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New FTC commissioner prioritizes transparency in enforcement

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New Federal Trade Commission Commissioner Joshua D. Wright explained at a recent ABA Antitrust Meeting that his top priorities were to develop a more transparent and evidence-based approach to FTC Section 5 enforcement and to encourage commission actions against government anticompetitive conduct. This antitrust headline-grabbing speech was Commissioner Wright's most important elaboration of priorities since joining the commission in January. I was in the very-full ballroom during the speech, and can attest that, once it started, blackberries went dim and conversations ceased.

There are typically five commissioners on the FTC - though there are only four now - but each commissioner has substantial power in setting priorities and helping to marshal resources in certain directions. So Commissioner Wright's speech, titled "What's Your Agenda?," deserves a close look.

Section 5 of the FTC Act

Section 5 of the FTC Act allows the commission to reach business conduct that is not condemned by traditional antitrust laws; it speaks generally of "unfair methods of competition." Controversy arises over how far the section reaches and what conduct it governs. With the exception of a handful of decisions, courts haven't answered the question, and the agency has not issued any meaningful guidance. Over the last several years, however, the FTC has sought to test the limits of Section 5, in both words and deeds. One of the most prominent recent examples is the FTC's action against Intel (which was eventually settled), where the FTC brought both traditional antitrust law and standalone Section 5 claims.

The problem, of course, is that without standards and limits, business uncertainty reins, and companies may abstain from beneficial conduct. In addition, at present the FTC has a giant baseball bat that it can use to force settlements for questionable antitrust violations or to investigate conduct that is likely not contrary to the antitrust laws. Indeed, before the FTC's settlement with Google, there was much speculation that the FTC might pursue a standalone Section 5 claim if the traditional antitrust claims were weak.

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Clients constantly ask what Section 5 covers, and unfortunately, antitrust counsel are not able to provide useful answers. There is consensus that an invitation to collude is under Section 5, and the cases seem to require some sort of competitive harm, but businesses are mostly left in the dark.

Wright's approach

Commissioner Wright, refreshingly, acknowledges that "Section 5 has fallen far short of its intended promise" and that the FTC has provided neither guiding nor limiting principles. He announced that he will support and advocate for an evidence-based approach to Section 5 that starts with an FTC policy statement, so businesses have a better idea of what they can and cannot do.

Commissioner Wright outlined the history of Section 5 and its initial rationale: "an expert administrative tribunal would be delegated the authority to interpret its operative statute in a manner that was flexible to changes in the marketplace and capable of expanding beyond current judicial interpretations." The FTC's creators intended that the commission would rely upon information it accumulated over time, and that Section 5 would adapt to changes in empirical learning. But, according to Commissioner Wright, Section 5 has not lived up to its "promise of nudging the FTC toward evidence-based antitrust." Indeed, he continued, the evidence suggests that "the commission's use of Section 5 has done little to influence antitrust doctrine and less to inform judicial thinking or to provide guidance to the business community." The commissioner therefore concluded, "there is considerable risk to the agency of continuing on its current path of putting Section 5 to use without providing guidance."

The better choice, said Commissioner Wright, is for the FTC to "issue a policy statement clearly setting forth its views on what constitutes an unfair method of competition as we have done with respect to our consumer protection mission." He then explained that such a policy statement should include both guiding and limiting principles. For example, one guiding principle is that a necessary (but not sufficient condition) for a Section 5 case is that it "must result in harm to the competitive process and, in turn, reduce economic welfare." A harm-to-competition requirement is, in fact, consistent with the limited case law on Section 5.

Commissioner Wright then described two possible limiting principles. First, Section 5 should not be used to evade existing antitrust law. That is, where "courts have proven competent to evaluate a particular type of business conduct under traditional antitrust laws, there is little reason for the commission to step in under its unfair methods authority. Second, the policy statement could explain that Section 5 cases do not involve plausible efficiency claims.

Importantly, Commissioner Wright delegated to himself the task of producing the first draft of a proposed "Section 5 Unfair Methods Policy Statement," which he announced he will soon "informally and publicly" distribute as a useful starting point for discussion.

Businesses should applaud Commissioner Wright's attempt to shine a light on Section 5. Over the last several years, the FTC's focus on expanding the - until recently - mostly dormant standalone Section 5 claim has created concern and confusion because nobody really knew what conduct its covers. And - as we have seen time-and-time again during Washington's recent budget standoffs - sometimes the most damaging economy policy is uncertainty. If the FTC indeed wants to enforce Section 5 beyond the antitrust laws, now is the time to tell us what it views as the starting and ending points of its authority. There is some speculation in the antitrust world that Congress may hold hearings on Section 5. Companies and their counsel should urge them to do so.

Public restraints

Commissioner Wright's second major priority is to allocate agency resources to fighting public restraints - that is, anticompetitive government conduct. He describes this as the "low hanging fruit," because it is often "clearly anticompetitive." In fact - as the U.S. Supreme Court reminded us this term in *FTC v. Phoebe Putney Health System Inc.*, No. 11-1160 - although substantial anticompetitive state and local government conduct is subject to the antitrust laws, it is not regulated nearly as much as private anticompetitive conduct. That is in part because of a limited state-action exemption from the antitrust laws, but also because certain statutory damage limits have kept the plaintiffs' bar from becoming unleashed on this conduct. Thus, targeting public restraints through both advocacy and enforcement is an efficient use of the FTC's resources.

Commissioner Wright then concluded by describing three recent FTC actions as models for how to approach public restraints.

First, the FTC commented on a proposed rule change in Colorado that could stifle innovation and hurt competition in the market for passenger vehicle services. Enterprising companies like Uber, Sidecar, and Lyft have disrupted the taxi market by creating software that allows consumers to use mobile devices to arrange and pay for car transportation services. These services unquestionably create competition, and consumers love them. Instead of embracing the new technology and its benefits, many jurisdictions seek to protect the traditional market-players with anticompetitive laws and

regulations. The FTC can use its advocacy tools to persuade these jurisdictions that their conduct harms competition.

Second, Commissioner Wright pointed to the FTC's amicus brief in a 5th U.S. Circuit Court of Appeals decision from last month striking down a Louisiana law granting funeral homes the exclusive right to sell caskets. The case was brought on constitutional grounds by the Institute for Justice - a hard-working public-interest law firm - but the FTC contributed by arguing that the restraints on third-party casket sales deny consumers benefits from competition with independent casket vendors.

Finally, Commissioner Wright described the FTC's recent Supreme Court victory in *Phoebe Putney*, where the Supreme Court unanimously ruled that the state action doctrine does not immunize a hospital merger involving a state entity from scrutiny under the federal antitrust laws.

Commissioner Wright's announced priorities provide an ambitious and welcome starting point to his term.

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