



## FTC's use of Section 5 under attack

### Antitrust Alert

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The Federal Trade Commission's potential use of Section 5 of the FTC Act as a means to challenge anticompetitive conduct outside of the reach of traditional antitrust laws is receiving sharp criticism from both sides of the Congressional aisle, the private sector and internally at the FTC.

Over the last several years, both FTC Chairman Jon Leibowitz and Commissioner J. Thomas Rosch have made the argument that Congress, for the benefit of businesses and consumers, designed Section 5 to grant the FTC authority to investigate anticompetitive conduct beyond the confines of the traditional antitrust laws, such as the Sherman Act.

The highly publicized investigation of Google and other technology companies by the FTC has brought the Section 5 issue to the forefront. Both Republicans and Democrats from the House and Senate have expressed serious concern over the negative impact such an interpretation of Section 5 would have on the nation's recovering economy. Such investigations, they charge, punish companies whose innovation has resulted in their market leader status.

The operative language of Section 5 vaguely prohibits "unfair or deceptive acts or practices in or affecting commerce." Chairman Leibowitz recently stated that "we think that used judiciously and appropriately, our Section 5 authority . . . can benefit consumers and businesses alike . . . . Businesses because the possibility of follow-on private treble damages actions is diminished . . . and consumers because we can reach some anticompetitive harm that perhaps the antitrust laws can no longer reach." This interpretation of Section 5 is now under heavy attack from all sides.

On November 15, 2012, ten Republican members of the Senate, including Senators Jim DeMint (R-SC), Pat Toomey (R-PA) and Marco Rubio (R-FL), sent the FTC a pointed letter. In it they emphasized "poor employment and economic growth" and urged the FTC "to act with humility and restrain itself to activities for which it has clear legal authority." The lawmakers also expressed concern about the FTC's "apparent eagerness . . . to expand Section 5 actions without a clear indication of authority or a limiting principle," and asked "for clarity related to the FTC's ongoing and intended use of Section 5 authority granted under the Federal Trade Commission Act." In particular, the lawmakers are troubled by the FTC's investigation of "the rapidly evolving technology industry," as well as "the consequences of hampering legitimate business model innovations and market activities of companies under an aimless, expansive and possibly unauthorized use of the Commission's powers."

Two Democratic lawmakers subsequently also expressed "great concern" about the FTC's use of Section 5 in its probe of Google in a letter sent to Chairman Leibowitz on November 19, 2012. In their letter, Congresswomen Anna

Eshoo (D-CA, the ranking member of the Communications and Technology Subcommittee) and Zoe Lofgren (D-CA) stressed that “[s]uch a massive expansion of FTC jurisdiction would be unwarranted, unwise, and likely have negative implications for our nation’s economy.” The letter highlighted “online services, a crucial engine of job creation, where technological advancement and small business innovation are rapid.” Eshoo and Lofgren said they are particularly troubled because the FTC’s use of Section 5 “could lead to overbroad authority that amplifies uncertainty and stifles growth” in the technology sector.

Other lawmakers from both sides of the aisle continue to express similar concerns. For example, as recently as November 26, 2012, Chairman Leibowitz received another letter from a lawmaker, Senator Ron Wyden (D-OR), that criticizes the FTC’s “troubling” probe of Google and its controversial interpretation of Section 5: “It would be troubling if the FTC sought to expand the use of its authority to target a company for simply being popular rather than engaging in unfair or deceptive practices that harm consumers.”

In addition to lawmakers, companies, among them Google and Microsoft, have been actively seeking guidance on the FTC’s use of Section 5. Representatives of the Chamber of Commerce, which includes the aforementioned companies, recently met with the Commission and senior members of the FTC staff in order to request more information and guidance on the FTC’s use of Section 5 going forward. Significantly, concerns regarding the FTC’s use of Section 5 to challenge conduct beyond the reach of the Sherman Act, which to this date the Supreme Court has resisted, have been voiced even from within the Commission. Commissioner Maureen Ohlhausen, the newest member of the FTC, recently stated the “need to use Section 5 on the competition side very cautiously.”

The FTC’s use of Section 5 to challenge conduct outside the scope of traditional antitrust laws, coupled with its new policy to routinely seek disgorgement of profits and damages in addition to injunctive relief, remains unpredictable. Therefore, companies must be fully prepared to deal with such a challenge by the FTC. With his second term secured, President Barack Obama’s aggressive pursuit of antitrust enforcement will continue, as was made clear by the DOJ Antitrust Division recently. It is unclear how Congress’s opposition to increased power for the FTC will alter President Obama’s antitrust agenda. Similarly, it remains to be seen how Chairman Leibowitz and Commissioner Rosch’s announced departure from the FTC and the nomination of Dr. Josh Wright, a professor at George Mason University, to fill one seat on the bipartisan FTC will affect the FTC’s use of Section 5.

Stay tuned.

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