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CLIENT ALERT

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FTC Issues First Formal Policy on Section 5's Unfair Competition Authority

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ALTHOUGH THE BRIEF FTC STATEMENT IS BENEFICIAL, THE SWEEPING LANGUAGE CONTAINED IN THE POLICY STATEMENT GIVES LITTLE PRACTICAL GUIDANCE TO THE BUSINESS COMMUNITY.

On August 13, the Federal Trade Commission (FTC) issued its first formal policy statement on the agency's authority under the FTC Act, Section 5's unfair methods of competition provision. The FTC commissioners voted in favor of the policy 4–1, with only Commissioner Maureen Ohlhausen dissenting. Without question, the effort at bipartisan guidance on the reach of Section 5 is to be lauded.

Consistent with recent U.S. Supreme Court decisions, the risk of chilling procompetitive conduct is great where the governing legal principles are unclear and do not sufficiently take into consideration the legitimate business goals of trade restraints. On the plus side, the FTC policy statement should give businesses that are uncertain of the agency's process comfort that there is an analytical framework by which their conduct will be measured. On the minus side, the brief and general language of the FTC's policy statement provides little new information or practical guidance for business.

Background of Section 5

Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce" and gives the FTC powers to combat anticompetitive and potentially anticompetitive behavior beyond the Clayton and Sherman Acts.[1] The FTC has used this power to address a wide range of conduct, including standard setting, distribution policies and invitations to collude. For years, however, attorneys, companies and commentators have been left to speculate on how far this power extends beyond the antitrust laws and when the FTC will choose to exercise that power. A recent push for the FTC to issue formal guidelines began with Commissioner Joshua Wright's Proposed Policy Statement Regarding Unfair Methods of Competition, issued on June 19, 2013.[2]

The FTC's Policy Statement

Despite earlier commissioner remarks opposed to a formal Section 5 policy statement, ultimately, the FTC issued a one-page Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.[3] The FTC statement reiterated that "Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or 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 FTC then enumerated three principles it will use in its analysis of and decision whether to challenge an act or practice as an unfair method of competition under Section 5:

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

2. The act or practice will be evaluated under a framework similar to the rule of reason, *i.e.*, an act or practice challenged by the FTC must cause, or be likely to cause, harm to competition, or the competitive process, taking into account any associated cognizable efficiencies and business justifications.

3. The FTC 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 an accompanying statement, Chairwoman Ramirez and Commissioners Brill, Wright and McSweeny said that the policy "makes clear that the Commission will rely on the accumulated knowledge and experience embedded within the 'rule of reason' framework developed under the antitrust laws.[4] The FTC provided no other clarification or guidance on how it would exercise its Section 5 authority or how it would interpret these principles.

Commissioner Ohlhausen's Dissent

In her dissent, Commissioner Ohlhausen wrote that the policy statement is "too abbreviated in substance and process" for her to support.[5] Commissioner Ohlhausen faulted the policy statement for failing to mention, "much less grapple with," existing case law and failing to provide examples of either lawful or unlawful conduct. In general, Commissioner Ohlhausen does not believe the policy statement provides any real guidance or constrains the FTC in any way. To the contrary, she worries that "[a]rming 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."

Commissioner Ohlhausen argued that any Section 5 policy statement should be put out for public comment before adoption and should include:

> (1) a substantial harm requirement; (2) a disproportionate harm test; (3) a stricter standard for pursuing conduct already addressed by the antitrust laws; (4) a commitment to minimize FTC-DOJ conflict; (5) reliance on robust economic evidence on the practice at issue and exploration of available non-enforcement tools prior to taking any enforcement action; and (6) a commitment generally to avoid pursuing the same conduct as both an unfair method of competition and an unfair or deceptive act or practice.

Analysis of the Policy Statement

Although the brief FTC statement is beneficial, the sweeping language contained in the policy statement gives little practical guidance to the business community. Chairwoman Ramirez, who had previously opposed written guidelines for fear that they would narrow or inappropriately limit the FTC's authority, said in a speech after the announcement that the policy statement "does not signal any change of course in our enforcement

practices and priorities.[6] Chairwoman Ramirez also noted that the FTC's "aim in adopting this policy statement is to reaffirm the principles that guide our enforcement decisions, leaving for future generations the flexibility to do the same."

The only limitation on the FTC's Section 5 authority mentioned in the policy statement, which was also well understood before, is that harm considered must be "to competition or the competitive process.[7] As Chairwoman Ramirez explained in her speech, the FTC, for the last few decades, "has confined its Section 5 cases to conduct that diminishes consumer welfare by harming competition or the competitive process, as opposed to conduct that merely harms individual competitors or poses public policy concerns unrelated to competition."

The policy statement does not provide guidance on what is meant by "any associated cognizable efficiencies" or how such efficiencies will be weighed. Commissioner Wright, who voted in favor of the policy statement, previously said that his "preferred approach is that Section 5 only be used where there are no cognizable efficiencies present.[8] The policy statement does not adopt Commissioner Wright's approach to efficiencies, which leaves businesses wondering what the FTC will require with respect to the link between the conduct and the claimed efficiency and what level of proof will be expected.

The policy statement permits use of Section 5 to challenge an act or practice that is "likely to cause harm," even if the conduct has not yet caused any actual harm to competition. The "likely harm" language is consistent with the FTC's practice, but it also raises questions for counselors advising businesses. Chairwoman Ramirez gave examples of conduct challenged because it would "likely harm" competition, such as cases involving invitations to collude and any situation to "stop anticompetitive conduct in its incipiency." The policy statement does not, however, expressly limit the use of the "likely to cause harm" standard to only incipient conduct or provide examples such as those referenced by Chairwoman Ramirez in her individual comments. This might be a function of the brevity of the statement, the challenge of selecting examples upon which the commissioners could agree, or reliance on the body of Section 5 consent decrees.

The third principle — that the FTC 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 — might be used by parties entering into Section 5 consent decrees to defend themselves against the virtually inevitable private class action litigation that follows such consent decrees. Because the FTC Act does not provide for a private right of action, private litigants basing claims on a Section 5 consent decree

(or judgment) generally rely on the Sherman or Clayton Act. Regardless, this third point confirms that the reach of Section 5 will remain greater than — and presumably separate from — that of traditional antitrust statutes.

The policy statement reflects a recognition by the FTC that concerns exist regarding the scope and use of Section 5 and a need to attempt to address such concerns. Whether it has any further ramifications is yet to be seen. The only real framework that business advisors have had in the past is that of the rule of reason. Accordingly, it is unlikely that this statement will alter or provide greater clarity for business. The FTC's policy statement appears to reiterate the general principles one could already glean from the history of Section 5 consent decrees, but it is unclear, as Commissioner Ohlhausen suggests, whether it will provide meaningful guideposts for the FTC staff or business advisors.

Endnotes

1. 15 U.S.C. § 45(a)(1).

2. Statement of Commissioner Joshua D. Wright (June 19, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf. On August 17, only four days after the announcement of the Section 5 policy statement, Commissioner Wright announced his resignation from the FTC. *See* Press Release, FTC, FTC Commissioner Joshua D. Wright to Resign (Aug. 17, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/08/ftc-commissioner-joshua-d-wright-resign.

3. FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

4. Statement of the FTC on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

5. Dissenting Statement of Commissioner Maureen K. Ohlhausen (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.

6. Address by FTC Chairwoman Edith Ramirez at the Competition Law Center, George Washington University School of Law (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

7. This is in contrast to the FTC's unfair trade practices authority, which extends to harm to competitors as well as harm to competition overall.

8. Remarks of Commissioner Joshua Wright at the Symposium on Section 5 of the Federal Trade Commission Act (Feb. 26, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf.