Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

The FTC's Competition Rulemaking Authority

Updated January 11, 2023

On January 5, 2023, the Federal Trade Commission (FTC) proposed a rule that would prohibit noncompete clauses in employment contracts. The proposal relies on the FTC's putative authority to issue rules defining "unfair methods of competition" (UMC) under Sections 5 and 6(g) of the Federal Trade Commission Act (FTC Act). Other antitrust rules may be forthcoming.

Such efforts implicate three unsettled questions. First, does the FTC Act provide the FTC with substantive UMC rulemaking authority? Second, if the statute does so, what is the scope of that authority? Third, is rulemaking an appropriate vehicle for implementing antitrust policy?

This Legal Sidebar provides an overview of these questions. A separate Sidebar discusses the FTC's proposed noncompete rule.

Does the FTC Have Substantive UMC Rulemaking Authority?

Antitrust enforcement has traditionally proceeded via adjudication rather than rulemaking. In recent years, however, some commentators have argued for the expansion of the enforcement toolkit, contending that the FTC should activate its dormant competition rulemaking authority.

The existence of this authority is unsettled. While there is case law holding that the FTC possesses UMC rulemaking authority, analysts have debated whether courts would reach the same conclusion if presented with that issue today.

For the foundation of its UMC rulemaking power, the FTC has pointed to the broad language of Section 6(g) of the FTC Act, which empowers the agency to issue rules "for the purpose of carrying out" the statute. Because Section 5 of the FTC Act prohibits "unfair methods of competition," the Commission contends, Section 6(g) provides it with the authority to prescribe rules identifying practices that fall within that category.

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

This position has support in the case law. In its 1973 decision in *National Petroleum Refiners Association v. FTC*, the D.C. Circuit held that Section 6(g) authorizes the FTC to promulgate substantive Section 5 rules defining "unfair or deceptive acts or practices" (UDAP) and UMC.

Two years later, Congress responded to *National Petroleum Refiners* in the Magnuson-Moss Act, which established special procedures for the FTC's UDAP rulemakings under a new Section 18 of the FTC Act. Magnuson-Moss did not, however, purport to alter the FTC's UMC rulemaking authority. The statute contains a provision disclaiming an intent to "affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce."

While Magnuson-Moss did not by its terms affect the FTC's UMC rulemaking authority, the Commission has not made extensive use of that power. The FTC has promulgated one substantive antitrust rule—a 1968 regulation (preceding Magnuson-Moss) that involved price discrimination in the men's clothing industry, which the agency never enforced and later repealed.

Some commentators have argued that the absence of a robust historical pedigree for UMC rules—along with several principles of statutory construction—suggest that the FTC does not have substantive UMC rulemaking authority.

First, some observers contend that the D.C. Circuit's decision in *National Petroleum Refiners* employed an interpretive approach that would likely have little traction today. There, a trade association challenging the FTC's rulemaking authority invoked a canon of construction under which the expression of one thing implies the exclusion of others. In particular, the group argued that Section 5's identification of adjudication as the means of implementing the provision's prohibitions should be read as precluding the availability of other enforcement tools like rulemaking. The D.C. Circuit was not persuaded, remarking that the relevant maxim was "increasingly considered unreliable." Some commentators, however, have suggested that courts may give the canon more weight today. Others have argued that modern courts would likewise place greater emphasis on the fact that the FTC had disclaimed substantive rulemaking authority for much of its history—a detail that the D.C. Circuit did not regard as significant.

Second, skeptics of the FTC's UMC rulemaking authority have emphasized another principle under which courts presume that Congress does not alter the "fundamental details" of a regulatory scheme in "vague terms or ancillary provisions"—the so-called "elephants in mouseholes" canon. They argue that Section 6(g)—which is located in a section of the FTC Act involving the FTC's investigative powers—is such a provision. As a result, these commentators contend, Section 6(g) is best read as granting the FTC limited ministerial rulemaking powers, rather than broad substantive authority to prohibit specific categories of conduct.

Such an interpretation may derive further support from the fact that the FTC Act does not provide any penalties for violations of rules adopted under Section 6(g). This type of structural argument and the "elephants in mouseholes" canon played a role in the Supreme Court's recent decision in *AMG Capital Management, LLC v. FTC*, where the Court unanimously rejected the FTC's long-standing interpretation of some of its remedial authority.

Third, some commentators have highlighted the major questions doctrine as another possible impediment to substantive competition rules. Under that doctrine, the Supreme Court has rejected claims of regulatory authority involving issues of "vast economic and political significance" when an agency has been unable to establish "clear congressional authorization" for the relevant power. The FTC's critics argue that the authority to issue substantive UMC rules would implicate "major questions" and that Section 6(g) does not constitute the type of clear congressional authorization that would be necessary to implement such rules.

In addition to these statutory arguments, some observers have suggested that Section 6(g) may raise constitutional concerns if interpreted to authorize substantive UMC rulemaking. The alleged infirmity involves the non-delegation doctrine, which requires Congress to provide agencies with an "intelligible principle" to guide delegations of lawmaking authority. While the Supreme Court has taken a deferential approach in applying this test, several Justices have recently expressed interest in reinvigorating the doctrine. It remains to be seen whether any future litigation over UMC rules would offer an attractive vehicle for that effort.

Proponents of UMC rulemaking have offered several responses.

First, some commentators have reiterated a point that the D.C. Circuit emphasized in *National Petroleum Refiners*: Section 6(g) of the FTC Act does not identify any limitations on the rulemaking power it confers. They argue that the court's reliance on the plain meaning of the statutory text is consistent with current interpretive practice.

Second, supporters of UMC rulemaking have denied that some of the canons of statutory construction discussed above cut against the FTC's authority. For example, some have questioned whether rulemaking would in fact alter the "fundamental details" of a statutory scheme in which the FTC can independently implement Section 5's prohibition of UMC via adjudication. In other words, it may not be clear that UMC rulemaking authority is sufficiently elephantine to justify application of the "elephants in mouseholes" canon.

Third, some commentators have argued that competition rulemaking would not categorically implicate the types of issues that trigger the major questions doctrine. While some UMC rules might involve issues of "vast economic and political significance," they contend, others might not. As a result, the major questions doctrine may play a role in challenges to the scope of the FTC's UMC rulemaking power, rather than the threshold question of whether the agency has such authority in the abstract.

Fourth, defenders of the FTC's UMC rulemaking power have argued that it is unlikely that such authority violates the non-delegation doctrine's "intelligible principle" test based on the Supreme Court's deferential application of that standard. Likewise, they suggest that it is doubtful that UMC rules would categorically violate any replacement test that the Court may adopt, even if the Court might use such a test to invalidate particular UMC rules.

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

Even if the FTC possesses substantive UMC rulemaking authority, there will likely be questions about the scope of that power. Courts have recognized that Section 5 of the FTC Act is broader than the Sherman and Clayton Acts—the other core antitrust statutes. However, the precise scope of Section 5's extra coverage—often called the FTC's "standalone" Section 5 authority—is unsettled.

Courts and the FTC have concluded that, in addition to prohibiting conduct that violates the Sherman or Clayton Act, Section 5 bars certain "incipient" antitrust violations that may not have ripened into a violation of those statutes. Practices in this category have included invitations to collude; certain distribution arrangements that may mature into an antitrust violation because of specific industry conditions; and sequences of individually permissible mergers that collectively harm competition. Other distinctive Section 5 prohibitions may include conduct that violates the "spirit" of the antitrust laws but falls within a "gap" in their coverage, such as certain pricing practices that facilitate tacit collusion.

While Section 5 is thus broad, the courts have curtailed some of the FTC's attempts to extend its reach. The Commission lost several standalone Section 5 cases in the 1980s, demonstrating that the judiciary has cabined the provision even while acknowledging its capaciousness.

These limits may soon be tested again. In November 2022, the FTC released a policy statement repudiating its previous practice of hewing closely to Sherman and Clayton Act principles in exercising its Section 5 authority. In place of an exclusive focus on consumer welfare, the November 2022 policy statement identifies two criteria that the FTC plans to use to determine whether conduct qualifies as a UMC.

First, the statement indicates that a UMC "may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature," and "may also be otherwise restrictive or exclusionary."

Second, the statement explains that a UMC "must tend to negatively affect competitive conditions"—for example, by tending to "foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers."

While the policy statement addresses possible justifications for challenged conduct, it does not contain detailed affirmative guidance on that topic. Rather, the FTC notes that there is "limited" case law on "what, if any, justifications may be cognizable in a standalone Section 5 [UMC] case," and that "some courts have declined to consider justifications altogether." The statement further explains that, if a party asserts a justification as an affirmative defense to a Section 5 claim, the FTC "can draw on [its] long experience evaluating asserted justifications when enforcing Section 5, as well as its review of decided cases and past enforcement actions."

Whether the courts will accept the FTC's conception of its standalone Section 5 authority remains to be seen. As discussed, the judiciary has limited several of the FTC's past efforts to extend that power, leading some commentators to characterize the agency's Section 5 litigation record as "uninspiring." In addition, the major questions doctrine may serve as an independent limitation on the FTC's standalone Section 5 authority in specific cases.

Should the FTC Issue UMC Rules?

Besides these legal questions, commentators have debated whether rulemaking is an appropriate vehicle for implementing antitrust policy. Advocates of competition rules have offered several arguments in their favor.

First, supporters of competition rules have argued that *ex post* adjudication moves too slowly to effectively address certain issues—for example, the allegedly anticompetitive conduct of large technology platforms that operate in constantly changing markets. While complex antitrust litigation can take years to resolve, the FTC may be able to develop and enforce competition rules more expeditiously.

Second, depending on their content, rules may provide regulated entities with more legal certainty than some of the open-ended standards that make up antitrust doctrine.

Third, rulemaking may allow for greater democratic participation in the fashioning of competition policy than case-by-case adjudication.

Fourth, rules 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 during the rulemaking process.

Critics of antitrust rules make several arguments in response.

First, while rules offer the potential benefits of speed and certainty, those virtues may come with the cost of increased error. If UMC rules include bright-line prohibitions, for example, they may condemn unacceptable amounts of procompetitive conduct. By contrast, if rules simply create presumptions of illegality that can be rebutted with proof of procompetitive benefits, they lose some of the speed and certainty advantages that arguably make them an attractive alternative to adjudication.

Second, some commentators have argued that UMC rules present risks of institutional conflict between the FTC and the Department of Justice—the other federal antitrust enforcer. In particular, they contend that UMC rules that reach beyond the Sherman and Clayton Acts would create separate standards of liability that vary between the agencies, raising the possibility of disparate treatment for similarly situated parties.

Third, some observers have contended that UMC rulemaking would likely result in "zig-zagging" regulations that come and go with changes in presidential administration. This phenomenon may undermine the certainty benefits discussed above. Skeptics of UMC rules argue that the FTC's limited resources may be better devoted to litigation under existing procedures, which may produce greater stability than regulation.

Considerations for Congress

Whether the FTC possesses UMC rulemaking authority is primarily a question of statutory interpretation. Congress could thus try to resolve that question via legislation clarifying the Commission's powers. To the extent that Section 5's broad language raises possible non-delegation issues, Congress could attempt to address such concerns by providing more specific standards to guide the FTC's exercise of lawmaking authority.

Congress could also respond to specific competition rules, should the FTC implement them. History may be instructive on this point. After the Commission successfully deployed Section 5 to challenge certain pricing arrangements in the 1930s and 1940s, Congress considered several bills to overturn the relevant decisions, ultimately adopting one of the proposals in 1950. While President Truman vetoed the bill, congressional concerns about the FTC's policies—which various Members expressed through the oversight process—prompted the agency to disavow an expansive reading of the relevant doctrine.

Congressional oversight can also be used to encourage more aggressive enforcement efforts. At various points in its history, the FTC has responded to congressional calls for more vigorous antitrust policy by focusing its resources on specific industries of concern. Members of Congress could thus encourage the FTC to use its putative UMC rulemaking authority to address particular areas of interest.

Author Information

Jay B. Sykes
Legislative Attorney

Disclaimer