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ANTITRUST TRADE AND PRACTICE

The FTC's Recent Vote Refuels Debate on the Scope of Section 5

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The Federal Trade Commission (FTC) has once again addressed its unique authority to regulate unfair methods of competition under Section 5 of the FTC Act. After having previously narrowed its authority under Section 5, the recent FTC 3-2 decision on July 1 to rescind the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act (2015)" signals that the FTC will likely take a more expanded view of that authority. Press Release, Fed. Trade Comm'n, "FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act" (July 1, 2021). FTC Chair Lina Khan, who rose to prominence as a major critic of "Big Tech" and is expected to pursue a more progressive enforcement agenda during her tenure, led the push to rescind the 2015 policy statement. As part of that agenda, Chair Khan is largely expected to renew the use of the Section 5 as critical tool for antitrust enforcement.

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History of the 2015 Enforcement Principles

Section 5 was enacted in 1914 and was initially used together with other antitrust laws to challenge dominant firm behavior. Shepard Goldfein and James Keyte, *Section 5 Guidelines (Finally), and a Commissioner's Departure*, 254 N.Y.L.J. 56 (2015) [hereinafter Goldfein & Keyte 2015]. Section 5(a) declares "unfair methods of competition in or affecting commerce" to be unlawful. 15 U.S.C. §45(a)(1). Since 1927, when the U.S. Supreme Court examined the reach of FTC orders under Section 5, see *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927), the use of Section 5 to challenge conduct that is also challengeable under the Sherman and Clayton Acts has largely gone unquestioned. Goldfein & Keyte 2015; see also William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L. J. 3 (2010). But the power of the FTC to use Section 5 by itself—and not in connection with a Sherman or Clayton Act challenge—has been unclear.

In 2008, then-Chairman Jon Leibowitz promoted his view that Section 5 authority extends "well beyond the reach of Antitrust laws." Shepard Goldfein and James Keyte, Republican Commissioners Make Case for Formal Section 5 Guidance, 250 N.Y.L.J. 39 (2013) [hereinafter Goldfein & Keyte 2013]. Despite a 2008 FTC Workshop on the reach of the FTC's authority under Section 5, Chairman Leibowitz declined to issue a formal policy statement. Upon her promotion to chairwoman, Edith Ramirez also initially declined to issue a formal statement, instead preferring a "case by case approach" to developing the scope of Section 5. Id. After several court cases targeting the technology industry, the potential far reach of Section 5 raised calls for increased clarity and highlighted disagreements over the use and application of Section 5. On June 9, 2013, Commissioner Wright proposed a policy statement covering Section 5 and questioning the

use of Section 5 authority under former Chair Leibowitz. Id. The proposed policy statement included a two-prong test for unfair methods of competition: To violate Section 5, the alleged conduct must (1) harm competition and (2) lack cognizable efficiencies. Sarah Sandok Rabinovici, "Has The Time Come For A Meaningful FTC Section 5 Standard?" Law360 (Aug. 13, 2015). The first prong focused the standard of review on economic theories of harm. Under the second prong, Commissioner Wright described cognizable efficiencies as "conduct-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or services." Goldfein & Keyte 2013.

Commissioner Ohlhausen largely shared Commissioner Wright's views, stating that Section 5 "must be grounded in economics." Id. In a speech on July 25, 2013, Commissioner Ohlhausen encouraged the adoption of a policy statement to promote transparency and provide predictability. Her proposal, however, called for a six-factor balancing test, with a focus on considering substantial harm to competition, weighing efficiencies, avoiding the use of Section 5 "as a fallback" or when claims under the Clayton or Sherman Act exist, evaluating conduct as to whether it reduces consumer welfare, and turning to other non-enforcement tools if they provide a more efficient approach to addressing the conduct. Id. Neither commissioner's proposal was fully adopted by the Commission.

Nonetheless, on Aug. 13, 2015, the Commission voted 4-1 to adopt a policy statement on the enforcement principles as formal guidance on the scope of Section 5 on a standalone basis. Bryan Koenig, "Is The Consumer Welfare Standard On FTC's Chopping Block?" Law360 (June 29, 2021). Commissioner Ohlhausen ultimately dissented from the rule's adoption. Goldfein & Keyte 2013. The 2015 policy statement asserted that Section 5's ban on unfair methods of competition "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, could violate the Sherman or Clayton Act." "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (Aug. 13, 2015).

> FTC Chair Lina Khan, who rose to prominence as a major critic of "Big Tech" and is expected to pursue a more progressive enforcement agenda during her tenure, led the push to rescind the 2015 policy statement. As part of that agenda, Chair Khan is largely expected to renew the use of the Section 5 as critical tool for antitrust enforcement.

The policy statement laid out three principles for using Section 5 authority:

(1) the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;

(2) 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

(3) 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.

Id. Many saw the adoption of this policy statement as rather general, given that the one-page statement included only three guiding principles. Chairwoman Ramirez stated that the guidance served to reaffirm the rule of reason analysis that the Commission has consistently used prior to the policy's adoption. Goldfein & Keyte 2013.

Since 2015, the FTC has brought a handful of antitrust enforcement claims under Section 5. In 2016, the FTC challenged a firm's invitation to collude, alleging that defendants invited a competitor to raise and fix prices. Press Release, Fed. Trade Comm'n, "FTC Consent Order Protects Competition in Ductile Iron Pipe Industry" (Aug. 9, 2016). The FTC has also claimed a violation of Section 5 where the FTC alleged that the defendant unlawfully maintained a monopoly. See Press Release, Fed. Trade Comm'n, "Statement by Acting Chairwoman Rebecca Kelly Slaughter on Agency's Decision not to Petition

Supreme Court for Review of Qualcomm Case" (March 29, 2020). The FTC Section 5 challenges from 2015 to 2021 were seemingly narrow and often included violations also charged under the Sherman and Clayton acts. Notably, while cases prior to 2015 garnered attention for the use of Section 5 to regulate technology companies, only a fraction of recent cases alleged that a technology company engaged in exclusionary conduct. The FTC's recent focus on Section 5 may foreshadow a reach back to pre-2015 Section 5 enforcement patterns, including increased enforcement activity directed toward "Big Tech."

Current Debate on The Scope of Section 5

In deciding to rescind the 2015 policy statement, the FTC's Democratic majority saw the 2015 guidance as creating "procedural and substantive" roadblocks to establishing a broader view of the antitrust laws. "FTC's First Open Meeting Highlights Aggressive Enforcement Priorities and Partisan Divide" (July 13, 2021). Chair Khan, for instance, argued that the use of the rule of reason as the basis for Section 5 enforcement "would prevent the Commission from combating insipient wrongdoing before it becomes likely to harm competition." Transcript, Fed. Trade Comm'n., Open Commission Meeting (July 1, 2021). In her view, the 2015 policy statement caused the Commission's standalone enforcement authority under Section 5—which she characterized as "one of the Commission's core statutory authorities"—to become "a dead letter." Id. In a statement following the vote, Chair Khan and Commissioners Slaughter and Chopra asserted that the 2015 policy statement "abrogate[d] the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute." "Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (July 1, 2021).

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Republican Commissioners Phillips and Wilson both dissented from the decision to rescind the 2015 policy statement, arguing that the rescission would result in legal uncertainty for businesses. Id. In his statement, Commissioner Phillips questioned whether the vote to rescind the policy statement reflected a move by the majority away from the precedent that applied the traditional rule of reason when assessing the lawfulness of conduct under Section 5. Noah Phillips, Commissioner, Fed. Trade Comm'n, "Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the Section 5 Policy Statement" (July 1, 2021). In her own dissenting statement, Commissioner Wilson criticized only receiving one week notice of the meeting (a criticism Commissioner Phillips shared), and continued to question the uncertainty surrounding the application of the consumer welfare standard, the judicial precedent preceding the adoption of the policy statement, and the lack of a replacement policy. Christine S. Wilson, Commissioner, Fed. Trade Comm'n, "Dissenting Statement of Commissioner Christine S. Wilson."

Conclusion

The 2015 policy statement provided some guidance as to the application of Section 5. Its rescission leads to questions about the use and scope of Section 5 under the Biden Administration and seems to signal a shift toward a more aggressive enforcement agenda. In many ways, the vote on the policy statement may foreshadow an intent to expand Section 5 authority over anticompetitive practices and a move away from the current consumer welfare standard. Rescinding the policy statement will likely lead to increased uncertainty in the near term and a closer focus on the developments in the FTC under Chair Khan's leadership.