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Symposium Advances Debate Over FTC's Section 5 Enforcement Powers

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Special to the Legal

What is an “unfair method of competition” for purposes of the Federal Trade Commission’s enforcement powers? For more than 100 years, lawyers, economists and other experts—as well as courts—have debated that question, trying to determine exactly what conduct Congress meant to prohibit, beyond conduct already condemned by the antitrust laws, when it enacted Section 5 of the FTC Act of 1914. The Baker & Hostetler-sponsored Symposium on Section 5, held in Washington, D.C., on Feb. 26, assembled, for the first time in a public forum, key decision-makers and experts from all three branches of government to debate the future of FTC’s competition enforcement authority as the agency embarks on its second century. (The last symposium on Section 5 took place in 2008 but was an internal workshop for the FTC.) The vigorous exchange of opinions among the 14 distinguished symposium speakers clarified the terms of the dialogue over whether the FTC should adopt



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formal guidelines to finally define “unfair methods of competition” and place limits on its enforcement discretion under its “stand-alone” Section 5 authority—that is, its power to pursue anti-competitive conduct not reached by the Sherman or Clayton antitrust acts.

GUIDELINES OR NO GUIDELINES?

FTC Commissioner Joshua Wright, the symposium’s keynote speaker, inaugurated his tenure at the agency in 2013 by proposing a policy statement in favor of Section 5 guidelines based on well-defined economic and legal criteria. Since then, the competition community—including the commission itself—has divided into pro-guidelines and anti-guidelines camps, with the pro-guidelines camp further divided into factions that support competing criteria for guidelines. At the symposium, Wright welcomed the robust discussion sparked by his proposal and reaffirmed his view that formal guidelines are needed to safeguard the FTC’s independence, strengthen its enforcement efforts in the courts, and reduce harmful uncertainty for business. He cited the Horizontal Merger Guidelines used by the FTC and the U.S. Department of Justice for years as a model, noting that they have proven to be “one of the most significant contributions to antitrust law and policy and have greatly benefited the antitrust agencies, the federal courts, and the business community.”

(Recordings from the symposium can be found at <http://goo.gl/FlmWx8>.)

Other symposium presenters echoed Wright's call for guidelines from several different points of view. His fellow commissioner, Maureen Ohlhausen, gave remarks that renewed her support for Section 5 guidelines in the interest of transparency, predictability, and policy coherence, but emphasized that, in her view, "the commission ought to focus on developing the antitrust laws rather than expanding the scope of its [stand-alone] Section 5 authority." Judge Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit, reviewing how courts have dealt with the lack of Section 5 guidelines to date, said that it has been "an unmitigated disaster for the commission." Without guidelines to illustrate the limiting principles that govern the agency's authority, Ginsburg said, "you have a court looking down a very deep well and deciding that it might be better not to jump"—with the result that the FTC has not prevailed in court on a stand-alone Section 5 claim since the 1960s. Former FTC chairman William Kovacic, a non-executive director of the U.K. Competition and Markets Authority, stressed that guidelines are also important to help define the respective roles of the FTC and the DOJ in competition enforcement, not only for domestic policymaking but also in the "increasingly vital" task of "providing a coherent vision to the rest of the world" about U.S. competition policy.

Two of the top antitrust lawyers from the House and Senate

subcommittees with jurisdiction over competition policy, Anthony Grossi and Matthew Owen, pointed out at the symposium that a number of their Republican members have expressed displeasure with the status quo and have urged the FTC to adopt Section 5 guidelines, both at hearings and

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in an October 2013 letter signed by members of both houses of Congress. Adding a Democratic voice to what has been largely a Republican chorus, Robert Lande, Venable Professor of Law of the University of Baltimore School of Law, also a former FTC attorney, declared himself "solidly in favor of guidelines" and unable to understand "why the guideline issue has become so partisan." Addressing his fellow Democrats, Lande urged, "Just because Commissioner Wright prefers guidelines doesn't mean you should oppose them."

In a review of the FTC's recent use of its stand-alone Section 5 authority, the director of the agency's Bureau of Competition, Deborah Feinstein, implicitly challenged the need for guidelines. She observed that the single

most common use of stand-alone Section 5 at present is in cases involving invitations to collude, which are uncontroversial because no one today disagrees that such conduct is an "unfair method of competition." She further downplayed the significance of the issue because stand-alone Section 5 enforcement accounts for only "a handful of cases," the FTC generally seeks only prospective relief and not disgorgement or other monetary equitable remedies, and there is, therefore, little reason to believe that the lack of guidelines has a substantial chilling effect on business activity.

Later in the symposium, Wright responded to Feinstein's "handful of cases" statement 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 stand-alone Section 5 enforcement actions amount to well over half of all consumer savings achieved by its non-merger competition enforcement agenda. That, he concluded, makes it "a big deal."

WHICH GUIDELINES?

The symposium participants' broad agreement on the need for Section 5 guidelines did not extend to their content. Lande argued that neither the FTC Act nor the antitrust laws require an exclusive focus on economic efficiency narrowly construed, and that any Section 5 guidelines should address both price and non-price factors to protect "consumer choice." In Lande's

view, conduct should not violate Section 5 unless it “significantly interferes with the choices that otherwise would come onto the market”—a limiting principle that, he argued, will garner respect from the courts.

Most speakers at the daylong symposium, however, described their preferred guidelines in terms of balancing anti-competitive harms against economic efficiencies. According to Wright, there appears to be a consensus even within the current commission that an “unfair method of competition,” for purposes of the FTC’s stand-alone Section 5 authority, is conduct “that harms or is likely to harm competition significantly” and for which “there is not well-forged case law under the traditional anti-trust laws.” Disagreement arises, in Wright’s view, only as to the role that efficiencies should play in the analysis. Under his preferred guidelines, the FTC should not pursue a stand-alone Section 5 claim if the conduct in question gave rise to any cognizable economic efficiencies. Ohlhausen, on the other hand, said she favors slightly less strict guidelines that would target conduct only if its harm to competition were “disproportionate to its benefits to consumers and to the economic benefits to the defendant.” The third and least stringent view, which Wright labels the “rule of reason” test, would allow the FTC to pursue conduct where the harms were “not outweighed by the cognizable efficiencies.”

IF NO GUIDELINES, WHAT THEN?

Though Wright expressed optimism about the current commission’s ability to achieve consensus on Section 5 guidelines, he conceded that there is no guarantee of success. Part of his case for guidelines is that, if the agency does not create them, Congress may very well step in—and that “would result in a more restrictive definition of what constitutes an ‘unfair method of competition’ than anything the commission would implement.” Owen, offering his view from a Senate vantage point, added that it is ultimately the responsibility of Congress to ensure that someone “cleans up the mess” that Congress created 100 years ago, “whether it’s the agency or the federal courts in litigation or ultimately the legislature itself.” Grossi, from the House side, noted that Congress has three options: sending letters to express its views and to urge action, holding hearings to highlight the issues for the public, and legislating. “In the Section 5 context so far, we have sent letters and had hearings,” he said, and it “remains to be seen” whether legislation will be necessary.

Against this background of congressional dissatisfaction and the risk of further losses in the courts, Wright announced at the symposium that he would put the three principal options for guidelines to a commission vote the following week. Any of those three options, he declared, would be “better than the status quo.” Though hopeful that a consensus would

coalesce around one of them, he acknowledged that all three might be defeated, and he also warned of a third possibility: namely, that a majority of the commissioners would not vote at all, leaving Wright’s motion “languishing in agency procedural purgatory.”

Since Wright’s announcement at the Baker & Hostetler symposium, several weeks have passed without any announcement from the FTC about a decision on Section 5 guidelines. It seems possible, therefore, that his fears about “procedural purgatory” may be coming to pass. The term of office of FTC chairwoman Edith Ramirez—up to now an opponent of adopting formal Section 5 guidelines, favoring instead a “common-law” approach based on decided cases and agency settlements—will expire in September, and President Obama will at some point have to nominate a new commissioner and a new chair for the FTC. That nominee will be seeking confirmation by a majority Republican Senate. If the FTC has not taken up Wright’s challenge by then, will the continued lack of Section 5 guidelines loom large enough before the Senate Commerce Committee or the full Senate to become an issue at confirmation hearings and, perhaps, finally break the stalemate in this long-running debate? Stay tuned. •