

After Long Debate, FTC Issues Only General Principles Regarding Section 5

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08/21/15

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On August 13, 2015, the U.S. Federal Trade Commission (FTC) issued formal guidance on Section 5 enforcement consisting of a general statement of principles¹ to guide application of its authority to challenge “unfair methods of competition” under Section 5 of the FTC Act.² While it is generally accepted that Section 5’s prohibition on “unfair methods of competition” reaches beyond the acts and practices condemned by the Sherman Act and Clayton Act,³ the precise scope of Section 5 and the FTC’s standalone jurisdiction to pursue such claims has long been a source of debate. Many within the antitrust community have called on the FTC to define the limits of its Section 5 authority with the goal of enhancing certainty and predictability. Until now, the FTC has declined to issue formal guidelines. Those anxious for guidance, however, will not find the FTC’s statement on Section 5 wholly satisfying.

In a bipartisan 4-1 vote with Commissioner Maureen K. Ohlhausen dissenting, the FTC’s short statement provides that a standalone Section 5 action will adhere to three principles: (1) the FTC will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare, (2) the act or practice subject to Section 5 will be evaluated under a framework similar to the rule of reason (that is, an act or practice challenged by the FTC 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 (3) the FTC is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman Act or Clayton Act is sufficient to address the competitive harm arising from the act or practice.⁴

In prepared comments for presenting the new guidelines at a legal seminar, Chairwoman Edith Ramirez hailed the guidelines’ flexible approach, saying they would enable the FTC to keep pace with a rapidly changing economy.⁵ She also highlighted the guidelines’ accessibility, noting their incorporation of recognizable principles and widely used concepts of antitrust law, namely “consumer welfare,” “rule of reason,” “harm to competition” and “cognizable efficiencies.”⁶ Departing Commissioner Joshua D. Wright,⁷ the most vocal proponent of formal Section 5 guidance,⁸ echoed Ramirez’s comments, stating that the tying of the “unfair methods of competition” analysis to the traditional rule of reason balancing test is the most important and instructive feature of the FTC statement, because it provides a familiar framework for advising clients about the applicability of Section 5.⁹

¹ “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (August 13, 2015) [hereinafter Statement of Principles], available at <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>.

² 15 U.S.C. § 45(a)(1).

³ See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

⁴ See Statement of Principles.

⁵ Edith Ramirez, chairwoman, Fed. Trade Comm’n, “Remarks by Chairwoman Edith Ramirez Regarding Section 5 Enforcement Principles” at the Competition Law Center of George Washington University Law School (August 13, 2015) [hereinafter Remarks by Chairwoman Edith Ramirez], available at <https://www.ftc.gov/public-statements/2015/08/remarks-chairwoman-edith-ramirez-regarding-section-5-enforcement-0>.

⁶ *Id.*

⁷ Wright recently announced that he will resign his position with his last day as a commissioner on August 24, 2015.

⁸ See Joshua D. Wright, comm’r, Fed. Trade Comm’n, “Section 5 Recast: Defining the Federal Trade Commission’s Unfair Methods of Competition Authority, Remarks at the Antitrust Section of the New York State Bar Association’s Executive Committee Meeting” (June 19, 2013), available at <https://www.ftc.gov/public-statements/2013/06/section-5-recast-defining-federal-trade-commissions-unfair-methods>.

⁹ Melissa Lipman, “Wright Sees No Risk of Section 5 Tsunami After Guidance,” *Law360* (August 13, 2015), http://www.law360.com/competition/articles/691046?nl_pk=05439b52-b6b6-408a-869e-156eec8ea967&utm_source=newsletter&utm_medium=email&utm_campaign=competition.

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Ramirez pointed out in her comments that the FTC has consistently applied this rule of reason-style approach in its recent standalone Section 5 cases. She highlighted three types of practices that had attracted Section 5 use in the recent past, including invitations to collude, the improper exchange of competitively sensitive nonprice information and breaches of commitments to license standard-essential patents on reasonable terms. She noted that the FTC has predicated these cases on a high likelihood of competitive harm, with negligible countervailing efficiencies or other cognizable business justifications. Although the FTC generally has been able to extract consent decrees in these types of cases, it has litigated very few Section 5 cases successfully.

Ohlhausen, also a longstanding proponent of formal Section 5 guidance,¹⁰ did not join Ramirez or Commissioners Wright, Julie Brill and Terrell McSweeney in voting for the issuance of the guidelines. In a separate statement, Ohlhausen criticized the effort as “too abbreviated in substance and process” to provide any meaningful guidance, saying it “raises many more questions than it answers.”¹¹ Specifically, Ohlhausen regretted the statement’s failures to provide examples of lawful and unlawful conduct and address the existing Section 5 case law.¹² She additionally expressed her apprehension that the FTC’s “unbounded interpretation” would lead to expansive use of Section 5, noting

that the policy could potentially accommodate a variety of controversial theories the FTC has considered or pursued unsuccessfully in the past.¹³

In her remarks, Ramirez stressed that the statement did not signal a “change in course” for the FTC that wasn’t already evident in its recent enforcement actions.¹⁴ Rather, Ramirez explained, the FTC sought only to “reaffirm” the principles underlying the agency’s recent enforcement actions.¹⁵

Ramirez’s remarks strongly suggest that the guidelines are unlikely to cause a dramatic shift in the application of Section 5, at least in the short term. Indeed, to the disappointment of many interested parties hoping for the proverbial Rosetta Stone of Section 5, the broad principles offer little in the way of clarification or practical advice for the business community at large. Instead, it appears the FTC likely will continue to rely on its prior enforcement record, and a case-by-case development of the law, to elucidate Section 5. As Ohlhausen highlighted in her dissent, the lack of detailed guidance leaves the door open for Section 5 to be used more expansively in the future. Despite assurances from Ramirez, given the open-ended approach of the statement, the FTC’s view of its Section 5 authority may expand or contract depending on the composition of the sitting commission.

¹⁰ See Maureen K. Ohlhausen, comm’r Fed. Trade Comm’n, “Section 5: Principles of Navigation,” remarks at the Chamber of Commerce (July 25, 2013), available at <https://www.ftc.gov/public-statements/2013/07/section-5-principles-navigation>.

¹¹ Maureen K. Ohlhausen, comm’r, Fed. Trade Comm’n, “Dissenting Statement of Commissioner Maureen K. Ohlhausen – FTC Act Section 5 Policy Statement” (August 13, 2015), available at <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>.

¹² *Id.*

¹³ *Id.*

¹⁴ Remarks by Chairwoman Edith Ramirez.

¹⁵ *Id.*

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