PUBLICATION

Federal Trade Commission Guidance Addresses Stand-alone Claims of Unfair Competition Under Section 5 of the FTC Act [Ober|Kaler]

2015

Section 5 of the FTC Act, in effect since 1914, authorizes the FTC to pursue claims of unfair competition beyond the reach of both the Sherman and Clayton Acts. 15 U.S.C. § 45(a)(1). Until now however, the FTC has been reluctant to issue public guidance on the parameters of conduct subject to Section 5, or the legal framework used to analyze and enforce such stand-alone claims.

The *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* [PDF] (Statement), approved August 13, 2015, on a 4-1 vote, with a significant dissenting statement, was offered to provide clarity on these issues. Among other things, the Statement announces that the scope of Section 5 "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, would violate the Sherman or Clayton Act."

In addition, the Statement indicates that the FTC will adhere to the following principles when analyzing and prosecuting stand-alone claims under Section 5:

- The Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- 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 stand-alone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

For some, particularly antitrust practitioners, the Statement provides useful guidance relating to the application and enforcement of Section 5. For others, and in particular, market participants, the brevity and general nature of the Statement may offer little comfort. As highlighted by the dissent authored by Commissioner Maureen K. Ohlhausen, the Statement has a number of limitations.

As a preliminary matter, the scope of conduct covered by Section 5, as now interpreted by the FTC, is both vague and potentially enormous. Whether conduct violates the "spirit of the antitrust laws" will raise serious questions and uncertainty for those subject to the FTC's jurisdiction. As noted by Commissioner Ohlhausen, the FTC did the general public no favors by failing to provide examples of conduct that would be prosecuted on a stand-alone basis under Section 5.

By the same token, the FTC may have announced an intention to pursue claims regardless of any substantial harm to competition. If true, this would add an unprecedented wrinkle to the FTC's enforcement authority, and run contrary to the history of case law repeatedly rebuffing the FTC's prior efforts to bring stand-alone claims under Section 5 not otherwise subject to the antitrust laws.

Furthermore, it is not entirely clear how the FTC defines an analytical framework "similar" to the rule of reason for evaluating standalone conduct. Commissioner Wright, who recently announced his resignation from the FTC and was a driving force behind this Statement, appears to have overlooked this detail when he was quoted as saying that "[a]ntitrust lawyers who counsel clients re the rule of reason can, for the first time, counsel Section 5." On the other hand, the supporting statement of Commissioners Ramirez, Brill, Wright and McSweeny candidly acknowledges that the principles were designed to "retain for the Commission the flexibility to apply its authority in a manner similar to the case-by-case development of the other antitrust laws," suggesting that the vague and ambiguous nature of the Statement was intentional.

The FTC declined to seek public comment, and it is unclear whether the Statement was intended to strictly provide guidance, or foreshadow increased enforcement under Section 5. Even leading members of the House Judiciary Committee (namely Chairman Bob Goodlatte and antitrust law subcommittee Chairman Tom Marino), who welcomed the Statement, cautiously noted that they would monitor how the FTC applies its guidance and made it clear that they wanted "to ensure that the FTC administers our antitrust laws in a transparent, stable, fair, and predictable manner and that it does not exceed its statutory authority."