commissioner – so my guess is that, while perhaps not necessary, the statement will nevertheless have enduring value.

Chefitz: I never worked for the FTC so let me offer an outsider's take on the new Statement and Bill's question.

I like the statement's brevity; no antitrust lawyer wants a cookbook. I like its importation of the rule of reason and the consumer welfare principle; they are familiar concepts, comfortable to any antitrust lawyer. I like the common law method of interpreting sparse governing documents – whether the Constitution or the Sherman Act. But does that analogy truly fit the commission's development of "unfair methods of competition" under section 5? In practice, is the statement correct the the FTC's application of section 5 is "subject to judicial review"? The vast majority of FTC cases under that prong of section 5 end in settlement and are never subject to judicial review. Those settlements reveal the commission's thinking and the results of arm's-length bargaining, but they are not adjudicative decisions and so do not contribute to the common law development of section 5.

Nor does reliance on "the spirit of the antitrust laws" offer much guidance on the FTC's so-called "standalone authority" to attack methods of competition that pass muster under the antitrust laws. Areeda & Hovenkamp have the better of the argument "that the spirit and letter of the antitrust laws are identical". Judges and lawyers may be guided by the spirit but interpret the words of statutes. And Commissioner [Maureen] Ohlhausen correctly observes "that the FTC was repeatedly rebuffed by the courts when it last tried to reach well beyond settled principles of antitrust law in asserting Section 5 authority".

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Less clear, to me at least, is the import of the statement's closing comfort that the FTC is less likely to challenge conduct "if enforcement of the Sherman or Clayton Act is sufficient to address [its] competitive harm". If this means the commission won't challenge a practice for which the antitrust laws already provide an established framework, then we can take comfort that we won't see another Intel case challenging conduct that would pass the Brooke Group test for predation. But if this means the FTC will refrain from exercising its "standalone authority" only if the antitrust laws already forbid the conduct, then we may see more administrative overreach. As the Supreme Court made clear in Matsushita and Brooke Group, and as Judge Posner did recently in Text Messaging, over-enforcement may deter procompetitive conduct and result in less competition – not more of it.

Kimmel: I think we can all agree the statement represents the art of the possible. While it does not provide detailed guidance, at least it assures that the dialogue at all levels within the commission will be grounded in economics. That's a good statement for the commission to make about its antitrust enforcement principles for the next 100 years.

Blumenthal: Let me offer three observations triggered by comments from the others.

First, like Joel, I clearly am missing the significance of the element stating that the commission is unlikely to use standalone authority if Sherman or Clayton would have sufficed. The commission's authority is section 5, and the courts have held for decades that the scope of section 5 includes Sherman and Clayton violations. Why would the commission ever need to assert section 5 standalone authority if section 5 already applies? If we want to clarify ambiguities like that, perhaps there's need for an explanatory statement to the statement.

Second, as to Jon's admiration of the placement of metes and bounds, I'm not sure I see a lot of self-limitation. If this statement had issued at the time of Keppel in the 1930s, or even in the 1970s, it would have advanced the state of the art. But when viewed in the context of current agency enforcement standards and existing case law limiting overexpansive reach, I don't view the statement as particularly novel, comforting, or constraining. Arguably, its opening appeal to spirit and incipiency seeks to reclaim theories and authority that had previously been ceded.

Third, perhaps I'm myopically viewing the statement through the lens of modern enforcement practices, but I don't attach great value to the statement's suggestion that dialogue will be grounded in economics. That a regulator of economic activity would conduct its competition mission by reference to principles of economics is, I suppose, better than the alternative. But I don't think those alternatives were ever realistically on the table, nor were they needed by those who are intervention-minded. There's enough ambiguity, discretion, and flexibility just within the field of economics.

Tom: I am pleased to see Joel cite the Areeda treatise. Reading that treatise back in 1978, I was struck by Professor Areeda's advocacy of a lower standard for government injunctive actions as compared with private damage actions, on the ground that government injunctive actions pose far less risk of overdeterrence, because they do not punish past conduct, but simply set the rules of the road for future conduct. I couldn't never understand how one could achieve that result with respect to the Sherman Act, because exactly the same statutory language should apply in both cases. Areeda's position was tailor-made, however, for section 5 of the FTC Act.

As to the statement that the FTC is less likely to challenge conduct "if enforcement of the Sherman or Clayton Act is sufficient to address [its] competitive harm," I think it was only meant to be a promise of analytical clarity. The commission will take pains to avoid "kitchen-sink" complaints that throw in both theories by which section 5 piggybacks on the Sherman and Clayton Acts, and "stand-alone" theories. As the case law develops, we will therefore gain better insight into the circumstances in which the commission is willing to venture beyond the boundaries of the Sherman and Clayton Acts. So it is a plus for guidance, but only in keeping with a common-law approach.

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Blumenthal: There seems to be at least one area of consensus here – on the advisability of developing section 5 doctrine through a common-law approach. OAG, Ethyl, and Boise Cascade offer some signposts, as does the recent Wyndham decision. I don't think it was ever realistic to expect meaningful, fleshed-out guidelines based on the current state of doctrinal development. But to be clear, that's not intended to advocate a spurt in standalone cases to aid in marking the boundaries. The occasional bolt-from-the-blue lightning strike on unsuspecting business isn't particularly welcome, but as a public policy matter it's a fair price to pay given the substantial burdens and costs of achieving greater specificity on the breadth of the standalone margin.

Chefitz: Just kidding here, but a moratorium on settlements wouldn't hurt the common law development of section 5.

Tom: Few clients want to be the guinea pig if the FTC is being reasonable, and I would hate to encourage the FTC to be unreasonable merely to get further development in the law. I would much rather accomplish my client's goals without litigation, but I would not hesitate to fight if appropriate.

Before we all get too carried away with consensus on a common-law approach, might I suggest that, like all analogies, it can lead one astray? I do not think that a bolt-from-the-blue lightning strike on an unsuspecting business is either a fair price to pay, or one that we have to pay to get good public policy. An administrative agency is NOT an Article III court, constrained by the Constitution to consider only actual cases and controversies presented to it. And it has many tools available to increase certainty in the law beyond guidelines and policy statements. Consider, for example, the 2006 commentary on the Horizontal Merger Guidelines, which I thought was a real contribution to public understanding of the agencies' thinking, without forcing the agencies to achieve consensus on every conceivable issue that might come before it in the future in that area of law.

All that said, it would be nice if the commission made fuller use of the common-law opportunities that DO come its way, such as through more fully fleshed-out analyses to aid public comment, majority and dissenting statements, and closing statements in matters in which stand-alone section 5 authority is used or considered.

Kimmel: Agree or disagree with the outcome, I think the analysis and statements in Google/MMI were pretty thorough! But if I could go back to Bill's earlier comment regarding competitive effects, I disagree that binding standalone section 5 enforcement to an analysis of competitive harm lacks any teeth. Sure, one can tell a lot of stories about competitive effects. But there are decades of federal court precedent, as well as joint FTC/DoJ enforcement guidance, that looks at competitive effects under the Sherman and Clayton Acts.

These developments have tracked developments in economics, particularly with respect to vertical relationships, IP licensing and the role of dynamic competition in consumer welfare. It seems odd to think that a court would look at competitive effects differently under section 5. If a standalone section 5 case is resolved through a settlement, that precedent doesn't bind. That's also the case if the commission settles a case under its interpretation of [Sherman Act] section 2 principles. In my view, expressly linking section 5 to competitive harm imports all the developments in US antitrust law more broadly. The commission has already done that in a variety of documents in recent years, so nothing very new, but here the commission does so expressly in a document intended to define how it views its own authority.

Tom: On Google/MMI, there was certainly more explanation than for a typical consent order. Such additional explanation is appropriate for an area of law in as much need of clarification and guidance as stand-alone section 5 enforcement is. The commission is to be commended for that, and especially for taking the public comments seriously enough to modify the order. One might still wish, however, that the majority had more thoroughly engaged the points raised by Commissioner Ohlhausen in her dissent.

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As to how much the commission constrains itself by tethering its analysis to competitive effects, I can't really share Lisa's optimism on that point. The decades of federal court precedent are, as Lisa points out, largely limited to analysis of competitive effects under the Sherman and Clayton Acts. If the statement is meant to stay within the bounds of that analysis, then it is hard to think of a role for stand-alone section 5 beyond invitations to collude, where the statutory element of concerted action prevents invocation of the Sherman Act.

Nothing I have seen suggests that the commission intends to confine itself to invitations to collude. Instead, many past and present commissioners seem to view the principal benefit of stand-alone section 5 as enabling it to venture into more ambiguous areas of economics, where an error-cost analysis might lead the commission to worry more about over-deterrence if federal and state treble-damage actions were to follow more automatically. (I think commissioners do understand, however, that private actions ARE often filed in the wake of stand-alone section 5 cases.) If the commission is indeed going to wade into complex areas such as standard-setting, facilitating practices, loyalty discounts and bundled discounts, it will have to tread cautiously, and it will have to supply the guidance and clarification itself, rather than relying on the sparse and inconsistent case law.

Leibowitz: My sense is that the commission will use section 5 going forward, if at all, in several of the ways that Will described – that is, loyalty discounts, reneging on standard setting, perhaps cases where the alleged malefactor had market power prior to the exclusionary conduct. Those are, to my mind, areas of the law where "standalone" section 5 authority is consistent with Congress' intent for the agency to have flexible authority and appropriate given the commission's limited bag of remedies.

But I suspect that, even if the FTC does bring another section 5 case sometime soon, it will likely involve a settlement rather than a test case. The commission had hoped for a test case in either Intel or Google/Motorola Mobility but sometimes you just have to take "yes" for an answer. And as all of us recognise, there is also a "be careful what you wish for" issue with litigating a case against an agency rather than taking a settlement. See, for example, Wyndham.

Chefitz: At the risk of misunderstanding some of the comments, I'll take a stab at summarising our points of convergence and possible divergence on the statement.

First, of course we all agree with Will that, when settlement best serves the interests of our clients, we shall zealously represent our clients to achieve that goal. Second, we apparently all applaud the statement's preference for common law development of section 5 doctrine, as Chairwoman Ramirez emphasised in her remarks at [The George Washington University] the day of the statement's release. Third, I think we all agree with Will that the commission differs from an Article III court, which adjudicates cases brought before it by litigants having no ties to the court, and that the vast majority of FTC cases are settled and are never subject to judicial review. Contrary to the assumption expressed in the statement, for those reasons the vast majority of FTC cases do not contribute to the common law development of section 5. Fourth, we appear to diverge on the effectiveness of limits placed in the statement on the commission's "standalone authority" under section 5, to which the courts of appeals seem to have paid more lip service than deference.

Some take comfort in the closing principle that the FTC "is less likely to challenge" a practice "if enforcement of the Sherman or Clayton Act is sufficient to address [its] competitive harm." I am less certain whether this suggests deference whenever an established antitrust framework applies or only when the antitrust laws already forbid the conduct, especially if that deference is guided by the ethereal "spirit of the antitrust laws." Nevertheless, I am optimistic that the statement signals the commission will be guided by Brooke Group, Matsushita and Text Messaging and will recognise that challenging non-predatory low prices and nonconsensual interdependence among oligopolists could result in higher prices and net consumer harm.

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