The Past, Present, and Future of Section 5 of the FTC Act: Perspectives From the Commission, the Judiciary, and Congress

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What is an “unfair method of competition” for purposes of the Federal Trade Commission’s (FTC’s) enforcement powers? BakerHostetler recently hosted a symposium on Section 5 of the Federal Trade Commission Act that brought together, for the first time in a public forum, present and former representatives from all three branches of government, who discussed the origins, past and present use, and future parameters of Section 5 as a renewed enforcement vehicle. The vigorous exchange of opinions among the 14 distinguished symposium speakers clarified the terms of the dialogue over whether the FTC should adopt formal guidelines to finally define “unfair methods of competition” and place limits on its enforcement discretion under its “standalone” Section 5 authority – that is, its power to pursue anticompetitive conduct not reached by the Sherman or Clayton antitrust acts.

The discussions yielded valuable insight for in-house and outside counsel entrusted with protecting companies and institutions from potential FTC enforcement actions.

Section 5 of the FTC Act has been aggressively used by the FTC in recent years to challenge conduct by companies as antitrust or consumer protection violations. The FTC has challenged conduct that might otherwise be permissible under the Sherman Antitrust Act, an interpretation some courts have endorsed. Recent public investigations against major companies have ensued, seeking consent decrees as well as restitution and disgorgement of profits. Congress also has joined the debate about Section 5, calling for guidelines on its use.
Panel 1: The Legislative, Federal Trade Commission, and Judicial History of Section 5

The symposium’s opening panel examined the history of Section 5 to draw lessons about its meaning and appropriate use today. Examining the antitrust concerns of Section 5’s drafters and the early commissioners, the panelists emphasized that Congress intended Section 5 to afford the FTC great flexibility to pursue its mission and offered examples of conduct that they believe are ripe for FTC oversight and enforcement.

Legislative History of the FTC Act

The FTC Act’s legislative history shows that it was intended to reach conduct beyond that covered by the Sherman and Clayton acts. Setting the stage, the panelists described how the early 20th century saw a wave of mergers, a contested presidential race, and two decades of judicial interpretation of the Sherman Act that enriched the antitrust debate among legislators. Mr. Lande noted that Congress was concerned about both the wealth transfer effects of market power and protecting consumer choice. As a result, the FTC Act’s drafters envisioned that enforcement under Section 5 would be driven by more than just economic efficiency; it would be driven by other non-price indicia, including consumer protection.

Consumer Protection Should Be the Centerpiece of Section 5

Recognizing that ensuring consumer protection and consumer choice were initial goals of Section 5, the panel voiced support for the continued centrality of those goals in contemporary enforcement. The panelists argued that this objective would be faithful to Congress’ intent that Section 5 be broader than other antitrust laws, would provide predictability to businesses, and would make it more likely that the FTC’s actions would be upheld by the courts. Mr. Winerman advised that the FTC seek narrow, forward-looking remedies rather than levying stiff penalties on offenders.

Conduct That Section 5 Should Address

The panelists gave specific examples of conduct that Section 5 ought to address, with Mr. Averitt and Mr. Lande noting the possibility of prosecuting business torts, including industrywide tortious practices that could adversely affect competition and consumer choice. Other suggestions included traditional invitations to collude, as well as unilateral or collusive attempts to suppress innovation (particularly in the software development realm). The panel agreed that a policy statement by the FTC regarding the scope and application of Section 5 is essential to allow the Commission to make beneficial use of the full range of powers that the drafters of Section 5 intended. The panel concurred that the FTC should carefully select Section 5 test cases as the Commission moves into new enforcement territory.

Panel 2: Recent Developments in the Interpretation and Use of Section 5 by the FTC

This panel included Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection; Barry J. Cutler, former Director of the Federal Trade Commission Bureau of Consumer Protection, and now of Counsel, BakerHostetler; and Deborah L. Feinstein, Director of the Federal Trade Commission Bureau of Competition. It was moderated by BakerHostetler partners Carl W. Hittinger and Tanya Forsheit.

“Our expertise has centered on preserving consumer welfare, and we do that best when we focus our enforcement activities on conduct that threatens the competitive process, and that’s what Section 5 is tied to – things that threaten the competitive process, even in their incipiency.” – FTC Director Deborah Feinstein

The second panel featured three current or former directors of the FTC’s two enforcement bureaus. Drawing on years of experience, the panel discussed developments in the criminalization of consumer protection, the FTC’s standalone Section 5 cases, and how the FTC approaches privacy and data security issues.
Criminalization of Consumer Protection

Mr. Cutler discussed the trend, dating from the early 1990s, of folding criminal matters into traditional civil antitrust matters in the consumer protection arena. Director Rich added that fraud is a central concern for the FTC’s consumer protection mission and noted that if the FTC discovers a company is engaged in intentional fraud, a criminal referral is likely.

The FTC’s Criminal Liaison Unit, created to refer FTC cases involving criminal conduct to the Department of Justice for possible criminal prosecution, has increasingly been used to coordinate dual civil and criminal investigations of antitrust violations. Considering the trend toward criminalization and use of administrative tools to investigate and prosecute criminal actions, Mr. Cutler cautioned that counsel advising a client about civil FTC-related issues also should be cognizant of potential criminal prosecution risks.

The FTC’s Use of Section 5

Directors Feinstein and Rich stated that Section 5 is the source of the FTC’s jurisdiction in nearly every enforcement action, but the use of Section 5 as a standalone authority, independent of the antitrust laws, has not been nearly as prevalent. Indeed, Director Feinstein noted that standalone Section 5 actions account for only “a handful of cases.”

Director Feinstein highlighted several aspects of the FTC’s approach to using its standalone Section 5 authority, pointing out the following:

- The number of standalone cases is limited because most FTC actions fall under the antitrust laws.
- The Commission seeks modest redress of violations, usually limited to prospective injunctive relief, to send the message: “Don’t do it again.”
- The FTC’s low-stakes approach does not chill procompetitive business activity.

(Later in the day, Commissioner Joshua D. Wright took issue with some of Director Feinstein’s points – see the discussion of his keynote speech, below.) As Director Feinstein explained, the FTC does not seek disgorgement in these cases, a position solidified by the FTC’s 2012 withdrawal of its policy statement on monetary equitable remedies in competition cases.

When asked how practitioners can know whether a case is a standalone Section 5 case, Director Feinstein stated that the FTC’s complaint and public comment normally contain key words that clarify whether the matter arises under the antitrust laws or is a “pure” Section 5 case. She highlighted invitation to collude cases as the primary target of standalone Section 5 enforcement; additionally, market power and standard-essential patent cases are other examples of activities within the ambit of Section 5.

Keynote Speech: FTC Commissioner Joshua D. Wright

Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority

“Although the desire to strike the correct balance between flexibility and certainty is well-intended, the so-called ‘common-law approach’ to defining Section 5 is a recipe for unprincipled and inconsistent enforcement and an invitation for an outside institution – the courts or Congress in particular – to define Section 5 for the FTC.” – FTC Commissioner Joshua Wright

In his keynote speech, Commissioner Wright made the case for his view that the agency should issue formal guidance regarding the scope and role of its authority under Section 5. Commissioner Wright recognized that without guidelines, Section 5 enforcement can be as broad or as narrow as a majority of the commissioners at any given time believe it to be, and the business community suffers from the resulting uncertainty. The Commissioner asserted that a common-law, case-by-case approach to defining Section 5 (as championed by FTC Chairwoman Edith Ramirez) is undesirable because it leads to inconsistent and unpredictable results, and invites Congress and the courts to step in and define the FTC’s authority.

The Commissioner stated that the time has come, after many years of debate and input from a variety of stakeholders, for the commissioners to adopt formal agency guidelines. Commissioner Wright credited some of his fellow commissioners with helping create three principal alternative definitions of “unfair methods of competition.” The Commissioner said he planned to put all three definitions up for a vote the following week, though as a single commissioner he had no power to force the vote to take place if the other commissioners did not agree to take up his proposal. Each of the definitions contains two common elements that must be present for the anticompetitive conduct to rise to a Section 5 violation:

- The conduct must “harm or be likely to harm” competition significantly.
- The conduct must be outside the reach of traditional antitrust laws.

Beyond those elements, the definitions vary as to how any procompetitive efficiencies generated by the conduct should be weighed against the anticompetitive effects of the conduct. Commissioner Wright noted that the matter of efficiencies was, in his view, essentially the only basis
for disagreement among commissioners. In his view, any
cognizable efficiencies should be sufficient to exempt
conduct from FTC scrutiny, leaving the Commission free to
devote its resources to combating anticompetitive conduct
that has no redeeming qualities.

Commissioner Wright concluded by expressing his desire
that the current Commission be the one to finally define
the FTC’s authority under Section 5. He predicted that if
the FTC continues to resist defining the scope of Section
5, Congress will likely step in and adopt a narrower
view of the FTC’s Section 5 authority than any of the
commissioners envision.

In the question-and-answer period following his speech,
Commissioner Wright responded to Director Feinstein’s
statement that the FTC brings few standalone cases
under Section 5 by saying that he “rejected the premise,
the application, and the concept.” Wright pointed out that
in the agency’s reports to Congress in recent years, the
consumer savings attributed to its standalone Section
5 enforcement actions amounted to well over half of all
consumer savings achieved by its nonmerger competition
enforcement agenda. That, he concluded, makes it “a big
deal.”

Panel 3: The Current Debate at the
FTC Over Section 5 Guidelines

This panel included Joshua D. Wright, Commissioner,
Federal Trade Commission; William E. Kovacic, former
Federal Trade Commission Chairman, and now professor
at The George Washington University Law School; Terry
Calvani, former Commissioner, Federal Trade Commission,
and now of counsel, Freshfields Bruckhaus Deringer LLP;
and Hon. Douglas H. Ginsburg, Circuit Judge, Federal
Court of Appeals for the District of Columbia Circuit. The
panel was moderated by BakerHostetler partner Carl W.
Hittinger and counsel Jeffry W. Duffy.

“...the premise, the application, and the concept." – Judge Douglas H. Ginsburg

The third panel took up the theme of Commissioner
Wright’s keynote speech with a discussion of the debate
over Section 5 guidelines. The panelists all agreed that
guidelines are necessary if the Commission hopes to be
successful in using its standalone Section 5 authority to
bring enforcement actions.

Commissioner Wright’s Call to Action for
Section 5 Guidelines

Continuing the themes of his keynote address,
Commissioner Wright emphasized that any guidelines
provided by the Commission, even if less restrictive of
the Commission’s authority under Section 5 than what he
recommends, are “better than the status quo,” and that the
FTC should act now to establish them. Without FTC-issued
guidelines, every panel member agreed that Congress may
step in to fill in the gap.

Lack of Guidance From Both the FTC and the
Courts

The absence of any guidelines by the Commission
exacerbates the lack of guidance from the courts.
Former Commissioner Kovacic stated that there are few
litigated cases under Section 5 because the Sherman Act
expanded beyond its initially contemplated reach. That,
and the Commission’s failure to explain what is prohibited
under Section 5, has led to judicial development of the
Sherman Act at the expense of Section 5. The absence
of guidelines impedes what Mr. Kovacic described as
the “norm creating” function of the Commission, which
requires the Commission to deploy its unique technical
expertise in a principled and transparent way to establish
its credibility with all three branches of government. Mr.
Kovacic added that any FTC guidelines should take into
account the Department of Justice’s role in antitrust
policymaking and enforcement.

Guidelines Would Prevent Overreaching and
Provide Transparency

Former Commissioner Calvani argued that guidelines are
necessary to the extent that Section 5 is interpreted to
prohibit activity outside the purview of the antitrust laws.
Violations should not be determined subjectively, and
guidelines would offer much-needed transparency. Mr.
Calvani also recommended issuing guidelines to prevent
the reach of Section 5 into amorphous – and potentially
politically untenable – territories such as defining or
prohibiting “social” or “environmental” harm.

The Need for FTC Guidelines in Judicial
Proceedings

Judge Ginsburg emphasized that, when addressing
agency decisions, courts want to put cases into context
and ensure that agency actions are restrained by limiting
principles. Without applicable limiting principles, courts
cannot ensure that the agency is acting within its purported
sphere of expertise. In the absence of such guidelines, the
agency faces a poor climate in the courts. In fact, the FTC
has not prevailed in court on a standalone Section 5 claim
since the 1960s.
Because most generalist courts will not have substantial background or expertise in antitrust or standalone Section 5 cases, a lack of guidelines may lead to haphazard results or make it unnecessarily difficult for the FTC to prevail on novel causes of action.

Judge Ginsburg recommended self-limiting guidelines because they are given more respect than those that leave an agency too much unfettered discretion. It is in the Commission’s self-interest to at least undertake the process of drafting guidelines that will genuinely define “unfair methods of competition” and provide a meaningful framework for the FTC’s enforcement efforts. Judge Ginsburg acknowledged that such guidelines may not pass a divided Commission, but there is no way of knowing for sure since the Commission has not tried passing any at all.

Invitations to Collude Under Section 5

The panelists specifically discussed the propriety of including invitations to collude as prohibited conduct under Section 5. Mr. Kovacic began with the premise that clear-cut invitations to collude are fundamentally dangerous with no redeeming justification. He pointed out that when the answer to an invitation to collude is “yes,” then the enforcement consequences can be severe, including up to 10 years in prison. Accordingly, the initial invitation to collude should also be prohibited, regardless of whether any harm arises from the invitation, because it lacks any societal benefit. Mr. Kovacic cautioned that the clarity and setting of an “offer” should be informed by contract principles. While antitrust counsel ought to be counseling their business clients not to discuss prices in general, such as at a trade association meeting, it may be permissible within the context of a proposed joint venture to discuss pricing common outputs.

Arguing that modern economic theory justifies banning invitations to collude as an unfair method of competition, Commission Wright stated “there is some forward-looking component of Section 5 analysis, just like there is in the Sherman Act.” He explained that there is a prospective harm to competition in an invitation to collude if there is “a significant probability” of an affirmative answer to the invitation. He added that it will be important to limit how far in advance to look for the suspected harm, but most cases would require looking only a matter of days beyond the invitation to collude. Commissioner Wright also stated that rather than a categorical ban, “the more fruitful way to discuss” invitations to collude is to begin with the principles underlying the rest of the antitrust laws and to determine how to make Section 5 fit within those principles.

Panel 4: The Future of Section 5 at the FTC, in the Courts, and in Congress

This panel included The Hon. Maureen K. Ohlhausen, Commissioner, Federal Trade Commission; Matthew Owen, Chief Counsel to the U.S. Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, and General Counsel to Senator Mike Lee (R-Utah); Anthony Grossi, Counsel to the U.S. House Committee on the Judiciary and the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law; and Susan A. Creighton, former Director of the Federal Trade Commission Bureau of Competition, and now Partner, Wilson, Sonsini, Goodrich & Rosati, PC. It was moderated by BakerHostetler partners Carl W. Hittinger and Danyll W. Foix.

“Rather than seeking to expand the scope of Section 5, the FTC ought to focus its efforts and available tools on developing the antitrust laws.” – FTC Commissioner Maureen K. Ohlhausen

“If Section 5 is a mess … then that mess was created by Congress, and it is ultimately the responsibility of Congress to ensure that someone cleans up that mess, whether it’s the agency or the federal courts in litigation or ultimately the legislature itself.” – Chief Counsel to the U.S. Senate Subcommittee on Antitrust, Matthew Owen

The final panel wove together the strands of debate raised earlier in the day, as the panelists debated the future of Section 5 in light of its history, its current uses, and the debate over guidelines.

Commissioner Ohlhausen’s Conservative View of Section 5

The panel began with Commissioner Ohlhausen explaining her criteria for the FTC’s use of Section 5 outside the scope of the antitrust laws. She advocated a cautious approach, under which the Commission would use that authority only to address a substantial threat to competition caused by a market failure, and in which the benefits of implementing an enforcement action outweigh the costs of or disincentives for innovation.
Commissioner Ohlhausen concluded that the Commission should extend its enforcement authority with respect to Section 5 only a very limited amount beyond the antitrust laws. Otherwise, the Commission risks chilling innovative or efficient conduct in the market. Further, in her view, the more the Commission attempts to expand Section 5 beyond the scope of the Sherman Act, the more it risks going beyond the intended purpose of the FTC Act and inviting political backlash. Commissioner Ohlhausen recognized that not all commissioners have shared her cautious approach, citing the FTC’s assertion of standalone Section 5 violations in the Google/MMI, Bosch, and N-Data matters.

**Congressional Concerns Over Section 5**

Mr. Owen and Mr. Grossi offered their perspectives as counsel to the U.S. Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights and the U.S. House Committee on the Judiciary and Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, respectively. They noted that Congress has harbored a long-standing concern regarding Section 5 and the discretion it affords the FTC in enforcement actions.

When addressing the Commission’s use of Section 5, Mr. Grossi noted that Congress has three options: (1) write letters to the Commission; (2) hold oversight hearings; and (3) propose legislation. Congress has already pursued the first two options. The House and Senate Judiciary Committees, and the Subcommittees on Antitrust, Competition Policy, and Consumer Rights sent a joint letter to FTC Chairwoman Edith Ramirez expressing concern about the lack of guidelines on the parameters of the Commission’s authority under Section 5, particularly given that the Commission recently prosecuted standalone violations of Section 5 outside traditional antitrust law. The letter argued that a lack of guidelines generates uncertainty in the business community, which deters innovation. Thus, the letter recommended that the Commission issue appropriate guidelines to identify what conduct constitutes an unfair method of competition under Section 5.

Chairwoman Ramirez responded indirectly by asserting that the Commission’s complaints and settlement decrees and the existing case law provide sufficient guidance. She further stated that the Commission initiated standalone Section 5 cases only in limited instances and with both care and caution. Congress held antitrust hearings shortly after Chairwoman Ramirez’s answer, during which many members expressed frustration with the chairwoman’s response. While Mr. Grossi and Mr. Owen emphasized that they could not speak for the Judiciary Committees or any committee members, it is clear that Section 5 continues to be a significant area of interest and that the potential for legislative action to remedy what some in Congress see as the FTC’s excessive discretionary power remains on the table.

**Caution to Private Practitioners in Light of Section 5’s Uncertain Future**

From Susan Creighton’s perspective as a former director of the Bureau of Competition and a current private practitioner, the need for the Commission to act as a bipartisan expert agency with regard to antitrust laws has expanded, while the need to pursue standalone actions under Section 5 has diminished. Nevertheless, Ms. Creighton said she believed that the Commission had recently missed some opportunities, such as in the Intel and N-Data cases, to clarify what conduct falls under the Sherman Act as opposed to being “pure” Section 5. The Commission’s recent treatment of Section 5 in those cases, therefore, only muddled the law.

Even if the future of Section 5 is uncertain, Ms. Creighton noted, a private practitioner should nevertheless keep it in mind when advising clients. Clients may propose (albeit rarely) some actions that fall outside the antitrust laws but would raise concerns from the Commission. Those cases may prompt the Commission to resort to Section 5 as a gap-filling measure, particularly if the Commission intends to force a settlement rather than test its Section 5 authority.

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If you have any questions about the material presented in this white paper or about the symposium in general, contact Carl W. Hittinger at chittinger@bakerlaw.com or 215.564.2898.

To view video of the symposium, please visit www.bakerlaw.com/events/symposium-on-section-5-of-the-federal-trade-commission-act.