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A MORE PREDICTABLE APPROACH TO ANTITRUST AND MERGER ENFORCEMENT

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Introduction

On January 25, 2017, President Donald Trump appointed Commissioner Maureen K. Ohlhausen to be the Acting Chairman – which should be good for businesses in a number of ways. Notably, since she was appointed as a Commissioner in 2012, Acting Chairman Ohlhausen has consistently taken a narrower view of the agency's mandate than the Commission majority – and in particular has been a staunch advocate for a narrower, proscribed reading of Section 5 of the FTC Act[1] to address "unfair methods of competition." There are reasons for corporate America to believe that under her leadership, the Commission will be more focused on demonstrable and "substantial" consumer harm, regulatory caution, and will ultimately implement a much more limited view of the Commission's enforcement role. These changes should be welcomed.

Acting Chairman Ohlhausen's approach to Section 5 limits – that she has advocated for consistently over the past several years in both her dissents and in public statements – is sensible and will provide clarity and predictability to both practitioners and the business community. This article examines Acting Chairman Ohlhausen's proposed framework for Section 5 and the potential path the agency will take regarding Section 5 enforcement under her leadership.

Acting Chairman Ohlhausen's position on Section 5 limits and the Commission's 2015 Section 5 policy statement

The Federal Trade Commission ("FTC" or "Commission") uses Section 5 of the FTC Act, which incorporates Sherman and Clayton Act principles by reference, to address "unfair methods of competition."[2] Congress passed the act over 100 years ago and purposely framed it broadly to allow the Commission some discretion in determining which business practices were harmful to competition. In the majority of enforcement actions where the Commission invokes its Section 5 authority the alleged conduct indisputably violates the Sherman and Clayton Acts as well, and thus the use of Section 5 is relatively uncontroversial. But the Commission also brings standalone Section 5 enforcement actions challenging conduct that unquestionably falls outside the scope of the Sherman or Clayton Acts – rendering the line between lawful and unlawful conduct unclear for those subject to the Commission's jurisdiction. To date, the result has been a somewhat unpredictable enforcement policy without any clear limits.

On August 13, 2015, the Commission released a Section 5 Policy Statement ("Policy Statement"),[3] purportedly with the purpose of clarifying the relationship between the traditional antitrust laws and the limits of Section 5. While arguably providing some minimal information, the Policy Statement offered little clarity regarding what conduct would trigger an enforcement action, and mainly compounded the confusion regarding exactly what Section 5's limits are. It certainly reinforced the unremarkable and generally agreed-upon principle that Section 5 reaches beyond the traditional antitrust laws, stating that Section 5 "encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."[4] Other than that, the Commission's statement failed to provide any meaningful guidance to the business community regarding exactly how the Commission intends to exercise its standalone Section 5 authority. This is both concerning and burdensome to anyone who believes that antitrust enforcement should be transparent and predictable in order to allow businesses to – among other things – develop sound antitrust policies. This result was expected by many, as former Chairman Edith Ramirez had long opposed issuing any formal guidance regarding Section 5, instead favoring a common law approach.

Acting Chairman Ohlhausen appeared to be particularly disheartened at the Policy Statement's failures, authoring a pointed dissent. In her dissent, she criticized the Statement as being "unbounded," "seriously lacking" in substance, and "includ[ing] no examples of either lawful or unlawful conduct to provide practical guidance on how the Commission will implement this open-ended enforcement policy."[5] Acting Chairman Ohlhausen ultimately concluded that the Statement "provides more questions than answers," undermining its value for any "meaningful guidance to those subject to our jurisdiction," and suggested that it will ultimately lead to "more frequent exploration of this authority in conduct and merger investigations and standalone Section 5 enforcement by the Commission."[6] The Acting Chairman also took particular issue with the fact that, rather than adopting a "substantial harm" to competition standard which she had previously advocated, the Commission chose to adopt a lower "harm to competition standard" that is vague and unpredictable.

Maureen K. Ohlhausen's appointment to the FTC's Acting Chairmanship should be good for businesses in a number of ways

Acting Chairman Ohlhausen's disagreement with the Policy statement came as no surprise – since being appointed as a Commissioner, she has on many occasions made her views clear regarding the need for clear limits to Section 5 in order to provide a predictable standard for the business community and the public. Now that Commissioner Ohlhausen has been appointed to lead the agency, it will be interesting to see the direction the Commission takes under her leadership. It seems fairly clear that, rather than using the Commission's Policy Statement for guidance, the Acting Chairman would prefer that the agency employ an analytical framework that includes six factors which she has urged: (1) use Section 5 only in cases of substantial harm to competition; (2) use Section 5 only where there is no procompetitive justification for the challenged conduct or where such conduct results in harm to competition that is disproportionate to its benefits; (3) avoid conflict with other institutions, particularly the DOJ; (4) ground Section 5 enforcement in robust economic evidence regarding anticompetitive effects; (5) prior to using Section 5, the Commission should consider using its non-enforcement tools; and (6) the Commission should provide clear guidance and minimize the potential for uncertainty for businesses regarding the use of Section 5.[7]

The future of Section 5 enforcement policy and the Commission's mandate under Acting Chairman Ohlhausen's leadership

With three open Commissioner spots, as well as the permanent Chairman position, the agency's focus has the potential to change significantly during the Trump administration. Under Acting Chairman Ohlhausen's leadership, there is potential for clarity and predictability in Section 5 enforcement that has so far been lacking. Because Acting Chairman Ohlhausen has been consistent and straightforward with her viewpoints during her tenure – taking a more conservative, consistent and predictable approach to antitrust and merger enforcement than the Commission majority – there are clear indications of direction the Commission will take under her leadership.

After she was appointed Acting Chairman by President Trump, Commissioner Ohlhausen said that she would "preserve America's true engine of prosperity: a free, honest, and competitive marketplace," while working to "protect all consumers from fraud, deception, and unfair practices," "safeguard competition," all while ensuring that the "Commission minimizes the burdens on legitimate business."[8] Acting Chairman Ohlhausen has made it clear that she "believe[s] in the power of markets – when free of restraints and unnecessary regulations – to provide the best outcomes for consumers."[9] She has also recognized the strain and excessive costs imposed on companies by the Commission in its investigations during the Obama administration – which at times pursued an antitrust agenda that appeared to completely disregard economics – and has vowed to ease the intrusiveness of Commission probes, including addressing the "overbroad discovery" in enforcement actions.[10]

Under Acting Chairman Ohlhausen's leadership, we should expect any Section 5 enforcement action to have "a sound factual basis" and be grounded in "rigorous economics."[11] Specifically, under Ohlhausen's leadership it can be reasonably expected that the agency will move towards considering the six factors (as noted above) before bringing an enforcement action under Section 5.

Following these six factors, which Acting Chairman Ohlhausen has advocated for since at least 2013, is reasonable and provides meaningful guidance regarding how the Commission will invoke its Section 5 authority. Particularly, using Section 5 only in cases of "substantial" harm to competition makes obvious sense – it is sound policy that the Commission should focus on conduct with clear anticompetitive effects, such as higher prices or reduced output. This is also consistent with bedrock antitrust principles under the Sherman and Clayton Act, as it would only address harm to competition, rather than competitors, and would avoid chilling procompetitive conduct. Further, requiring that any Section 5 enforcement action be grounded in "robust economics" promotes both fairness and predictability. As Acting Chairman Ohlhausen stated, it is "equally important to know when not to intervene," and "a rigorous application of economic theory is crucial for

understanding the likely effects of business conduct and for informing enforcement decisions."[12] We agree.

Finally, Acting Chairman Ohlhausen's proposition of avoiding conflict with other institutions – particularly the DOJ – is significant for a number of reasons. The Commission's Section 5 Policy Statement did not suggest any restrictions on the use of Section 5 in the merger context, which is particularly unhelpful because in our dual agency system, the use of Section 5 has the potential for disparate treatment between agencies.[13] And while the Sherman and Clayton Acts have decades of well-developed case law, Section 5 simply does not. Given that the Commission can and does bring standalone Section 5 actions, knowing the outer boundaries of Section 5 and having clear enforcement criteria is crucial for all businesses subject to the Commission's jurisdiction.

A predictable Section 5 enforcement policy will provide much-needed guidance for the business community while still protecting competition through vigorous enforcement

The predictable "evidence based" approach to Section 5 enforcement that we can expect under Acting Chairman Ohlhausen's leadership will provide some much-needed clarity to the business community that has been lacking for years. The "regulatory humility" that the Acting Chairman has called for will also hopefully prevent some of the unnecessary and wasteful investigations and enforcement actions that have been prevalent for the past eight years – with the Commission at times bringing cases with little to no evidence of consumer harm. Such a policy – following the factors outlines above – will minimize burdens on the business community while still vigorously enforcing the antitrust laws and preventing the precise evils that the antitrust laws were enacted to prevent.

Ohlhausen has indicated that the FTC will take an approach to Section 5 enforcement that is grounded in 'rigorous economics'

That said, Acting Chairman Ohlhausen's positions are not "pro-business" to the detriment of protecting competition. Quite the opposite. Acting Chairman Ohlhausen has made it clear that where enforcement is appropriate, she will strongly advocate for it. She recently noted that under her leadership the Commission "will continue aggressively to challenge anticompetitive mergers and exclusionary conduct, building on the agency's hard-won achievements."[14] Her track record supports this, as she has voted with the Commission majority on many occasions when it was deemed appropriate to bring enforcement actions.

Acting Chairman Ohlhausen has also taken particular issue with certain abuses and advocated strongly for enforcement in those areas. For example, the Acting Chairman has frequently cited the abuse of the "government process" – particularly by states – as particularly "destructive" to competition, and has advocated for vigorous enforcement and a limiting of the state-action doctrine's reach in that area.[15] She recently said that "[a]lthough antitrust obviously polices private-firm conduct, a blind spot emerges regarding the state," and the "Commission will ... work to define and confine the anticompetitive effects that flow from state action."[16] Acting Chairman Ohlhausen pointed to the Commission's "victory at the Supreme Court in North Carolina Dental as being particularly notable," and has lauded the Commission's role in "forc[ing] states wishing to limit competition to clearly articulate that goal and to actively supervise its application by [state actors who are also] market participants."[17]

Acting Chairman Ohlhausen's history of dissents offer further insight regarding her sensible approach to Section 5 enforcement

Acting Chairman Ohlhausen is well-known for her dissents regarding what she believes the boundaries of Section 5 should be. Her dissents give further insight into where the agency will go with respect to Section 5 enforcement under her leadership. For example, in Qualcomm, she dissented because she believed the enforcement action "based on a flawed legal theory (including a standalone Section 5 count) that lacks economic and evidentiary support, that was brought on the eve of a new presidential administration, and that, by its mere issuance, will undermine US intellectual property rights in Asia and worldwide."[18] She said there was "no robust economic evidence of exclusion or anticompetitive effects" to support the allegations, and instead "simply a possibility theorem."[19] She concluded by saying that "it is no answer to an unsupported Sherman Act theory to bring an amorphous standalone Section 5 claim based on the same conduct."[20]

In Motorola Mobility, Acting Chairman Ohlhausen dissented because she believed "the *Noerr-Pennington* doctrine precludes Section 5 liability for conduct grounded in the legitimate pursuit of an injunction," and thus the respondents' actions did not violate the antitrust laws. Acting Chairman Ohlhausen said that "[b]ecause I fear the legacy of our actions in this area will be greater uncertainty ... as well as conflict between the Commission and other institutions with authority in these matters, I decline to join in another undisciplined expansion of Section 5."[21]

In Amerigas, Acting Chairman Ohlhausen likewise dissented, stating that the "there was very weak evidence supporting what

I saw as, at best, a novel Section 1 case. I therefore did not have reason to believe that the parties had committed a Section 1 violation." She further said that the complaint "runs contrary to the now decades long evolution in antitrust doctrine away from per se treatment of benign or even procompetitive business conduct, as well as the more sophisticated economic analysis that animates modern antitrust law."[22]

Finally, Acting Chairman Ohlhausen dissented in Bosch because she believed "such conduct was protected by *Noerr*" and thus did not violate the Sherman Act. She stated that "this enforcement policy appears to lack regulatory humility" and that it "is important that government strive for transparency and predictability." She concluded by saying the questionable application of Section 5 fails to provide any guidance and instead "raises more questions about what limits the majority of the Commission would place on its expansive use of Section 5 authority."[23]

Conclusion

Ultimately, the future of the Commission during the Trump administration remains unclear, but Acting Chairman Ohlhausen's statements have provided an indication that under her leadership the agency will take an "evidence based" approach to Section 5 enforcement that is grounded in "rigorous economics." Such a policy should be welcomed, as it would provide the business community with the clarity and guidance regarding Section 5 enforcement that has recently been lacking. ■

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Footnotes

1 15 U.S.C. § 45.

2 *Id.*

3 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, (August 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

4 *Id.* (emphasis added).

5 Dissenting Statement of Commissioner Maureen K. Ohlhausen, FTC Act Section 5 Policy Statement (August 13, 2015).

6 *Id.*

7 Section 5: Principles of Navigation, Remarks of Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, U.S. Chamber of Commerce, Washington, D.C. (July 25, 2013); Appendix, FTC Commissioner Maureen K. Ohlhausen, Summary of Proposed Factors for Enforcement of Section 5/Unfair Methods of Competition (July 25, 2013).

8 Statement of Acting FTC Chairman Ohlhausen on Appointment by President Trump (January 25, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/0l/statement acting-ftc-chairman-ohlhausen-appointment-president.

9 Maureen K. Ohlhausen, The Federal Trade Commission's Path Ahead, The Criterion Journal on Innovation, Vol. 2, 2017.

10 Antitrust Policy for a New Administration, January 24, 2017, The Heritage Foundation.

11 The Federal Trade Commission's Path Ahead, Maureen K. Ohlhausen, The Criterion Journal on Innovation, Vol. 2, 2017.

12 The Federal Trade Commission's Path Ahead, Maureen K. Ohlhausen, The Criterion Journal on Innovation, Vol. 2, 2017.

13 Written Statement of Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, Concerning "Section 5 and 'Unfair Methods of Competition': Protecting Competition or Increasing Uncertainty?", April 5, 2016.

14 *Id.*

15 The Federal Trade Commission's Path Ahead, Maureen K. Ohlhausen, The Criterion Journal on Innovation, Vol. 2, 2017.

16 *Id.*

17 Antitrust Policy for a New Administration, January 24, 2017, The Heritage Foundation.

18 Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Qualcomm, Inc., File No. 141-0199 (January 17, 2017).

19 *Id.*

20 *Id.*

21 Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Motorola Mobility LLC and Google Inc., FTC File No. 121-0120 (January 3, 2013).

22 Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of AmeriGas and Blue Rhino, FTC Docket No. 9360 (October 31, 2014).

23 Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Robert Bosch GmbH, FTC File No. 121-0081 (November 26, 2012).