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Unfair Competition

FTC's Guidance on Section 5 Could Lead To More Enforcement in Health-Care Industry

A Federal Trade Commission policy statement interpreting the commission's authority to prosecute ''unfair methods of competition'' under FTC Act § 5 fails to provide significant guidance and could open the door to more enforcement in the health-care industry, health-care antitrust attorneys told Bloomberg BNA.

The FTC said the policy statement, issued Aug. 13, is designed to provide a framework for the exercise of its ''standalone'' Section 5 authority to address acts or practices that are anticompetitive, but that may not fall within the scope of the Sherman or Clayton Acts. It also clarified that it isn't likely to use its Section 5 authority where an action under the Sherman Act or Clayton Act would be sufficient to address the competitive harm alleged.

However, the policy statement provides no examples and discusses the FTC's approach to exercising its Section 5 authority in unfair methods of competition (UMC) cases only in general terms. This is potentially worrisome for health-care organizations because it creates uncertainty for regulated entities and could signal that the FTC intends to exercise its Section 5 authority in UMC cases more often, James M. Burns, with Baker Donelson PC, in Washington, said.

''The FTC's issuance of this new guidance on its Section 5 enforcement philosophy is particularly significant for those industries—including health-care—that are principally regulated by the FTC rather than the Department of Justice,'' Burns said.

''Whether the issuance of the statement signals an intention on the part of the FTC to expand its use of Section 5, rather than merely an effort to clarify its current views on the issue, remains to be seen,'' he added.

Loose Framework. The FTC uses its authority under FTC Act Section 5 in almost all enforcement actions, but the FTC's use of its stand-alone authority under Section 5 in antitrust enforcement has been rare. Because many of these cases end in consent agreements, there has been very little precedent to guide businesses targeted for enforcement.

Chairwoman Edith Ramirez, who announced the release of the policy statement at a legal seminar in Washington, said it responds to the need for guidance and sets out principles the agency follows in bringing standalone Section 5 cases, ''leaving for future generations the flexibility to do the same.''

She noted that the commission's authority to prosecute UMC cases as stand-alone Section 5 violations has shifted over the 100 years the agency has been enforcing the statute. The FTC has never before formally defined the reach of the UMC clause, nor has it made definitive statements about the type of behavior that will trigger enforcement, she said.

In a separate statement on the guidance, the commission said: ''[o]ur statement makes clear that the Commission will rely on the accumulated knowledge and experience embedded within the 'rule of reason' framework developed under the antitrust laws over the past 125 years—a framework well understood by courts, competition agencies, the business community, and practitioners.''

''The statement's failure to indicate that Section 5 authority will be used only where there is substantial harm to competition potentially leaves open the possibility for wide-reaching enforcement.''

—James M. Burns,
Baker Donelson PC, Washington

The commission voted 4-1 to issue the policy statement, with commissioner Maureen Ohlhausen dissenting. Ohlhausen, one of two Republican commissioners, said the guidance leaves too much room for enforcement of business behavior that the antitrust laws aren't designed to target, and ''raises many more questions than it answers.''

Lost Opportunity. Burns agreed that the absence of any examples or practical guidance, coupled with the statement that such authority will exercised in a manner ''similar'' to the rule of reason, stopped short of providing the type of guidance most practitioners would have liked to have seen. ''As Commissioner Olhausen notes in her dissent, the policy statement is a recipe for uncertainty and a forfeited opportunity for the commission to educate the business community on how to comply with the law,'' Burns said.

''With respect to health care, it will be interesting to see whether the FTC will begin to utilize Section 5 to address conduct that some have characterized as anticompetitive—such as 'product hopping' and the use

 ISSN 1064-2137

of restrictive provisions in provider contracts—even if the conduct does not clearly cross the line into liability under Section 1 or Section 2 of the Sherman Act,'' he said. Product hopping involves the practice by drug companies of extending a branded drug's patent protection by obtaining patents on trivial modifications to the drug and taking actions that move the market to the new, protected version.

''The statement's failure to indicate that Section 5 authority will be used only where there is substantial harm to competition potentially leaves open the possibility for wide-reaching enforcement,'' Burns continued. ''Although the FTC has suggested that it has no intention to exercise its authority in this fashion, only time will tell.''

Robert W. McCann, with Drinker Biddle & Reath LLP, Washington, said the FTC has, in the past, used its Section 5 authority to address UMC allegations in the health-care industry and that the policy statement could be viewed as reflecting the FTC's intention to use that authority more often in the future.

''Although the FTC's jurisdiction under Section 5 does not extend to the conduct of nonprofit charitable hospitals, joint ventures, partnerships, and associations between nonprofit hospitals and private individuals (such as physicians) or for-profit organizations are another matter,'' McCann said. The FTC has, for example, exerted jurisdiction over physician-hospital organizations on prior occasions, he noted.

''Accordingly, there is a foreseeable possibility that health-care provider collaborations could be challenged under a freestanding 'unfairness' theory under Section 5, even in cases where harm to competition may not be apparent,'' McCann said.

Rule of Reason. In deciding whether to bring standalone cases, the FTC said in the policy statement that it will evaluate challenged acts under a framework ''similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account an associated cognizable efficiencies and business justifications.''

Ramirez noted that the hallmark of Section 5 cases for the FTC is consumer welfare. The FTC has always ''rigorously scrutinized claims of competitive harm and have accounted for economic efficiencies and other cognizable business justifications,'' she said. As such, the rule of reason—as used widely under the Sherman Act—is a ''basic cost-benefit framework'' that ''cuts across all of the antitrust statutes and applies to virtually all conduct subject to antitrust scrutiny.''

She noted, however, that the FTC has argued for the use of a ''quick look'' analysis in some of its cases involving its stand-alone Section 5 authority, a review that takes a highly skeptical view of any purported benefits or efficiencies arising from the challenged conduct. Specifically, she pointed to cases alleging ''invitations to collude'' as instances where the FTC applied ''the equivalent of a quick-look analysis.''

Olhausen, however, pointed to the fact that the policy statement explicitly permits the FTC to pursue conduct that doesn't cause ''substantial harm to competition.'' This leaves open the possibility for ''expansive use of Section 5,'' she said

''The fact that this policy statement requires some harm to competition does little to constrain the Commission, as every Section 5 theory pursued in the last 45 years, no matter how controversial or convoluted, can be and has been couched in terms of protecting competition and/or consumers,'' she said.

''Thus, the possibilities for expansive use of Section 5 under this policy statement appear vast,'' she continued. In fact, she saw nothing in this policy to restrain the commission from pursuing ''a host of controversial theories'' that it has considered in the past 40 years, ''including breach of standard-setting commitments, loyalty discounts, facilitating practices, conscious parallelism, business torts, incipient violations of the antitrust laws, and unfair competition through violation of various laws outside the antitrust context.''

Impact on Regulated Parties. The new guidelines are ''not going to change the status quo in terms of how Section 5 is applied,'' Richard A. Feinstein of Bois Schiller & Flexner LLP in Washington, predicted. Feinstein, former director of the FTC's Competition Bureau, said he expects that sophisticated clients and experienced practitioners won't be surprised by the commission's new policy statement.

However, the question of issuing guidance concerning the Section 5 authority has been on the commission's radar for many years and formal guidance is a positive development, Feinstein said.

In the final analysis, the FTC's new guidance likely won't significantly impact the agency's ability to use Section 5 going forward because it won't differ substantially from how the FTC has used that power to date, he said. But, he said, the formal analysis will help businesses that want to steer clear of trouble under Section 5 to accomplish that goal, and will provide a roadmap for businesses facing enforcement to use in framing issues for defense.

''It's a move in the right direction, as we've been pressing for many years now,'' Carl Hittinger, a partner at Baker Hostetler, told Bloomberg BNA. Litigants need some idea of what conduct could trigger enforcement under Section 5, but he found the policy statement disappointingly vague and problematic for enforcement.

While some on the commission have said that businesses can look to past consent orders for guidance on what the FTC would pursue under its authority, Hittinger said that such sources are simply inadequate to really inform business decisions. To the extent that the policy leads to an FTC retreat from pointing to past consent orders as precedent, Hittinger sees that as a plus.

What would have really helped businesses avoid practices the FTC dislikes ''is concrete examples of what they think is illegal and what they think is not illegal,'' Hittinger said. Although he said he considers the new policy statement a first step, he sees less utility in vague policy announcements without good examples to use in arguing to a court about what should fall within the ambit of the statute.

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The FTC's policy statement is at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

  HLR ISSN 1064-2137

The commission public statement on issuance is at https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

Ohlhausen's dissent is at https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.