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TRANSACTIONS

FTC antitrust statement offers little clarity

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Last week, the Federal Trade Commission issued a "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." The FTC Act established the agency in 1914, and the "unfair methods of competition" clause in Section 5 authorized the agency's antitrust enforcement authority. It is uncontroversial that this language encompasses all conduct that violates the Sherman or Clayton Acts. How much further it reaches beyond the boundaries of those laws has long been a vexing question and is the focus of the new guidance.

The FTC's statement, however, is less than one-page long and offers little clarity regarding what types of conduct are permissible under the Sherman and Clayton Acts, but barred by Section 5. It begins by declaring that Section 5 reaches acts that "contravene the spirit of the antitrust laws" and acts that "if allowed to mature or complete, could violate the Sherman or Clayton Act." The statement then stipulates that the FTC will (i) pursue cases advancing "the public policy underlying the antitrust laws, namely, the promotion of consumer welfare"; (ii) apply a framework "similar to the rule of reason" (an approach used for more than a century by courts to assess alleged Sherman Act violations); (iii) consider "efficiencies and business justifications"; and (iv) be "less likely" to assert Section 5 if "the Sherman or Clayton Act is sufficient to address" the situation.

Unlike other FTC guidance, there are no examples illustrating legal vs. illegal conduct, no safe harbors allowing businesses to be confident certain actions are legal, and no description of how this guidance relates to the FTC's past Section 5 enforcement actions. In the words of Commissioner Maureen Ohlhausen, who dissented from the statement, "the business community and other agency stakeholders are left guessing."

The FTC Act and Clayton Act were enacted 24 years after the nation's first federal antitrust law, the Sherman Act. The Clayton Act proscribes specific types of conduct, including, among other things, mergers that may "substantially ... lessen competition" or "tend to create a monopoly" and certain interlocking directorates.

In contrast, when crafting Section 5 of the FTC Act, Congress used deliberately general language, with the intention that the FTC would define the operative terms — "unfair methods of competition" — over time. Unlike the Sherman and Clayton Acts, which can be enforced by the Department of Justice, state attorneys general and even private parties, only the FTC is authorized to enforce Section 5. Thus, conduct that violates Section 5 but does not rise to the level of a Sherman or Clayton Act violation may be attacked under federal law only by the FTC. (However, many states, including California, have unfair competition statutes or "Little FTC Acts" that authorize state, local and private enforcement.)

In recent decades, the FTC has rarely pursued antitrust actions premised solely on Section 5 violations. Since the early 1980s, the agency has pursued only a handful of such cases, all of which have resulted in settlements. Those cases involved invitations to collude, violations of patent licensing commitments, and deception before a standard-setting organization. During the 1970s and early 1980s, the FTC brought a handful of Section 5 cases asserting more broadly applicable theories of harm through litigation, but was remarkably unsuccessful.

In *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (1984), for example, the 2nd U.S. Circuit Court of Appeals refused to find that noncollusive conduct violated Section 5 even when the conduct substantially lessened competition, holding that that FTC needed to "define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability." And in *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577 (1980), the 9th U.S. Circuit Court of Appeals held that a mere showing of parallel action, without demonstrating that the action had the effect of fixing prices, would not establish a Section 5 violation.

During the last several years, a drumbeat for guidance regarding how the agency will interpret Section 5's prohibition on "unfair methods of competition" has been growing steadily louder. In 2010, then-Commissioner William Kovacic called for the FTC "to articulate, in a policy statement or guidelines, its views about what constitutes an unfair method" of competition under Section 5. Current FTC Commissioners Joshua Wright and Ohlhausen, along with six members of the House Judiciary Committee and two U.S. senators, also publicly called for guidance. Many of these individuals cited as a model the FTC's long-standing and detailed guidance addressing its enforcement of various consumer protection laws, including other parts of Section 5.

While hopes were high for guidance that would flesh out the practical meaning of Section 5's very general language, the FTC's statement actually offers little clarity regarding the conduct proscribed by Section 5 or how the commission plans to exercise its exclusive Section 5 enforcement authority in the future. The lack of depth and detail is surprising given the FTC's congressional mandate to issue guidance and its substantial economic and legal resources.

In her pointed dissenting statement, Commissioner Ohlhausen described the statement as providing "more questions than answers." She further expressed that the FTC's "unbounded interpretation of [Section 5's prohibition barring unfair methods competition] is almost certain to encourage" FTC staff to pursue such cases. In contrast, immediately after the commission released its statement and Ohlhausen's dissent, Commissioner Wright, who joined the four-commissioner majority, told Law360 that the statement would not lead to an "explosion of litigation," and even suggested that the FTC's new approach would not support the theories underlying certain recent FTC settlements.

The differing views regarding whether the statement reflects likely expansion or contraction of the FTC's use of Section 5 only highlight the vagueness of the statement. Time will tell but we suspect that the statement portends a relatively modest expansion of the FTC's use of Section 5, and an increased willingness to pursue enforcement actions premised on Section 5 in cases that were "close calls" when analyzed through the lens of the Sherman and Clayton Acts.

Notably, the FTC's guidance is remarkably similar to the California Supreme Court's interpretation of California's Unfair Competition Law as it relates to cases brought by competitors in *Cel-Tech Communications Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 187 (1999). Rejecting much more "amorphous" definitions that "provide too little guidance to courts and businesses," the court defined "unfair" conduct as behavior "that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law or otherwise significantly threatens or harms competition." The FTC's statement clearly borrows from this verbiage and specifically references both the incipiency and "spirit of the law" concepts from *Cel-Tech*.

While convergence between the federal and state approaches is to be applauded, more specific guidance from the FTC would not necessarily have created divergence with California's approach and, indeed, likely would have been helpful to state courts in California and throughout the nation working to apply state unfair competition laws and "Little FTC Acts."

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