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Federal Trade Commission Issues First Ever Statement Regarding "Unfair Methods of Competition"

By The Antitrust and Competition Practice

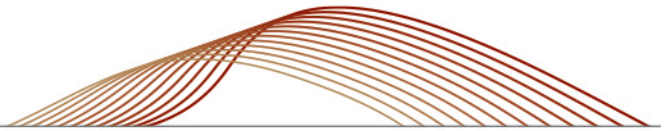
On August 13, 2015, the Federal Trade Commission ("FTC" or "Commission") issued for the first time a formal policy statement on its authority to enforce "unfair methods of competition" under Section 5 of the FTC Act.[1] Section 5 gives the FTC exclusive authority to take action against all "unfair methods of competition in or affecting commerce." This broad language has generally been understood to encompass not only those acts and practices that *actually* violate the federal antitrust laws (the Sherman and Clayton Acts), but also conduct that *could* violate antitrust law if left unaddressed. Until now, however, neither the FTC nor Congress provided any guidance as to what conduct would qualify as an "unfair method of competition" under Section 5 since its enactment over 100 years ago.

"Statement of Enforcement Principles"

The one-page "Statement of Enforcement Principles" outlines basic principles that the Commission will follow when deciding whether to challenge an act or practice as an unfair method of competition. Under the new guidelines, the Commission will adhere to the following three principles when deciding whether to exercise its standalone authority to challenge unfair methods of competition under Section 5:

- the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- only conduct that causes or is likely to cause harm to competition or the competitive process—after taking into account any associated cognizable efficiencies or business justifications—will be subject to enforcement under Section 5; and
- the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if that conduct is more appropriately challenged under the antitrust laws.

The guidelines are intended to provide greater certainty to businesses as to what conduct violates Section 5, while retaining the FTC's flexibility to use Section 5 to protect competition and consumers.



What Do the New Guidelines Mean to Your Business?

Although the business community (and antitrust practitioners alike) had long called for formal guidance from the Commission on the application of Section 5 to "unfair methods of competition," the new guidelines arguably fall short in providing the desired clarity. The Statement of Enforcement Principles neither identifies what specific practices or conduct will violate Section 5, nor does the Commission define or explain what the terms "associated cognizable efficiencies" or "business justifications" mean or the weight they will be given when assessing whether to challenge conduct under Section 5. Perhaps more importantly, the Statement sets out the well-trodden and often litigated "rule of reason" as a possible analogue, but then specifically qualifies the reference by stating that potential Section 5 violations will be analyzed under a framework "*similar to the rule of reason*." There is no guidance provided as to which acts or practices would be *similar* to a rule of reason violation, or in what circumstances those acts or practices would not otherwise violate the Sherman or Clayton Acts. The lack of clarity, in fact, led FTC Commissioner Maureen Ohlhausen to dissent, stating that the guidelines on "this important issue of competition policy" were "too abbreviated in substance and process" for her to support.

To assess Section 5 risk, businesses and practitioners will likely revert to traditional antitrust analysis in the first instance. The Commission's outlined framework for Section 5 analysis mimics some of the key rubric that commonly guides antitrust inquiry, whereby the likely anti-competitive effects of a scrutinized practice are balanced against the competitive benefits arising from the conduct in question. In that sense, businesses can take some comfort in the fact that the policy statement affirms Section 5's alignment with the antitrust laws and permits businesses to refer to 125 years of "rule of reason" jurisprudence when assessing Section 5 risk. But it is the marginal cases that will continue to vex antitrust practitioners and in-house counsel. It seems likely that Section 5 will remain a seldom used and ambiguous power that generates additional leverage for the Commission when dealing with aggressive business practices.

Both the rule of reason and any similar analysis under Section 5 require a fact-intensive inquiry that must be performed on a case-by-case basis. Businesses are best advised to consult antitrust counsel early in the process when considering the implementation of any new practices that may raise competitive concerns. If you have any questions concerning these developing issues, please do not hesitate to contact the Paul Hastings Antitrust and Competition practice.

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[1] "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.