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David Balto on Some Quick Observations on the Drive for UMC Policy Guidelines
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I appreciate the opportunity to provide comments on the current Section 5 discussion and add a few modest thoughts about the very thoughtful speeches of Commissioners Wright and Ohlhausen. I must admit, that as a former FTC Policy dude my mouth salivates at the thought of any new Guidelines. After all what could be more fun that coming out with thought pieces, speeches, commentaries, drafts, revised drafts, reply drafts, and more drafts. What could be more enjoyable than spending hundreds of hours parsing through every word to debate and detect every nuance. And then providing a document that is both sufficiently flexible and informative that it can live and adjust to changing circumstances – that sounds like fun. Why this sounds like an effort that would make any Talmudic debate sound like a simple task.

So I wonder at the outset: what is the need for any policy statement or guidelines. Although both speeches perhaps may raise the specter of unwarranted enforcement I simply do not see it. No matter what recent FTC administration we refer to the actions seem extremely modest. There are less than a handful of cases in the past decades.

Indeed, the lack of enforcement should raise concern about the ability to issue any type of policy statement. The question, quite legitimate is whether the agency has the experience from Section 5 enforcement to fully articulate the set of issues and criteria necessary to conclude a practice is an unfair method of competition.

Another concern might be that unclear Section 5 powers might stifle firms from engaging in potentially procompetitive or efficient conduct. So I decided to test that proposition (very informally) by reading through a handful of antitrust counseling treatises on issues such as distribution. I could find nary a single mention of some additional liability firms faced or additional uncertainty because of the FTC's Section 5 powers. Obviously the areas where the Commission has tread so far – invitations to collude, improper information sharing and deception involving standards are the types of conduct that have so little redeeming merit that there is no concern over stifling procompetitive conduct.

So as the old lady in the Wendy's commercial of the 1980s says "Where's the Beef?"

Now as to the speeches I have a few observations.

First, Section 5 is a law enforcement statute. Congress enacted it to enable the Commission

to challenge conduct that was broader that the Sherman Act. It is not a regulatory statute. Like all antitrust laws (except that adopted cousin the Robinson Patman Act) it is a generalist statute, broad in nature to give the Commission and the courts the ability to adapt to changing conduct and changing market conditions. We do not issue policy statements for the other antitrust statutes (there is no statement defining an unreasonable restraint of trade). Why should there be a statement defining an unfair method of competition?

Second, neither of the speeches recognize that Section 5 is an incipiency statute (like the Clayton Act). Congress intended the FTC to use the statute to attack practices in their incipiency before they become full blown violations.

Third, Commissioner Ohlhausen relies in detail on the Clinton-era executive order on Regulatory Planning and Review EO 12866. I find the idea intriguing but that EO is intended for regulatory agencies and their regulatory regimes – not law enforcement. There are strong reasons why it is necessary to rein in regulatory agencies especially because of the costs they can impose through their regulations. A single law enforcement action does not raise these concerns.

Commissioners Ohlhausen suggests that the agency should hold its fire if there may be other regulatory alternatives ("using the most direct route"). Let's look at the Phoebe Putney merger or the situations involving regulatory abuse such as the FTC's 2003 case against Bristol Myers. Would we really feel confident in lobbying the Georgia state legislature or the FDA as an alternative?

Finally, I am concerned about one possible unintended consequence. 29 states have little FTC Acts which condemn unfair methods of competition. Those Acts have led to dozens of important enforcement actions benefitting consumers. Any FTC policy statement on UMC can potentially weaken enforcement under those Acts.

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