

FTC to Develop New Group Aimed at Antitrust and Deceptive Practices Rulemaking

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While the debate continues about whether the Federal Trade Commission (FTC) has the authority to make rules governing antitrust or competition law issues, on March 25, Acting FTC Chair Rebecca Kelly Slaughter announced the creation of a new group focused, in part, on new rules to prohibit unfair or deceptive practices and unfair methods of competition. This potential shift is significant because traditionally the FTC has relied on Sherman, Clayton, and FTC Act enforcement actions and consent decrees to develop federal antitrust law, not rulemaking.

The FTC has adopted only one antitrust rule. In 1967, the agency adopted the Men's and Boys' Tailored Clothing Rule, which required manufacturers of men's and boys' tailored clothing to, among other things, distribute advertising allowances and other services to large and small retailers on a proportional basis. The FTC never used the Tailored Clothing Rule, and eventually repealed it in 1994.

In contrast, the FTC currently enforces dozens of rules related to unfair and deceptive trade practices.

Those that support the use of antitrust rulemaking to establish substantive legal standards rely on the general "unfair methods of competition" language in Section 5 of the FTC Act. In addition, Section 6(g) of the FTC Act provides the agency the authority, "[f]rom time to time to classify corporations, and to make rules and regulations for the purpose of carrying out the provisions of [this sub-chapter]." In Acting Chair Slaughter's March 25 announcement, she made clear that she believes "[i]t is ... time for the Commission to activate its unfair methods of competition rulemaking authority in our increasingly concentrated economy, and [that she is] excited for this new rulemaking group to explore all the possibilities."

One recent example of where the FTC considered antitrust rulemaking involved the use and legality of non-competition provisions in the context of employment arrangements. In January 2020, the FTC held a public workshop to examine whether it should adopt a rule to restrict the use of non-compete clauses in employment contracts.^[1] Although many commenters supported antitrust rulemaking in this area, the American Bar Association Antitrust Law Section, among others, casts doubt on whether the FTC had the authority, under Section 6(g) to adopt a rule banning or limiting the use of non-competes.^[2]

Despite lingering questions about the FTC's authority, some at the agency have emphasized the important role antitrust rulemaking could play. Recently, Commissioner Chopra, who President Biden recently nominated to serve as the director of the Consumer Financial Protection Bureau, argued that "exclusive reliance on case-by-case adjudication" in the antitrust arena has led to "a system of enforcement that generates ambiguity, drains resources, privileges incumbents, and deprives individuals and firms of any real opportunity to participate in the

process of creating substantive antitrust rules.”^[3] Commissioner Chopra also envisions using the process set forth in the Administrative Procedures Act (APA). Both the APA and interpreting case law impose numerous procedural safeguards around rulemaking. In fact, Commissioner Chopra argues that some of the APA’s requirements will, among other things, provide greater transparency and be faster than establishing legal standards through litigation. For example, the APA provides for notice to the public of a proposed rule, including the substance of the rule, the legal authority on which the rule is based, the date that the rule will become effective, and provision for an opportunity for the public to comment on the rule in advance of its effective date.

Some of the recent proposals for specific antitrust rules include banning all non-competes, making presumptively or completely unlawful reverse settlement payments between branded and generic pharmaceutical manufacturers, declaring that breach of a standard setting organizations’ requirement that patents in industry standards be licensed at fair reasonable and nondiscriminatory terms constitutes a Section 2 violation, and implementing the 1968 horizontal merger guidelines market share thresholds. Interestingly, each of these proposals appear to be an effort to reverse or change the governing case law developed by the Supreme Court and federal appellate courts.

Given the ambiguity of Section 5’s prohibition on “unfair methods of competition” and the lack of an express grant of authority to the FTC to make antitrust rules, the concern most often expressed is that broad rules intended to cover the conduct of all businesses or all firms in a particular industry could inhibit innovation and growth of U.S. industries. For example, many commercial practices differ in their effect depending, among other things, on the structure of the market, the number of other market participants, the significance of any barriers to entry, and the homogeneity of the products or services at issue. Therefore, many fear the consequences of FTC antitrust rulemaking regardless of its authority to do so because such rules will not take into account the specific facts at issue and the actual effect of the conduct on competition.

According to Acting Chair Kelly Slaughter, the new rulemaking group has been installed within the FTC’s Office of the General Counsel to “allow the FTC to take a strategic and harmonized approach to rulemaking across its different authorities and mission areas.” The FTC’s announcement explained that currently, “rulemaking within the FTC is decentralized, with individual bureaus and divisions responsible for particular rules” and predicted that “[t]he new structure will aid the planning, development, and execution of rulemaking — especially new rulemakings — in turn making the Commission’s work more efficient and potent.” Given the various pending legislative efforts to change the antitrust laws and the continuing evolution of those laws through the courts — including the upcoming Supreme Court decision on whether the FTC has the authority to seek certain monetary remedies and the recent government actions filed against a number of big tech firms, as well as the ongoing FTC studies into health care provider and pharmaceutical markets — this latest effort to increase the reach of the antitrust laws on a broader array of activities should not be taken lightly.

While it is not yet possible to predict whether any of these efforts will succeed, this latest proposal appears to be among the most likely to create greater uncertainty for businesses. The FTC may view rulemaking as an opportunity to extend the per se rule in novel or more industry-specific circumstances, drawing off the agency’s authority to conduct research into the competitive impact of business practices. Placing changes in the hands of skilled and experienced antitrust authorities, such as the FTC, arguably has some appeal. On the other hand, development and implementation of rules that would have broad application to the economy, particularly if those rules are based on the vague “unfair methods of competition” standard and seek to reverse the law developed through years’ of court decisions, could raise doubts among businesses. Specifically, it could create greater

challenges for businesses in their assessment of the risks of innovative practices and make them more reluctant to undertake those risks. Additionally, courts reviewing such rules, particularly any that seek to overturn existing case law, might be inclined to skepticism.

These and the many other policy and legislative antitrust developments are worthy of attention, even if the long-term effect of them is very much in question.

[1] Full remarks from the workshop can be found [here](#). After the workshop, 328 comments were submitted and were largely in favor of an FTC rule that eliminates or restricts the use of non-competes.

[2] Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on “Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues,” [here](#).

[3] The Case for “Unfair Methods of Competition Rulemaking,” 87 U. of Chi. L. Rev. 357 (2020), available at [here](#).

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