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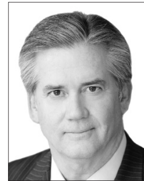
Expert Analysis

Republican Commissioners Make Case for Formal Section 5 Guidance



By Shepard Goldfein
And James Keyte

Despite years of debate, the contours of the Federal Trade Commission's (FTC) authority to prevent "unfair methods of competition" under Section 5 of the FTC Act remain a moving target. The inherently "elusive" standard of unfairness under the FTC Act has been the subject of numerous speeches, articles, and commission consent decrees in recent memory.[1] Former Chairman Jon Leibowitz, for instance, made no secret of his view that the commission's Section 5 authority extends "well beyond the reach of the antitrust laws."[2] But the Leibowitz commission resisted calls to issue a formal policy statement outlining the metes and bounds of the FTC's Section 5 authority, even after a 2008 FTC workshop on the subject.

When Leibowitz stepped down and Edith Ramirez became FTC chairwoman, the bar quickly tested her appetite for a Section 5 policy statement. She, too, declined, explaining at the American Bar Association Section of Antitrust Law's spring meeting that she preferred to develop the commission's authority on a case-by-case basis rather than through a formal policy. Undaunted by the chairwoman's view, Republican Commissioner Joshua Wright issued his own Section 5 policy statement in June 2013.

Several premises and goals underlie Wright's statement and accompanying speech.[3] Among them, Wright believes that it is the FTC's duty to identify unfair methods of competition based upon its institutional advantages and statutory mandate. He argues that delineating the FTC's Section 5 authority would provide needed guidance to consumers and the business community. And, finally, Wright maintains that such guidance should be grounded in economics and informed by precedent. His proposal is both forward looking and retrospective. Wright sees his policy statement as a starting point to engage his fellow commissioners and other stakeholders in a dialogue leading to formal commission guidance. But it is also a response to the enforcement tactics of commissions past, in particular, to the Leibowitz commission. "Commissioner Wright's Statement can be seen as the unintended culmination of—and backlash against—Leibowitz's Section 5 campaign," which included "efforts to expand Section 5 to challenge conduct under novel theories, devoid of economic grounding and without proof of anticompetitive harm (in cases like Intel, N-Data and Google, among others)."[4] With Wright's objectives in mind, we now move to his proposal.

Wright proposes a two-part test for unfair methods of competition. "[A]n unfair method of competition is an act or practice that (1) harms or is likely to harm competition significantly and (2) lacks cognizable efficiencies."[5] The first prong speaks to competitive effects. In Wright's view, competitive effects must be judged using economic theories of harm. Non-economic factors—such as impact on small businesses or offense to public morals—should not be relevant. Paramount to this inquiry is the market impact of the challenged conduct. Harm must be to competition and the competitive process, not competitors. Key indicators include higher prices, reduced output, lower quality, or declining incentives to innovate. Wright then provides examples of conduct that he considers sufficiently anticompetitive under Section 5's first prong. These include invitations to collude that may risk competitive harm or unfair methods of competition to obtain market

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power that do not rise to the level of monopoly power required under the Sherman Act.[6]

Under the second prong, the conduct must also lack cognizable efficiencies. Wright defines cognizable efficiencies as "conduct-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or services," but could not be attained by commercially practical alternatives that mitigate competitive effects.[7] Under Wright's proposal, the initial burden of demonstrating efficiencies falls upon the parties. Claims will then be vetted by the commission, which still has the ultimate burden to establish that an act lacks cognizable efficiencies.[8]

Response

In the months since Wright issued his statement, one goal has already been realized: It has already precipitated a dialogue. On July 25, 2013, Wright's fellow Republican Commissioner Maureen K. Ohlhausen responded with a speech outlining her views, which she noted will dictate her votes on future standalone Section 5 cases.[9] Ohlhausen's voyage (her speech uses a nautical metaphor nearly throughout) shares a number of Wright's premises and goals. Ohlhausen begins by commending Wright for setting forth his views, and expressing her shared goal of continuing the conversation. She also shares Wright's view that Section 5 authority must be grounded in economics. Its goals should not be social in nature, but economic regulation of business conduct. Working conditions and industrial policies—e.g., favoring domestic business—fall outside of Section 5's purview. Moreover, she joins Wright's view that a policy statement is both helpful and mandatory. To Ohlhausen, a policy statement promotes transparent and predictable enforcement efforts. She also notes that the courts have "very clearly" told the FTC that it needs to set forth principles for Section 5 enforcement.[10]

Ohlhausen's proposal builds off of Wright's, but differs in key respects. Like Wright, Ohlhausen espouses a limited role for Section 5. Her specific proposal involves a six-factor balancing test, with the first factor as her foremost consideration. She joins Wright by first requiring "substantial harm to competition or the competitive process," not competitors.[11] She explains that Section 5 should be used to address conduct that harms consumer welfare by output reduction, increased prices, or lower quality.

Second, Ohlhausen also turns to efficiencies. Here, she retreats from her colleague's bright line test that would bar enforcement where cognizable efficiencies exist. She agrees that the commission should challenge conduct where there is "a lack of any procompetitive justification," but would also introduce a proportionality test, and challenge practices if the harm is disproportionate to the benefits.[12] Despite the departure from Wright's standard, she notes that her test remains "a demanding one," and she concurs in Wright's view that avoiding false positives is a key need.[13] Ohlhausen also proposes a limitation on remedies for Section 5 violations to include only prospective, non-putative remedies, typically in the form of cease and desist orders.

> Commissioner Wright believes that it is the FTC's duty to identify unfair methods of competition based upon its institutional advantages and statutory mandate.

Third, Ohlhausen argues that when using Section 5 authority, the commission "should avoid or minimize conflict" with other institutions, particularly the Department of Justice.[14] Section 5 should not be used as a fallback, when Sherman or Clayton Act claims are deficient. Likewise, if a viable Clayton or Sherman Act claim exists, Section 5 should not be used. Fourth, Section 5 enforcement should be "grounded in robust economic evidence" that the conduct "reduces consumer welfare."[15] The commission, Ohlhausen opines, can use policy research to obtain expertise on particular conduct. Fifth, Ohlhausen would consider whether non-enforcement tools provide a more efficient and effective route to address the conduct in question. Finally, Ohlhausen implores the commission to provide clear guidance on Section 5. Businesses must be able to reasonably foresee that their conduct would be deemed unfair at the time it occurs. Moreover, the commission should explain why the conduct it is challenging is not reached by the traditional antitrust laws and is best addressed by Section 5.[16]

Ohlhausen next offers examples of conduct that Section 5 should capture. Like Wright, she begins with invitations to collude, which she believes should be pursued under Section 5 unless a viable Sherman Act attempted monopolization claim exists. Second, she points to the exchange of competitively sensitive information, like those in *Bosley*,[17] which raises the risk of collusion and lack a procompetitive justification. Further, in the standard-setting context, Ohlhausen clarifies that "we should not impose liability on an owner of a standard-essential patent merely for enforcing its patent rights," and that deception on standard-setting organization should not be pursued as a standalone Section 5 claim because it can now be pursued as a Section 2 claim.[18]

There is little question that the Republican commissioners' public pronouncements represent the greatest strides toward a policy statement since the 2008 Section 5 workshop. What will come of their efforts, however, remains to be seen. As Wright notes, the dialogue makes clear that areas of agreement exist. For instance, he argues that "there is near unanimity that the FTC should challenge only conduct as an unfair method of competition if it results in 'harm to competition' as the phrase is understood under the tradi-

tional federal antitrust laws."[19] In addition, Wright maintains that a majority of commentators agree that Section 5 guidance is needed. The form and substance of that guidance, however, remain the point of division.

Only Wright and Ohlhausen are in favor of an explicit policy statement. Ramirez, a Democrat and the current chairwoman, prefers case-by-case guidance, while Commissioner Julie Brill seems to support her fellow Democrat's approach.[20] At present, therefore, the commission stands 2-2. But that will soon change. Terrell McSweeny, a Democrat, policy wonk, and current Department of Justice Chief Counsel for Competition Policy and Intergovernmental Relations, was nominated to fill the FTC's vacancy on June 21. Her views on Section 5 remain to be seen.

Conclusions

We draw a few conclusions from this state of play. First, whether the momentum hatched by Wright and buttressed by Ohlhausen will result in a policy statement or not, attention to Section 5 is a good thing. Though formal principles would be far preferable, Wright has already succeeded in providing guidance above and beyond sporadic and brief consent decree opinions. Two of four commissioners have detailed their approach to standalone Section 5 actions already, and even the chairwoman recently committed to address Section 5 "in much more detail" in the course of 2013.[21] Thus, whether formal or informal, the business and antitrust communities can continue to look forward to Section 5 guidance from the current commission.

To be sure, however, the views of individual commissioners or even an individual commission cannot satisfy the business community's need for formal, long-term guidance. As Wright explains, practice indicates that "the scope of the commission's Section 5 authority today is as broad or as narrow as the majority of the commissioners believes that it is."[22] As Wright notes, without an institutional commitment, the Ramirez commission need not be consistent, a problem that is compounded as commissioners change over time.

Nevertheless, it is important to note that even formal guidance has its limitations. While the commission can and should utilize its institutional knowledge to outline how it will exercise its prosecutorial discretion, the scope of Section 5 ultimately will be for the courts to decide. While courts "give some deference to the Commission's informed view that a particular commercial practice is to be condemned as 'unfair,'" legal issues, like "the identification of governing legal standards and their application to the facts found" are "for the courts to resolve."[23]

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And if the past is a prelude, the FTC has every reason to proceed cautiously when and if it delineates the scope of its authority. The last set of Section 5 cases to reach the courts did not fare well for the commission. Indeed, three cases in the 1980s resulted in adverse appellate decisions for the FTC, while a district court also sided with the defense in the 1990s.[24] Antitrust jurisprudence has developed by leaps and bounds since the early 1980s, and as Ohlhausen notes, "we have ample reason to think that we will fare even worse today than we did" 30 years ago.[25] All the more reason, in our view, to develop principled guidance and take a limited approach to Section 5 pending the ultimate guidance of the courts.

1. *Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).
2. Jon Leibowtiz, Chairman, Fed. Trade Comm'n, Remarks as prepared for delivery at the Sixth Annual Georgetown Law Global Antitrust Enforcement Symposium 9 (Sept. 19, 2012), available at http://www.ftc.gov/speeches/leibowitz/120919jdlgeorgetownspeech.pdf.
3. Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013) [hereinafter Wright Policy Statement], available at http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf; Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority, (June 19, 2013) [hereinafter Wright Speech], available at http://www.ftc.gov/speeches/wright/130619section5recast.pdf.
4. Geoffrey Manne and Berin Szoka, Bringing the Error Cost Framework to the Agency: Commissioner Wright's Proposed Policy Statement on Section 5 Unfair Methods of Competition Enforcement, TRUTH ON THE MARKET (June 19, 2013), http://truthonthemarket.com/2013/06/19/bringing-the-error-cost-framework-to-the-agency-commissioner-wrights-proposed-policy-statement-on-section-5-unfair-methods-of-competition-enforcement/.
5. Wright Policy Statement, supra note 3, at 2-3.
6. See id. at 5-9.
7. Id. at 12.
8. See id. at 12-13.
9. Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Section 5: Principles of Navigation (July 25, 2013) [hereinafter Ohlhausen Speech], available at http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf.
10. Id. at 4.
11. Id. at Appendix.
12. Id.
13. Id. at 10, 16.
14. Id. at Appendix.
15. Id.
16. See id.
17. *In re Bosley*, FTC File No. 121-0081 (Apr. 8, 2013).
18. Ohlhausen Speech, supra note 9, at 18.
19. Joshua Wright, Commissioner Wright Responds to Section 5 Symposium, TRUTH ON THE MARKET (Aug. 2, 2013), http://truthonthemarket.com/2013/08/02/commissioner-wright-responds-to-section-5-symposium/.
20. See Interview with FTC Commissioner Julie Brill, ANTITRUST SOURCE, February 2012, available at http://www.ftc.gov/speeches/brill/120229antitrustsource.pdf.
21. Melissa Lipman, Section 5 Cases Offer Best Guidance, FTC Chief Says, LAW 360, April 12, 2013.
22. Wright Speech, supra note 3, at 8.
23. *Fed'n of Dentists*, 476 U.S. at 454; see also William E. Kovacic and Marc Winerman, "Competitive Policy and the Application of Section 5 of the Federal Trade Commission Act," 76 Antitrust L.J. 929, 941 (2010) ("One can have confidence in a theory's power and durability only when it has been tested in an adversarial proceeding and endorsed by reviewing courts").
24. See *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *FTC v. Abbott Labs.*, 853 F.Supp. 526 (D.D.C. 1994).
25. Ohlhausen Speech, supra note 9, at 16.

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