Client Alert

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Key Take-Aways From the FTC's New Section 5 Statement

The Federal Trade Commission's New Section 5 Statement Preserves the Agency's "Doctrinal Flexibility" but Fails to Provide Meaningful Concrete Guidance

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On August 13, 2015, the Federal Trade Commission (FTC) released its long-awaited "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (the "Statement," available here). The key take-aways are these:

- As Chairwoman Ramirez explained in her speech announcing the Statement, it "does not signal any change of course in [the FTC's] enforcement practices and priorities." Edith Ramirez, FTC Chairwoman, Address to the Competition Law Center at George Washington University Law School, at 6 (Aug. 13, 2015) [hereinafter Ramirez Address].
- The Statement is not a detailed set of guidelines and contains no safe harbors or other concrete prescriptions for agency action or inaction. It is instead a very high-level set of principles – articulated in one page via a total of three bullet points – designed to signal that the FTC will continue to evolve its Section 5 jurisprudence using a "common law approach." *Id.*
- The two key "common law" principles guiding the FTC's use of Section 5 will be (a) "the promotion of consumer welfare" rather than the pursuit of other policy objectives and (b) an analysis, consistent with rule-of-reason analysis under the antitrust laws, of conduct's potential for "harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."
- The FTC's "rule-of-reason-like" analysis will not necessarily involve a full-blown weighing of the harms and benefits to competition, but may instead involve "quick-look" condemnation of conduct that lacks meaningful efficiencies or other justifications. Ramirez Address at 7-8.
- The Statement's third principle confirms that the FTC intends its "unfair competition" authority to reach farther than the antitrust laws. It states that standalone Section 5 challenges are more likely when the Sherman and Clayton Acts are not "sufficient to address [a practice's] competitive harm." The FTC thereby signals that Section 5 may be used to address perceived threats of competitive harm despite the absence of any "agreement" of the sort required by Section 1 or any proof of existing or threatened "monopoly power" of the sort required by Section 2 in actions challenging unilateral conduct. Ramirez Address at 5.

BACKGROUND

Section 5 of the FTC Act prohibits two broad categories of "unfair" practices: "[u]nfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices."[1] Although the FTC typically enforces the "unfair methods of competition" clause of Section 5 (or "unfair competition" for short) against conduct that would violate the Sherman and Clayton Acts, it has long taken the view (supported by courts) that Section 5 can also be used against conduct that would not violate those statutes. The FTC calls this its "standalone" unfair competition enforcement authority, and it has successfully asserted it to obtain – usually via settlement – injunctive and other equitable relief.[2] Unlike the other antitrust statutes, however, the FTC Act creates no private right of action to enforce Section 5, and thus violations of the provision are not subject to private damages actions.[3]

The potential reach of the FTC's standalone unfair competition authority has generated much controversy over the years. In the 1970s and early 1980s, the FTC's use of Section 5 encountered considerable resistance in the courts, leading the agency to narrow its standalone Section 5 enforcement. By the late 1990s, however, judicial decisions narrowing application of the Sherman and Clayton Acts led some to call upon the FTC to make more frequent use of its Section 5 powers, especially in the unilateral conduct setting, while others urged the FTC to promulgate guidance confirming the boundaries of Section 5 and generally providing the business community with greater certainty about its potential reach. Despite much attention to the issue over many years, including an FTC workshop held in 2008 and repeated statements by agency personnel that the matter remained under study, many had come to expect that the FTC would not issue Section 5 guidance meaningfully narrowing its enforcement discretion.

THE NEW SECTION 5 STATEMENT

The Statement issued on August 13, 2015, by a 4-1 FTC vote (with Commissioner Ohlhausen dissenting, available here) and does not disappoint those who expected little guidance. The Statement eschews any definition of "specific acts and practices that constitute unfair methods of competition in violation of Section 5" in favor of allowing Section 5 jurisprudence to evolve at the hands of the FTC "as an expert administrative body, which [will] apply the statute on a flexible case-by-case basis, subject to judicial review." The Statement is limited to three high-level principles to which the FTC will "adhere" in deciding whether to challenge an act or practice as an unfair method of competition on a "standalone basis." They are sufficiently brief to be quoted verbatim:

- "the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;

1 See 15 U.S.C. § 45(a)(1). Previous FTC statements have provided detailed guidance on the reach of the "unfair and deceptive acts and practices" clause. See Fed. Trade Comm'n, Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, 104 F.T.C. 1070, 1071 (1984) (appended to In re Int'l Harvester Co., 104 F.T.C. 949 (1984)); Fed. Trade Comm'n, Policy Statement on Deception (appended to In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984)).

2 The FTC's 2012 Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases notes (at 2 n.6) that the FTC "do[es] not intend to use monetary equitable remedies in stand-alone Section 5 matters." (available here).

3 However, as noted by Commissioner Kovacic in his dissent in the N-Data case, many states have "baby FTC Act" statutes that are interpreted with reference to the FTC's own unfair competition jurisprudence, and some of those statues may support private damages actions in certain cases. See In re Negotiated Data Solutions LLC, FTC File No. 051-0094, Dissenting Statement of Comm'r Kovacic, at 2 (Jan. 23, 2008).

- "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."

Three key themes emerge from the substance of the Statement and the commissioner comments that accompanied it.

1. The FTC favors an enforcement platform unencumbered by any hard legal boundaries.

The Statement very clearly expresses the view of the majority of current commissioners that the agency's authority to seek out anticompetitive "acts and practices" should not be reined in by formalistic legal boundaries. The Statement emphasizes Congress' vintage-1914 intention that Section 5 apply to "acts and practices . . . that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act." Thus, as the Statement describes, the whole point of Section 5 is to encompass "acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act."

The Statement does not seek to advise which such practices will be deemed "anticompetitive." That determination will be left to future and "flexible case-by-case" adjudication. The Statement thus does not address such questions as: When may (or will) the FTC dispense with the need to prove an "agreement" as required by Section 1 of the Sherman Act? When may (or will) it attack unilateral conduct that does not quite rise to "monopolization"? And which other elements of antitrust violations are insufficiently tethered to the "anticompetitive" nature of the act or practice to be ignored in Section 5 cases? The Statement does not say.

2. The FTC does not appear to plan any major expansion in the standalone use of Section 5, but it surely intends no contraction.

The FTC would not have emphasized its "doctrinal flexibility" had it any intention to *constrict* its realm of Section 5 enforcement. Ramirez Address at 7. Fortunately, the FTC also appears not to plan any major expansion in such enforcement. As Chairwoman Ramirez noted, "[o]ur policy statement today . . . does not signal any change of course in our enforcement practices and priorities." *Id.* at 6.

In light of this "steady-as-she-goes" message, perhaps the best source of guidance on the likely focus of the FTC's future standalone Section 5 enforcement is the recent past. There is no reason to expect the FTC to shy away from such enforcement in the following contexts, none of which were pursued to judgment via contested litigation:

- Invitations to collude, including those delivered via public announcements and analyst statements, where no agreement cognizable under Section 1 is ever formed, as the FTC alleged in *In re U-Haul International*, *Inc.*, FTC File No. 081-0157 (complaint issued and settled on July 14, 2010); *In re Valassis Communications, Inc.*, FTC File No. 051-0008 (complaint issued and settled on April 19, 2006); and *In re Stone Container Corp.*, FTC File No. 951-0006 (complaint issued and settled on May 18, 1998).

- Parties' failure to abide by fair, reasonable and non-discriminatory (FRAND) licensing commitments (made by them or their patent transferees) relating to their standards-essential patents, as the FTC alleged in *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 (complaint issued and settled on July 23, 2013); *In re Robert Bosch GmbH*, FTC File No. 121-0081 (complaint issued on Nov. 21, 2012, settled on April 23, 2013); and *In re Negotiated Data Solutions, LLC*, FTC File No. 051-0094 (complaint issued and settled on Sept. 22, 2008). As the FTC noted in its statement in *Bosch*, "[w]hile not every breach of a FRAND licensing obligation will give rise to Section 5 concerns, when such a breach tends to undermine the standard-setting process and risks harming American consumers, the public interest demands action rather than inaction from the Commission."

- Steps taken by parties with alleged monopoly power to maintain that power using inappropriate means, potentially including deception, bundling, and loyalty discounting. The FTC made allegations of this sort in *In re Intel Corp.*, FTC File No. 061-0247 (complaint issued on Dec. 16, 2009, settled on Oct. 29, 2010) under Section 5 rather than Section 2, enabling it to sidestep Section 2's doctrinal requirements.

3. Whether the FTC will ever seek to use Section 5 more aggressively likely depends more on its perception of the economic evidence than on past precedent or legal doctrine.

There is no question that the Statement leaves the door of Section 5 wide open for future Commissions to consider enforcement actions involving other forms of conduct, not tightly constrained by the formal legal elements embedded in other antitrust statutes and the case law applying them. The principles espoused by the Statement do provide some solace that Section 5 will not be used to pursue non-economic policy objectives, or to prohibit conduct without regard to the efficiencies it generates. But that is about as far as one can reliably go, and there never was much doubt about these limitations.

Within this broad sphere, the FTC's future path likely will be driven by how it interprets evidence concerning the potential economic effects of the conduct it investigates and the potential for more competitive outcomes absent the conduct. The only truly binding constraint on the FTC's future creativity is likely to be the check of future "judicial review" and the deterrent of case law already on the books. Those precedents – albeit decided on the basis of long-ago facts rather than the "changing markets and business practices" to which future enforcement would target – will provide a meaningful deterrent barrier to Section 5's use in at least two areas.

First, the FTC's historic forays into the use of Section 5 to police conduct reflecting oligopoly interdependence and unilaterally adopted practices facilitating coordination, where Section 1 would not otherwise apply, were consistently rebuffed in the 1980s.

- In *In re Ethyl Corp.*, 101 F.T.C. 425 (1983), the FTC alleged that Ethyl and other market participants had engaged in "price signaling," as opposed to "price fixing" prohibited by the Sherman Act, to artificially inflate prices. The FTC found a Section 5 violation, but the Second Circuit reversed, holding that "[t]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws. It represents a condition, not a 'method;' indeed it could be consistent with intense competition." *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 138 (2d Cir. 1984). The court went on to observe that "[w]hen a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for

determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable." *Id.* at 138-139.

- Similarly, in *In re Boise Cascade Corp.*, 91 F.T.C. 1 (1978), the FTC used Section 5 to challenge the plywood industry's non-collusive use of "delivered pricing" on the theory that it led to diminished price competition. The Ninth Circuit swept aside that challenge for lack of any substantial evidence of anticompetitive effect. "[T]he weight of the case law, as well as the practices and statements of the Commission, establish the rule that the Commission must find either collusion or actual effect on competition to make out a section 5 violation for use of delivered pricing. In this setting at least, where the parties agree that the practice was a natural and competitive development in the emergence of the southern plywood industry, and where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior." *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980).

Second, case law will also serve as a bulwark against the unbridled use of Section 5 to challenge unilateral conduct solely because of its adverse implications for competition in some markets. In *In re the Ruben H. Donnelley Corp.*, 95 F.T.C. 1 (1980), for example, the FTC alleged that the unilateral decision of the publisher of the *Official Airline Guide* not to publish the flight schedules of smaller "commuter airlines" violated Section 5 because of its impact on competition in the airline industry (where the publisher did not compete). The Second Circuit rejected the FTC's theory, which eschewed the need to establish any anticompetitive purpose for a unilateral refusal to deal: "enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry." *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).

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Beyond these judicially imposed limits, however, the FTC's new Statement tells us that more certainty on the planned or permissible scope and breadth of the FTC's use of Section 5's unfair competition clause must await the evolution of the FTC's own common law of anticompetitive practices.

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