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Legal Sidebar

The FTC's Competition Rulemaking Authority

August 12, 2021

In the 1960s, small apparel retailers had a problem. Apparel suppliers were granting more generous advertising allowances to large retailers, inhibiting small retailers' ability to compete. This practice violated the Robinson-Patman Act's prohibition of price discrimination, so the Federal Trade Commission (FTC or Commission) issued cease-and-desist orders directing more than 300 clothing manufacturers to stop offering discriminatory allowances. However, the Commission did not stop there. After concluding that case-by-case enforcement faced limitations, the FTC issued a rule requiring manufacturers of men's apparel to adopt written plans governing any promotional allowances they offered to retailers. (The Commission determined that Robinson-Patman violations were more likely when manufacturers lacked written plans, and that such plans would help manufacturers resist requests for discriminatory allowances.)

The rule did not last. In 1994, the FTC repealed it, noting that it had never been enforced and that no industry participants had advocated its retention. Nevertheless, the FTC's 1968 Men's and Boys' Tailored Clothing Rule occupies a unique place in the agency's history: it remains the only instance in which the Commission has deployed its putative authority to issue rules defining "unfair methods of competition" (UMC) under Section 6(g) of the Federal Trade Commission Act (FTC Act).

That may change. In March 2021, FTC Commissioner Rebecca Slaughter announced the creation of a new "rulemaking group" within the Commission's Office of the General Counsel—a group devoted in part to "activat[ing]" the FTC's UMC rulemaking power. Commissioner Slaughter is not alone in her support for such efforts. In their academic work, FTC Chair Lina Khan and Commissioner Rohit Chopra have argued that the agency should use its UMC rulemaking authority to supplement its antitrust enforcement activities. President Biden has also echoed these calls. In a June 2021 executive order, the White House urged the FTC to issue rules to curtail the use of non-compete clauses in employment contracts and address several other "persistent and recurrent practices that inhibit competition," including manufacturer repair restrictions, occupational-licensing requirements, and pay-for-delay agreements among pharmaceutical companies. There is thus burgeoning support for the resurrection of the FTC's UMC rulemaking authority.

Congressional Research Service
https://crsreports.congress.gov
LSB10635

However, any efforts to that effect are likely to generate controversy. Many commentators have challenged the claim that Section 6(g) of the FTC Act endows the Commission with substantive rulemaking power. Moreover, even if the agency possesses such power, the scope of that authority remains unclear. Finally, there is debate over whether rulemaking is an appropriate tool of antitrust policy—and thus over whether the FTC should issue UMC rules even if it has the legal authority to do so. This Sidebar offers a brief overview of each set of issues.

Does the FTC Have Substantive UMC Rulemaking Authority?

Whether the FTC has substantive UMC rulemaking authority is not an issue of first impression for the federal courts. In 1973, the D.C. Circuit answered that question affirmatively in *National Petroleum Refiners v. FTC*, where it held that Section 6(g) of the FTC Act authorizes the Commission to promulgate legislative rules "defining the meaning of the statutory standards" the Commission is charged with enforcing. Those standards include prohibitions of "unfair or deceptive acts or practices" (UDAP) *and* UMC. (The statute's UDAP prohibition applies to consumer-protection issues, while its UMC clause outlaws various forms of anticompetitive conduct.)

Two years after *National Petroleum Refiners*, Congress mooted any lingering questions surrounding the FTC's UDAP rulemaking authority with the Magnuson-Moss Warranty Act. Magnuson-Moss imposed heightened procedural requirements on the FTC's UDAP rulemakings, but did not by its terms affect the agency's UMC powers. A series of 1980 amendments to the FTC Act likewise imposed further strictures on the Commission's UDAP rules, but did not explicitly address the agency's ability to issue UMC rules. The argument in favor of the FTC's authority to issue UMC rules thus draws upon the D.C. Circuit's holding in *National Petroleum Refiners* and the absence of later legislation abrogating that holding.

However, the proposition that the FTC possesses UMC rulemaking authority remains controversial. Section 6(g) of the FTC Act—the putative source of that authority—provides the FTC with the power to "[f]rom time to time classify corporations and . . . to make rules and regulations for the purpose of carrying out" the statute. While this language is broad, two structural features of the FTC Act arguably cast doubt on an expansive reading of Section 6(g). First, Section 6(g) is located in a section of the FTC Act giving the Commission various *investigative* authorities. Second, the FTC Act does not provide any penalties for violations of rules adopted under that provision. Several commentators have argued that these aspects of the FTC Act make it unlikely that Section 6(g) provides the Commission with substantive rulemaking authority, as opposed to more limited powers to adopt rules that aid its various investigative functions.

The Supreme Court's recent decision in *AMG Capital Management, LLC v. FTC* seems to reinforce these structural arguments. In that case, the Court unanimously held that Section 13(b) of the FTC Act—which authorizes the Commission to obtain "permanent injunction[s]" against violations of the statute—does not allow the agency to obtain restitution or disgorgement from wrongdoers. In rejecting the FTC's reading of the statute, the Court relied in part on the law's structure, describing Section 13(b) as "buried in a lengthy provision that focuses upon purely injunctive, not monetary, relief." (As discussed, Section 6(g) is likewise embedded in a lengthy provision focused on the FTC's investigative powers—not legislative rulemaking.) Moreover, the Court reached its conclusion in *AMG Capital Management* despite a long line of federal appellate court decisions affirming the FTC's power to seek restitution and disgorgement. The decision thus suggests that *National Petroleum Refiners*—which commentators have flagged as employing an outdated interpretive methodology—may be a candidate for re-examination if the FTC attempts to promulgate UMC rules. (An *en banc* D.C. Circuit could overturn *National Petroleum Refiners*; other federal circuit courts are not bound by that decision.)

What is the Scope of the FTC's UMC Rulemaking Authority?

Even if the FTC possesses UMC rulemaking authority, there will likely be questions about the scope of that power. A key issue here is the breadth of Section 5 of the FTC Act—the provision prohibiting UMC—relative to the Sherman Antitrust Act and the Clayton Antitrust Act (the other statutes that make up the core of federal antitrust law). The Supreme Court has repeatedly explained that Section 5 is broader than those statutes, but has been vague about the scope of this extra coverage. In one decision, the Court explained that Section 5 encompasses any conduct that would violate the Sherman Act or Clayton Act, in addition to practices that the FTC "determines are against public policy for other reasons." In another, the Court described Section 5 as extending to conduct that "conflict[s] with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." A third case indicates that Section 5 was designed to stop "in their incipiency" practices that would violate the Sherman Act or Clayton Act "when full blown."

This uncertainty about Section 5's reach may be irrelevant for certain types of UMC rules. For example, if the FTC promulgates a UMC rule that hews closely to the antitrust case law governing a given practice, questions about the precise scope of Section 5 will not matter. However, the FTC may be interested in developing rules that push the boundaries of existing antitrust doctrine. Consistent with such an interest, the Commission recently rescinded a 2015 policy statement reflecting a narrow view of standalone Section 5 liability. (In brief, the policy statement indicated that the FTC would generally employ principles from the Sherman Act and Clayton Act case law in bringing Section 5 actions.) Moreover, a restrictive rule governing non-compete clauses—which two Commissioners and the White House have supported—may venture beyond the relatively permissive antitrust case law on that subject. It remains unclear whether the federal courts would affirm such a rule. The same uncertainty extends to other prospective rules condemning conduct that does not violate the Sherman Act or Clayton Act. While the Supreme Court has said that Section 5 reaches beyond those statutes, the judiciary may attempt to identify a limiting principle that cabins the FTC's UMC authority.

Should the FTC Issue UMC Rules?

Finally, there is a long-standing normative debate over whether antitrust is amenable to rules, as opposed to case-by-case adjudication. This Sidebar cannot exhaustively review the dispute, but will canvass the general arguments on both sides.

Critics of antitrust rules have contended that bright-line prohibitions are necessarily over-inclusive and thereby chill procompetitive behavior. The basic argument here is that it can be difficult to evaluate the competitive effects of a business practice without a detailed inquiry into the surrounding facts and circumstances. Unlike regulation, case-by-case adjudication allows judges the flexibility to engage in this type of inquiry. Gradual development of the antitrust case law also allows courts to refine competition policy in response to changes in industry composition and business practice. In contrast, administrative rules may take longer to adjust to changed circumstances.

Supporters of antitrust rules do not deny that adjudication is more flexible than regulation. However, they focus on a different type of error cost. While proponents of adjudication emphasize the over-inclusiveness of bright-line rules, defenders of regulation highlight the burdens of protracted antitrust litigation, which can inhibit effective enforcement. Rules can also provide regulated entities with legal certainty and allow for greater democratic participation in the fashioning of competition policy than case-by-case adjudication. Finally, regulation may have technocratic virtues. Many commentators have argued that generalist judges and lay juries are ill-equipped to analyze the complex economic evidence that plays a

central role in contemporary antitrust litigation. In contrast, expert regulators often develop detailed knowledge of specific industries and conduct, which they can deploy in crafting competition rules.

Conclusion

Antitrust may be approaching an inflection point. Congress is considering legislation that would dramatically overhaul the competition laws governing Big Tech platforms; the FTC's newly appointed Chair has called for a comprehensive re-thinking of antitrust doctrine; and the White House has issued an executive order supporting more vigorous competition policy. In the words of one prominent scholar, antitrust is now "back on the menu" after decades of relative obscurity. UMC rules may be an intriguing accompaniment to new legislation and more aggressive enforcement efforts. This time, the FTC may have more than the men's clothing industry in its sights.

Author Information

Jay B. Sykes
Legislative Attorney

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