

## Antitrust Trade and Practice

## Expert Analysis

# Section 5 Guidelines (Finally), And a Commissioner's Departure

**A**ugust was a busy month for the Federal Trade Commission's Bureau of Competition as it released long-awaited guidance on a key provision of the FTC Act and, not long after, one of the bureau's few Republican commissioners announced his resignation. First, on Aug. 13, the commission issued formal guidelines under which it will enforce and challenge practices on a "standalone" basis under Section 5's "unfair methods of competition" provision.<sup>1</sup> Then, only a few days later, Commissioner Joshua D. Wright announced that he would resign his position at the Bureau of Competition, effective Aug. 24.

In many ways, the conclusion of Wright's tenure dovetails nicely with the announcement of formal Section 5 guidelines, as Wright spent a great deal of time and effort during his two-and-a-half years at the FTC championing the cause. The result of those efforts was a bipartisan 4-1 vote with only Republican Commissioner Maureen K. Ohlhausen dissenting to the promulgation of Section 5 rules. To many, though, these new guidelines do not quite represent a victory for Wright as they are quite general and may prove to not be practical tools for those looking for clear guidance.

The commission's Section 5 rules state that (1) in their determinations, the commission will consider the public policy underscoring the antitrust laws; (2) the commission will consider whether the challenged practice might cause harm to competition, given applicable efficiency and business justification arguments (a "rule of reason"-type approach); and (3) the commission will be less likely to challenge a business practice if the competitive harm can be adequately addressed under either the Sherman or Clayton Acts.<sup>2</sup>

While Wright hailed the guidelines' tying of standalone Section 5 analysis to the rule of reason,<sup>3</sup> Chairwoman Edith Ramirez stressed that the new guidance simply reaffirms an informal rule of reason analysis that the commission has



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been consistently using in recent years.<sup>4</sup> But whether the mid-August announcement is seen as an achievement worthy of celebration or a mere restatement of previously held principles, there is no doubt this is a major development in Section 5's somewhat spotty history, and could well re-invigorate Section 5 enforcement actions.

### Section 5's Long History

Enacted more than 100 years ago, Section 5's ambiguous "unfair methods of competition" lan-

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guage has managed to guide through the decades (including numerous changes in the economy, antitrust jurisprudence and political administrations) with little clarity. When passed in 1914, Congress appeared to intend Section 5 to encompass anticompetitive behavior not contemplated by the Sherman Act or Clayton Act.<sup>5</sup>

In its early stages, Section 5 was used concomitantly with the other competition laws to challenge dominant firm behavior; and by 1927, the U.S. Supreme Court had heard its final case in which it reviewed the commission's application of Section 5 to a company's exclusionary conduct.<sup>6</sup> Since then, the provision has continued to be used to address the same behavior covered by the Sherman and

Clayton Acts without question by the Supreme Court, but has also been widely understood to encompass anticompetitive behavior standing on its own.

It is the unclear enforcement of these "stand-alone" violations that have drawn ire—or at least confusion—during the act's long history. In recent years, for example, the commission has used Section 5's standalone authority to challenge the behavior of numerous technology companies. First, in 2008, the commission alleged that a data solution company breached a previous licensing agreement.<sup>7</sup> The action against Negotiated Data Solutions was eventually settled, but signaled an upcoming wave of similar Section 5 enforcement actions.

In 2010, the commission settled a case against Intel for allegedly using its market power to provide discounts at the exclusion of competitors.<sup>8</sup> While this case also referenced violations of the Sherman Act, the commission specifically pointed to its authority under the standalone unfair methods of competition provision of Section 5.<sup>9</sup> Many commentators believed that, regardless of the Sherman Act reference, the commission had used the broad mandate of Section 5 to force a settlement in what would have otherwise been a losing Section 2 case.

Finally in 2013, the criticism of Section 5's use reached a fever pitch. In that year, the commission challenged several allegedly anticompetitive practices of Google, namely, the alleged taking of content from competitors, the alleged passing off of such content as its own, and then threatening those who complained with being unlisted entirely from Google's website.<sup>10</sup> At the same time, Google was also accused of restricting advertisers' ability to advertise on competitors sites while also advertising on Google.<sup>11</sup> And the commission investigated Motorola, a Google subsidiary, for breaching agreements to license standard-essential patents on fair terms.<sup>12</sup>

Each of the allegations against Google highlighted the potentially far reach of an ambiguous Section 5; and, of course, the subsequent settlements associated with each investigation often revealed the deep disagreement over the scope of Section 5 among the commissioners. Indeed, only six months after his confirmation, Wright

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issued a proposed policy statement urging the FTC to promulgate clear principles regarding the enforcement of Section 5.<sup>13</sup> Not long after, Ohlhausen proposed similar guidelines.<sup>14</sup>

It is against this backdrop that last month's historic issuance should be viewed. After more than 100 years of muddled history, and numerous speeches and policy papers written by Wright and others, the FTC has finally spoken to the scope of its authority—action that Wright specifically highlighted in his resignation announcement as a significant accomplishment during his tenure.

### Wright's Tenure

Appointed in late 2012 for a term that was supposed to last for six years, Wright quickly emerged as one of the commission's more conservative enforcers and—based in large part on his emphasis on evidence-based decision-making—a stalwart dissenter to many of the actions brought by the commission's democratic leadership. Indeed, even before joining the Bureau of Competition, Wright had written critiques of the commission's actions against Google and discussed the importance of taking an evidence-based approach to antitrust enforcement.<sup>15</sup>

Wright's emphasis on empirical economic evidence was an ever-present theme in both his majority and dissenting opinions while at the FTC. Not surprisingly, in his first year and a half in office, Wright penned more dissents than any other sitting commissioner.<sup>16</sup> And over the course of his tenure, Wright wrote 16 dissents in total as well as gave numerous speeches and participated in a myriad of conferences.

One of Wright's underlying (and hardly opaque) goals was to push the commission into adopting an evidence-based approach to decision-making, centered on economic thinking and analysis.<sup>17</sup> For Wright, it was equally important to show the process by which a conclusion was reached as it was to show the conclusion itself. In interviews, Wright highlighted this goal by making the following comments regarding the frequency of his dissents: "I think I still have a duty and obligation to let the world know the way I'm thinking about cases. And whether or not that persuades anybody, I think there's value in doing that."<sup>18</sup>

To wit, the commissioner's most notable early opinions—*In the Matter of Nielsen Holdings, and Arbitron*, Docket No. C-4439 (2013) and *In the Matter of Apple*, Docket No. C-4444 (2014)—contain a level of empirical reasoning not normally seen in commission decisions. For example, in his Apple dissent, a case centering on the potential for children to make unauthorized purchases from within certain apps, Wright included a number of charts showing his economic analysis.<sup>19</sup> He used these charts to support his conclusion that the commission, without considering the extremely limited scope of the injury, "substitutes its own judgment for a private firm's decisions as to

how to design its product to satisfy as many users as possible, and requires a company to revamp an otherwise indisputable legitimate business practice."<sup>20</sup>

This type of language, openly challenging the commission on its lack of evidence-based reasoning, persists through his later dissents, including *In the Matter of Ardagh Group, Saint-Gobain Containers, and Compagnie de Saint-Gobain*, Docket No. 9356 (2013), and *In the Matter of Holcim and Lafarge*, Docket No. C-4519 (2015). In the latter, Wright concurred in part with the decision to issue a complaint, but dissented with respect to every market in which he believed "the record evidence supports neither a coordinated nor a unilateral effects theory."

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issuance of Section 5 guidelines. For Wright, clear Section 5 guidance was so important that he made it a topic of six different policy statements, papers and speeches. And in the end, many believe that Wright was so committed to some form of clarity, that he was willing to compromise somewhat in approving Section 5 principles that are considered by many to be too general to provide the analytical rigor that Wright himself so desires.

### Wright's Legacy

Joshua Wright's early departure has left a gap on the commission that will surely be felt. His training as both an economist and a lawyer gave him a particularly unique perspective on the role of the antitrust agencies in assessing the operation of markets and the behavior and incentives of their participants. And although the FTC employs economists specifically for the purpose of evaluating the economic effects of certain deals, Wright expressed his concern that the FTC's Bureau of Economics (BE) could be pressured to support settlements and consent decrees that may not be supported by empirical evidence.

As Wright observed in one interview, "in my experience, it is not uncommon for a BE staff analysis to convincingly demonstrate that competitive harm is possible but unlikely, but for BE staff to recommend against litigation on those grounds, but in favor of a consent order."<sup>21</sup>

In light of the high stakes associated with unfair competition investigations for both businesses and consumers, it is important that those tasked with carrying out these investigations understand and appreciate all of the evidence, both economic and otherwise. One can only hope that the new Section 5 guidance will include the evidence-based approach that Wright has long advocated for.



1. "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (Aug. 13, 2015), available at <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>.

2. *Id.*

3. Melissa Lipman, "Wright Sees No Risk of Section 5 Tsunami After Guidance," *Law360* (Aug. 13, 2015), [http://www.law360.com/competition/articles/691046?nl\\_pk=05439b52-b6b6-408a-869e-156ee8ea967&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=competition](http://www.law360.com/competition/articles/691046?nl_pk=05439b52-b6b6-408a-869e-156ee8ea967&utm_source=newsletter&utm_medium=email&utm_campaign=competition).

4. 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 (Aug. 13, 2015), available at <https://www.ftc.gov/public-statements/2015/08/remarks-chairwoman-edith-ramirez-regarding-section-5-enforcement-0>.

5. William E. Kovacic and Marc Winerman, Comm'rs, Fed. Trade Comm'n, "Competition Policy and the Application of Section 5 of the Federal Trade Commission Act," 933, available at <https://www.ftc.gov/sites/default/files/documents/public-statements/competition-policy-and-application-section-5-ftc-act-marc-winerman/2010kovacicwinermanpolicyapp.pdf>.

6. *Id.* at 933.

7. Press Release, Fed. Trade Comm'n, "FTC Challenges Patent Holders Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S." (Jan. 23, 2008), <https://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license>.

8. Press Release, Fed. Trade Comm'n, "FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets" (Dec. 16, 2009), <https://www.ftc.gov/news-events/press-releases/2009/12/ftc-challenges-intels-dominance-worldwide-microprocessor-markets>.

9. Statement of Chairman Leibowitz and Commissioner Rosch (Dec. 16, 2009), available at [https://www.ftc.gov/system/files/documents/public\\_statements/568601/091216inteltelc\\_hairstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/568601/091216inteltelc_hairstatement.pdf).

10. Press Release, Fed. Trade Comm'n, "Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search" (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

11. *Id.*

12. *Id.*

13. 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>.

14. Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, "Section 5: Principles of Navigation, Remarks at the U.S. Chamber of Commerce" (July 25, 2013), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/section-5-principles-navigation/130725section5speech.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf).

15. Geoffrey A. Manne and Joshua D. Wright, "Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google," 34 *Harv. J.L. & Pub. Pol.* 1 (2011).

16. Biographies, Fed. Trade Comm'n, Joshua D. Wright Former Commissioner [hereinafter Wright Biography], available at <https://www.ftc.gov/about-ftc/biographies/joshua-d-wright>.

17. *Id.*

18. Melissa Lipman, "FTC's Joshua Wright Takes Aim at 'State' Thinking," *Law360* (Sept. 3, 2014), <http://www.law360.com/articles/554922/ftc-s-joshua-wright-takes-aim-at-state-thinking>.

19. Joshua D. Wright, comm'r, Fed. Trade Comm'n, "Dissenting Statement of Commissioner Joshua D. Wright—In the Matter of Apple, Inc." (Jan. 15, 2014), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/dissenting-statement-commissioner-joshua-d-wright/140115a\\_pplstatementwright.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d-wright/140115a_pplstatementwright.pdf).

20. *Id.*

21. Melissa Lipman, "FTC's Wright Calls for More Economists at Antitrust Watchdog," *Law360* (Aug. 7, 2015), [http://www.law360.com/articles/688834/ftc-s-wright-calls-for-more-economists-at-antitrust-watchdog?article\\_related\\_content=1](http://www.law360.com/articles/688834/ftc-s-wright-calls-for-more-economists-at-antitrust-watchdog?article_related_content=1).