The FTC's Section 5 Initiatives: Where Things Stand Under the Biden Administration

Daniel S. Graulich, Daniel Gao, and Monica L Smith

Jun 28, 2024 9 min read

Historical Overview and Background

The Federal Trade Commission ("FTC" or the "Commission") enforces both antitrust and consumer protection laws. [1] Specifically, Section 5 of the FTC Act ("Section 5") prohibits (1) "unfair methods of competition in or affecting commerce," and (2) "unfair or deceptive acts or practices in or affecting customers," and grants the FTC the authority to enforce any alleged violations.

The Commission historically has challenged conduct that it alleges violates the Sherman Act, Clayton Act, or Robinson-Patman Act pursuant to its Section 5 authority. In addition, the Supreme Court has recognized that the scope of Section 5 potentially reaches beyond

violations of the federal antitrust statutes to include broader categories of conduct. [2] The FTC has sought to apply Section 5 to reach beyond the traditional federal antitrust statutes as part of its standalone authority.

The Commission has relied on its standalone Section 5 authority—notably through consent agreements. These consent agreements have addressed matters such as alleged invitations to collude, [3] practices that facilitate collusion or collusion-like results in the absence of an agreement, [4] and misconduct relating to standard setting [5] and other patent commitments. [6] In each of these matters, because the FTC did not allege all the elements required to pursue a Sherman Act claim, the theory of liability set out relied on the broader reach of Section 5 as the basis for bringing the challenge. The substance of these consent agreements have not been reviewed by a court on their merits.

The 2022 Policy Statement

On November 10, 2022, the FTC released a new Policy Statement regarding the Scope of Unfair Methods of Competition under Section 5 of the FTC Act ("Policy Statement"). [7] In a press release, the FTC stated that the Policy Statement "restores the agency's policy of rigorously enforcing the federal ban on unfair methods of competition." The press release was also critical of the approach taken by previous administrations and, in particular, the previously issued 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act. The FTC in July 2021 formally rescinded the 2015 Statement. [8]

The FTC has set out several criteria of an "unfair method of competition":

- *The conduct must be a "method of competition."* This means conduct "undertaken by an actor in the marketplace" that directly or indirectly implicates competition.
- *The method of competition must be "unfair," which means the conduct "goes beyond competition on the merits."* The Policy Statement further explains this would require analyzing the following conduct using a sliding scale: (1) conduct

that is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature," and (2) conduct that "tend[s] to negatively affect competitive conditions."

- *Potential cognizable justifications.* The Policy Statement comments that "[t]here is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5" case dealing with unfair methods of competition. The Policy Statement then states that in the event a party were to put forward such a justification, the relevant inquiry "would not be a net efficiencies test or a numerical cost-benefit analysis." The Policy Statement also notes that a defendant bears the burden of demonstrating any asserted benefits, that these benefits were realized within the relevant market at issue, and that the asserted benefits "outweigh the harm and are of a kind that courts have recognized as cognizable in standalone Section 5 cases." The Policy Statement does not otherwise specify the categories of benefits that can be used to counter a Section 5 claim.

The Policy Statement then identifies various "Historical Examples" of conduct that the FTC notes have been found to violate Section 5. These examples include:

- *Practices that violate Section 1 and 2 of the Sherman Act or provisions of the Clayton Act*.

- *"Incipient" violations*. Examples given include: (1) invitations to collude, (2) acquisitions that have a tendency to ripen into violations of the antitrust laws, (3) serial acquisitions that result in antitrust harms even though the acquisitions individually might not otherwise violate the antitrust laws, and (4) loyalty rebates, tying, bundling, and exclusive dealing arrangements that have a tendency to "ripen" into violations of the antitrust laws.

- *Conduct that "violates the spirit" of the antitrust laws that might fall outside prior Sherman and Clayton Act precedent*. The Policy Statement defines this to mean "conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a 'gap' in those laws." The Policy Statement then cites the following conduct as examples: (1) parallel exclusionary conduct that may cause aggregate harm, (2) conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market, (3) de facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market, (4) a series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were

designed to prevent, but individually may not have violated the antitrust laws, (5) mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition, (6) using market power in one market to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in adjacent markets, (7) false or deceptive advertising or marketing that tends to create or maintain market power, and (8) discriminatory refusals to deal which tend to create or maintain market power.

Since the issuance of the new, revised Policy Statement, the FTC has pursued many enforcement initiatives demonstrating the scope of its interpreted authority as articulated in the Policy Statement.

Key Initiatives Undertaken Since the Issuance of the 2022 Policy Statement

1. Brand Drug Manufacturers' Improper Listing of Patents in the Orange Book (2023)

On September 14, 2023, the FTC announced a policy statement that classifies alleged improper Orange Book listings as an "unfair method of competition" pursuant to Section 5 ("Orange Book Statement"). [9]

For context, the Orange Book refers to the "Approved Drug Products with Therapeutic Equivalence Evaluations" publication put out by the U.S. Food and Drug Administration ("FDA"). The aim of the Orange Book is to put companies that market generic drugs on notice of certain types of patents that a brand company claims cover its own marketed product. Specifically, the Hatch-Waxman Act creates a process through which brand pharmaceutical manufacturers submit certain patent information to list their patents in the Orange Book. In turn, companies that seek to market generic drugs must certify against any Orange Book-listed patents. Upon certification, the company that listed the referenced patent can choose to bring an infringement suit against the generic company. So long as the infringement suit is filed within 45 days of certification, the statute imposes a 30-month stay on the FDA approving the generic drug while the patent litigation proceeds.

In the Orange Book Statement, the FTC alleges that several drug companies have not followed the FDA's listing standards and, in some cases, submitted patents unrelated to the listed drugs and their method of use. The Orange Book Statement outlines the FTC's

view that improper listing may harm competition from less expensive generic alternatives and keep prices "artificially high." The Orange Book Statement also takes the view that this issue is a "longstanding problem" that "may have played a role in distorting pharmaceutical markets for decades" and raises concern that improper listing "may disincentivize investments in developing a competing product and increase the risk of delayed generic and follow-on product entry, reducing patient access to more affordable prescription drugs and increasing costs to the healthcare system."

In turn, the Orange Book Statement goes on to state the FTC's intention to "use its full legal authority" to take actions against companies that improperly list patents in the Orange Book, including use of the FDA's administrative process and seeking to hold companies and individuals liable for false certifications, including by referring such activities for criminal enforcement. The Orange Book Statement also indicates that the FTC views an improper listing as a potential standalone "unfair method of competition" in violation of Section 5 of the FTC Act and as a form of unlawful monopolization, which may be challenged under either Section 2 of the Sherman Act or Section 5 of the FTC Act.

Since the Orange Book Statement was issued, the FTC announced in November 2023 [10] and April 2024 [11] of its intention to challenge various patent listings through the FDA's administrative process.

2. Mergers Requiring Consent Decrees to Resolve Section 5 Concerns (2023, 2024)

The FTC has invoked Section 5 to address competition concerns resulting from mergers, requiring the use of consent agreements to resolve these issues. For example, on May 2, 2024, the FTC approved Exxon Mobil Corporation's ("Exxon") $64.5 billion acquisition of Pioneer Natural Resources, subject to certain conditions under Section 5. The FTC required a consent order that would prevent Scott Sheffield, the founder and former CEO of Pioneer, from joining Exxon's board of directors or serving in an advisory capacity. [12] The FTC expressed concerns that Mr. Sheffield's appointment to Exxon's board would allegedly violate Section 5 because he currently serves on the board of The Williams Companies, Inc., which operates a number of businesses that compete with Exxon's operations. [13] The consent order prohibits Exxon from nominating or appointing Mr. Sheffield or any Pioneer employee or director (with exceptions) to its board for five years, and imposes interlocking directorate attestation and reporting obligations for ten years. [14]

The FTC has also invoked Section 5 with respect to information sharing concerns resulting from mergers. On August 16, 2023, the FTC entered into a consent order with EQT

Corporation ("EQT") to resolve concerns regarding entanglements and improper information sharing with respect to EQT's acquisition of $5.2 billion of assets from Quantum Energy Partners. [15] The FTC expressed concerns that the parties were direct competitors in the production and sale of natural gas in the Appalachian Basin, and that the transaction would have resulted in Quantum becoming one of EQT's largest shareholders, providing potential opportunities for improper information sharing. [16] To resolve these concerns, the parties entered into a consent order that required Quantum to divest its EQT shares and unwind a prior joint venture between the parties. [17] The settlement marked the first time that the FTC used Section 5 as a standalone authority in a merger case.

3. Non-Compete Rulemaking (2024)

The FTC has also used Section 5 (in addition to Section 6(g) of the FTC Act) to propose a rule prohibiting non-compete agreements that it alleges violate the FTC Act. On April 23, 2024, the Commission voted 3-2 to approve issuance of the Non-Compete Clause Rule, which "provides that it is an unfair method of competition—and therefore a violation of section 5—for persons to, among other things, enter into non-compete clauses" with workers on or after the final rule's effective date, and deems existing non-competes with workers who are not senior executives to no longer be effective after the final rule's effective date. [18] The final rule reflects the Commission's analysis and justification for categorizing non-competes as unfair methods of competition. [19]

The final rule first considers whether non-competes are a method of competition, then considering whether they are unfair—that is, go beyond competition on the merits, as determined by a sliding scale weighing of whether the conduct has an indicia of unfairness and whether they tend to negatively affect competitive conditions.

The Commission found non-competes to be a method of competition because they are "specific conduct undertaken by an actor in a marketplace, as opposed to merely a condition of the marketplace." [20]

The Commission then concluded non-competes restrict workers' ability to seek or accept other work or start a business and impair competitors' opportunities to hire those workers. The Commission also found non-competes with workers other than senior executives to be exploitative and coercive because they "are unilaterally imposed by a party with superior bargaining power, typically without meaningful negotiation or compensation, and because they trap workers in worse jobs or otherwise force workers to bear significant harms and costs." [21] The Commission further found that non-competes

tend to negatively affect competition in labor markets due to their alleged effects on labor mobility, earnings, and job quality, and on product and service markets by allegedly inhibiting new business formation and innovation, increasing industrial concentration, raising consumer prices, and reducing product or service quality and choice. [22]

Commissioners Holyoak and Ferguson, who voted against the issuance of the rule, are among those taking the position that the Commission does not have the authority to issue the rule. [23] Notably, the validity of the rule is currently under challenge in Texas, with a decision on a motion for a preliminary injunction expected in early July. Unless implementation is barred or delayed, the Non-Compete Clause Rule will go into effect on September 24, 2024.

Conclusion

The Policy Statement signaled the FTC's intention to pursue standalone Section 5 challenges, which the FTC has implemented through a series of enforcement activities across a wide range of markets, industries, and practices. Moving forward, it is notable that the FTC's actions have not gone unchallenged—a number of lawsuits have arisen that challenge the FTC's broadly defined scope and application of Section 5—and it remains unclear how courts will rule on these issues. As interested parties wait for further Section 5 enforcement guidance and for courts to rule on these issues, many are taking note of the FTC's proactive approach and assessing business conduct accordingly.

Endnotes

1. 15 U.S.C. § 45(a) (1). *See also* FTC Website, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, available here (accessed June 26, 2024).

2. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 245, 92 S. Ct. 898, 906 (1972) (recognizing that the FTC has "broad powers" to declare trade practices "unfair" and that actions can be found to constitute an "unfair method of competition" even if the conduct "pos[es] no threat to competition within the precepts of the antitrust laws").

3. *See e.g., In re Valassis Commc'ns, Inc.*, Docket No. 4160 (Apr. 28, 2006) available here (accessed June 26, 2024).

4. *See e.g., In re U-Haul Int'l, Inc.*, Docket No. 4294 (July 20, 2010), available here (accessed June 26, 2024).

5. *See e.g., In re Rambus*, Docket No. 9302, (June 18, 2002), available here (accessed June 26, 2024); *In re Union Oil Company of California*, Docket No. 9305, (Aug. 2, 2005), available here (accessed June 26, 2024); *In re Dell Computer Corp.*, Docket No. C-3658 (Jun. 17, 1996), available here (accessed June 26, 2024).

6. *See e.g., Complaint, In re Negotiated Data Solutions LLC*, Docket No. 4234 (Sept. 23, 2008) available here (accessed June 26, 2024).

7. FTC website, "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," Commission File No. P221202 (Nov. 10, 2022) available here (accessed June 26, 2024).

8. FTC website, "FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act," press release (July 1, 2021) available here (accessed June 26, 2024). For more information regarding the 2015 statement, see FTC website, "Statement of Enforcement Principles Regarding Unfair Methods of Competition Under Section 5 of the FTC Act" (Aug. 13, 2015) available here (accessed June 26, 2024).

9. Fed. Trade Comm'n, Policy Statement Concerning Brand Drug Manufacturers' Improper Listing of Patents in the Orange Book (2023), available here (accessed June 26, 2024).

10. FTC website, "FTC Challenges More Than 100 Patents as Improperly Listed in the FDA's Orange Book," (November 7, 2023) available here (accessed June 26, 2024).

11. FTC website, "FTC Expands Patent Listing Challenges," (April 30, 2024) available here (accessed June 26, 2024).

12. FTC website, "FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal," (May 2, 2024), available here (accessed June 26, 2024).

13. *Id.*

14. *Id.*

15. FTC website, "FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal," (Aug. 16, 2023), available here (accessed June 26, 2024).

16. *Id.*

17. *Id.*

18. FTC website, "FTC Announces Rule Banning Noncompetes," (Apr. 23, 2024), available here (accessed June 26, 2024); Fed. Trade Comm'n, Non-Compete Clause Rule, 16 C.F.R. 910, Part I.A (2024).

19. *Id.* Part IV.3.

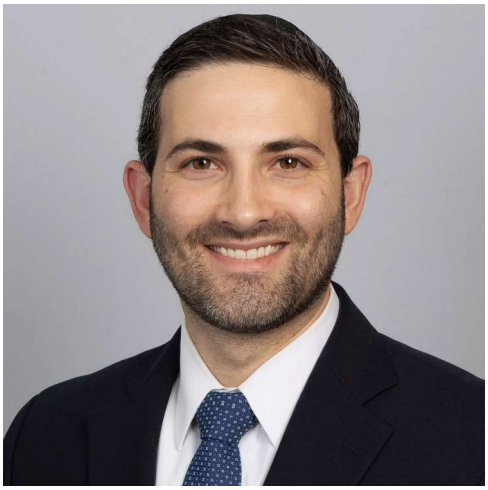
20. *Id.* Part IV.B.1.

21. *Id.*

22. *Id.*

23. Oral Statement of Commissioner Andrew N. Ferguson, In the Matter of the Non-Compete Clause Rule, Matter No. P201200 (Apr. 23, 2024), available here (accessed June 26, 2024); Oral Statement of Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200 (Apr. 23, 2024), available here (accessed June 26, 2024); *see also, e.g.*, Complaint, Chamber of Commerce v. Fed. Trade Comm'n, No. 6:24-cv-00148 (E.D. Tex. Apr. 24. 2024) (subsequently dismissed without prejudice).

Authors



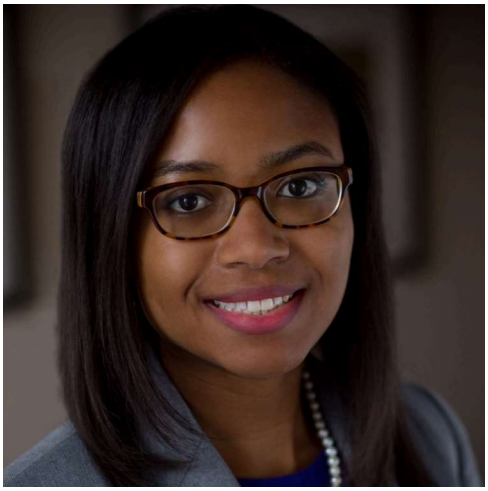
Daniel S. Graulich

Baker McKenzie

Dan is a senior associate in Baker McKenzie's North America Antitrust & Competition Practice Group. He is based in Washington D.C.

Daniel Gao

...



Monica L Smith

Wachtell Lipton Rosen & Katz

Monica L. Smith is an Associate in Wachtell Lipton's Antitrust Department. Monica received her B.A. magna cum laude in Political Science from Washington University in 2011. She received her J.D. in 2016.