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Antitrust Law Alert - Federal Trade Commission Provides Statement Of Enforcement Principles Regarding Unfair Methods Of Competition

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On Aug. 13, the Federal Trade Commission (FTC) issued its Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the Sherman Act. By a 4-1 vote, the FTC provided its framework for the analysis of its "stand alone" authority to pursue unfair competition claims that do not otherwise fall within the Sherman or Clayton Acts.

Background

Section 5 of the Federal Trade Commission Act declares "unfair methods of competition in or affecting commerce" as unlawful, 15 U.S.C. 45(a)(1). Congress chose not to define those words, leaving the FTC and the courts with flexibility to apply the statute to evolving circumstances. The vague statutory prohibition has never been defined by the FTC and judicial precedent has been relatively sparse over the past 100 years as compared to the well- developed case law surrounding the Sherman and Clayton Acts. Without first seeking public comment, the FTC chose to publish a framework for analyzing unfair competition claims that are not otherwise subject to other antitrust statutes.

Statement of Principles

The FTC's short statement of principles suggests future Section 5 analysis will follow the following rubric:

- the FTC will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- 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 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
- 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 or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

The FTC's short Statement of Principles was accompanied by an equally sparse majority statement. It affirms that enforcement of Section 5 of the Federal Trade Commission Act is intended to be aligned with other antitrust statutes and is "guided by the goal of promoting consumer

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welfare and by economic analysis." It focuses on the familiar "rule of reason" analysis that has been developed over the last 125 years and is familiar to the courts and practitioners. The majority statement suggests there is nothing new in its approach to Section 5.

The Dissent

Republican Commissioner Maureen Ohlhausen issued a detailed dissent explaining her "no" vote. Although Commissioner Ohlhausen suggests that she does not oppose the FTC's effort to clarify its enforcement standards, and in fact has advocated for written standards in the past, she objected to the new standards on both procedural and policy grounds.

Procedurally, Ohlhausen believes it is a mistake for the FTC to proceed without soliciting and considering public comments. Also, she is critical of the relatively cursory analysis provided by the FTC in the statement and accompanying comments.

As a matter of policy, Ohlhausen is concerned FTC staff may use the ambiguities embedded in the statement to expand the reach of the FTC's enforcement of Section 5. As she observes, the courts have repeatedly rebuffed FTC efforts to expand the scope of Section 5 enforcement. But, the new Statement of Principles might allow for theories which previously were rejected. She also objects to the Statement on the grounds that it explicitly allows the FTC to pursue Section 5 violations, even in the absence of substantial harm to competition.

Analysis

At first glance, the FTC's Statement of Principles does not appear to be a radical change from traditional antitrust enforcement. The rule of reason, and its balancing of consumer welfare against business efficiencies and justifications, is well understood by courts and businesses. The notion that the FTC will look first to the Sherman Act and Clayton Act is likewise a standard practice.

Time will tell whether Commissioner Ohlhausen's concerns will be realized. However, it is fair to say that the FTC has been more aggressive in seeking to expand its enforcement powers since President Obama's election in 2008. The extent to which the FTC's staff uses this new statement to expand its powers will likely be impacted by the outcome of the next presidential election.

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