Competition Policy and the Application of Section 5 of the Federal Trade Commission Act

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Section 5 of the Federal Trade Commission Act, with its prohibition upon "unfair methods of competition," was integral to establishment of the Commission in 1914. Congress intended Section 5 to be a mechanism for upgrading the U.S. system of competition law by permitting the FTC to reach behavior not necessarily proscribed by other U.S. competition statutes. In practice, though, FTC efforts to use its unfair methods authority to challenge anticompetitive conduct which is not proscribed by other antitrust laws have been notoriously unsuccessful. Past efforts have met with disapproval by both courts and Congress. Looking forward, we see a need for the Commission, as a foundation for future litigation to create a section 5 jurisprudence, to issue a policy statement that sets out a framework for the application of Section 5. We also offer some elements of what such a framework should include. Any application of a stand-alone section 5 jurisprudence should explain both the similarities of specific conduct to violations of other antitrust laws, as well as the differences between section 5 jurisprudence and jurisprudence under the other antitrust laws. Why should specific conduct be challenged under a competition law? Why does it fall outside other competition laws? And why should section 5 be used to overcome a specific impediment? Additionally, the FTC should develop its basis for a proposed application of section 5 through research, reports, and other policy implements